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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD  
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of: <b>Rodney Gaines</b>	<b>Proposed Decision</b> <b>(Penal Code § 4900 et seq.)</b>
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**Introduction**

This claim for compensation as an erroneously convicted person was decided based on the written record by considering all the evidence submitted to date and without the necessity of a telephonic or in-person hearing. The claimant is currently incarcerated in state prison as a result of an unrelated felony conviction and requested his claim be decided on the evidence submitted since he is unavailable for an oral hearing. Senior Attorney Kyle Hedum was assigned to hear this matter by the Executive Officer of the California Victim Compensation and Government Claims Board. The California Department of Justice, Office of the Attorney General (AG), was represented by Sally Espinoza.

After considering all the evidence, it is determined that Rodney Gaines (Gaines) has not proven by a preponderance of the evidence that he is innocent of the crime of possession of a controlled substance. Therefore, it is recommended that Gaines' claim for compensation pursuant to Penal Code section 4900 et seq. be denied.

## Background<sup>1</sup>

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2 According to the law enforcement report, on the evening of June 11, 2005, Los Angeles  
3 County Deputy Sheriff Roger Izzo was working undercover, dressed in plain clothes, and driving an  
4 unmarked patrol car. Deputy Izzo was conducting surveillance of a house where he believed  
5 narcotics were being sold. Deputy Izzo saw a maroon minivan leave the location, so he followed the  
6 minivan to a liquor store parking lot. Deputy Izzo backed his car into a parking space on the west wall  
7 of the liquor store so he could watch the minivan.

8 As Deputy Izzo sat in his car, he noticed Gaines standing near the front door of the liquor  
9 store. Gaines then approached Deputy Izzo and asked him whether he "smoked the white" and  
10 informed him that he "had it all." While sitting in his car, Deputy Izzo told Gaines he was waiting for  
11 someone and that he did not need anything. Gaines then spit a small black plastic "bindle" into his  
12 hand, held it out toward Deputy Izzo, and asked him again what he needed, restating that he had  
13 "everything." Deputy Izzo reiterated that he was just waiting for someone and was not interested.  
14 Gaines then turned around and walked back toward the front of the liquor store. Deputy Izzo used  
15 his cellular telephone to notify two other deputies to detain Gaines for further narcotics investigation  
16 because Gaines had offered to sell him narcotics.

17 While Deputy Izzo was providing a description of Gaines to the deputies, Gaines turned  
18 around and walked back to Deputy Izzo's car. Gaines extended his hand, dropped a glass pipe used  
19 for smoking cocaine and a small piece of cocaine into Deputy Izzo's hand and stated, "(t)his one [is]  
20 on me. Hit this. You'll like it." Gaines then turned and walked away from the car and went to the  
21 same location where he had previously been standing. Moments later, the two deputies pulled into  
22 the parking lot in their marked sheriff's patrol car. When Gaines saw them, he turned his back to the  
23 car, put his right hand to his mouth, and walked quickly toward the front of the liquor store.

24 The deputies twice ordered Gaines to stop, but he did not comply. One of the deputies  
25 grabbed Gaines by his shirt. Gaines spun in a circle and then went down onto the ground. His  
26 mouth was "clenched closed" and it appeared to the deputy that Gaines was chewing something and

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28 <sup>1</sup> The background is based on an appellate opinion, the crime report, investigative reports, trial  
testimony, court transcripts, and other claim-related documents.

1 then he saw "a distinctive swallowing motion" in Gaines' throat. Multiple times, the deputy ordered  
2 Gaines to open his mouth, and Gaines finally complied after 20 to 30 seconds. The deputy observed  
3 white crumbled residue on Gaines' tongue and inside his mouth. Gaines was handcuffed and placed  
4 in the back seat of the patrol car.

5 The pipe and cocaine that Gaines dropped into Deputy Izzo's car were booked into evidence.  
6 One of the deputies opined that the piece of cocaine was of a usable quantity. A senior criminalist  
7 with the Los Angeles County Sheriff's crime lab testified that the solid substance booked into  
8 evidence weighed .03 grams and contained cocaine in a base form.

9 On May 11, 2006, the Los Angeles County District Attorney charged Gaines with one count of  
10 the felony offense of sale, transportation, or offer to sell a controlled substance<sup>2</sup> and one count of the  
11 misdemeanor offense of possession of a smoking device.<sup>3</sup> In association with the felony count, it was  
12 alleged that Gaines had suffered one prior conviction for a serious or violent felony<sup>4</sup> and that he had  
13 served seven prior prison terms.<sup>5</sup>

14 At trial, the deputy sheriffs testified consistently with the facts in the crime report. Gaines  
15 testified on his own behalf.<sup>6</sup> Gaines admitted he was addicted to cocaine and testified that he went to  
16 the liquor store that night to panhandle. According to Gaines, an older black male was also  
17 panhandling at the liquor store. Gaines told the older male that he wanted to make \$20 so that he  
18 could buy some cocaine. Gaines further testified that he agreed to lend the older male his cocaine  
19 pipe in exchange for a "hit" or "a piece." The older male warned Gaines not to keep the pipe in his  
20 possession because deputies from the Sheriff's Department had been coming through that location  
21 and frisking people. The older male took Gaines' pipe and went behind the liquor store to use it. He  
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23 <sup>2</sup> Health & Saf. Code, § 11352, subd. (a).

24 <sup>3</sup> Health & Saf. Code, § 11364, subd. (a).

25 <sup>4</sup> Within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667,  
26 subdivisions (b) through (i).

27 <sup>5</sup> Within the meaning of Penal Code section 667.5(b).

28 <sup>6</sup> Gaines also acted as his own attorney.

1 told Gaines he would hide it in the slats on the side of a trash dumpster that was behind the store.  
2 Gaines later saw the older male cut through the parking lot and head toward the corner.

3 According to Gaines, he continued to panhandle until a store clerk came outside and looked at  
4 him. Gaines picked up his crate that contained some of his belongings and went around to the side  
5 of the building. He emptied all of the change from his pockets and placed it in the pocket of a sweater  
6 that was inside the crate. Gaines saw that the clerk was still outside the store, so he decided to leave  
7 the location. He retrieved his pipe from the trash dumpster and placed it in his sock.

8 Shortly thereafter, Gaines heard someone calling him. He looked around and saw someone  
9 sitting inside a car in the corner of the parking lot, so he walked over to the car. Deputy Izzo was  
10 inside, and according to Gaines, the deputy asked if he had some "rock" for sale. Gaines told Deputy  
11 Izzo that he did not sell rock, he just used it. Gaines testified that Deputy Izzo then asked him  
12 whether he knew of any other dealers in the area, and Gaines said he did not. Gaines asked Deputy  
13 Izzo for some money, but Deputy Izzo said he could not help him, so Gaines walked away toward his  
14 crate.

15 Gaines checked the store front again to see whether the clerk had gone back inside. The  
16 clerk was no longer outside, so Gaines decided to stay at the location and continued to panhandle.  
17 According to Gaines, a hand came "out of nowhere," grabbed him by the shirt collar and pulled him  
18 down. He was on the ground with two deputies on top of him. One of the deputies asked him what  
19 he was doing by the car in the parking lot. They handcuffed him, lifted him to his feet, and walked  
20 him toward their car.

21 Gaines also testified that he told the deputies that Deputy Izzo asked him if he had rock  
22 cocaine for sale. He told the deputies he was at the liquor store to panhandle. One of the deputies  
23 searched Gaines and found the pipe. The deputy also looked inside Gaines' mouth and told him to  
24 remove his socks and turn them inside out. According to Gaines, a white rock fell out of his sock.  
25 Gaines testified that the older male who had borrowed his pipe must have placed the rock in the pipe.

26 Just prior to cross-examination by the prosecutor, Gaines testified that "(a)nything beyond the  
27 fact I had the pipe in my left sock and the piece of rock in my sock is bogus." This admission came  
28 when Gaines disputed law enforcement's version of the events of the evening in question.

1 On cross-examination, Gaines denied that he had spit a black object out of his mouth and into  
2 his hand. He also denied that he had given Deputy Izzo a pipe and cocaine and told him, "(t)his one  
3 is on me. Hit this. You'll like it." He further denied that he put his hand to his mouth before being  
4 detained by the deputy sheriff.

5 At the conclusion of the trial, the court added a third count of felony possession for sale of  
6 cocaine base<sup>7</sup> and a charge of the felony of simple possession of a controlled substance.<sup>8</sup> The court  
7 instructed the jury on these counts and included both counts on the verdict forms. On May 15, 2006,  
8 the jury found Gaines guilty of the felony count of simple possession of a controlled substance and  
9 misdemeanor possession of a smoking device. Gaines was found not guilty of having a controlled  
10 substance for sale, transport, or offer of sale and not guilty of the related offense of possession for  
11 sale. Gaines admitted his prior strike conviction and five prior prison terms. On June 27, 2006,  
12 Gaines was sentenced to 11 years in state prison.

13 On appeal, Gaines argued the felony count of simple possession of a controlled substance  
14 was unlawfully added at trial because he was not originally charged with the crime, but the Court of  
15 Appeal denied the appeal because Gaines failed to object to the court's actions during trial.  
16 However, the appeals court returned the matter to the trial court on a claim that the court should have  
17 reviewed the arresting deputy sheriffs' personnel files to see if there was anything relevant for the  
18 defense.<sup>9</sup> Gaines petitioned for review in the California Supreme Court regarding both issues. The  
19 California Supreme Court granted review only to decide the appropriate remedy for a trial court's  
20 erroneous denial of the review of the records. The Supreme Court ultimately ordered the case be  
21 remanded to the trial court with directions to review the personnel records.

22 Following appeal and on remand, the trial court conducted an "in-camera" hearing to review  
23 the personnel records of the deputies outside the presence of both parties. The judge found no  
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26 <sup>7</sup> Health & Saf. Code, § 11351.

27 <sup>8</sup> Health & Saf. Code, § 11350, subd. (a).

28 <sup>9</sup> Gaines wanted the trial court judge to review the arresting officers' personnel files. The judge refused.

1 relevant or discoverable information, denied the motion, and reinstated the verdict. On September  
2 21, 2010, the Second District Court of Appeal affirmed this judgment.

3 On February 15, 2012, a federal court granted a writ of habeas corpus on the ground that  
4 Gaines was never properly charged with or tried for the felony offense of simple possession of a  
5 controlled substance. The court found the judge's late addition of the charge (after all evidence was  
6 introduced) was unconstitutional. Specifically, the court found that "the trial court's jury instructions  
7 and verdict form were clearly and obviously erroneous. Those errors resulted in Petitioner's  
8 conviction of a crime for which he was neither charged nor tried, and, as such, constituted a violation  
9 of his fundamental constitutional due process rights." That court ordered Gaines released unless he  
10 was retried within 60 days. The District Attorney was not able to proceed in a timely fashion and thus  
11 did not retry Gaines, who was released on April 16, 2012.

12 On October 30, 2012, Gaines filed an erroneously convicted person claim with this Board. He  
13 seeks compensation for the 2,260 days he was incarcerated in state prison.<sup>10</sup>

#### 14 **Claimant's Argument**

15 Gaines contends that he should be compensated for the time he served as a result of his  
16 conviction for possessing a controlled substance. He first contends, using the federal court's decision,  
17 that he was never properly charged with possessing a controlled substance; therefore, he was not  
18 convicted of that crime, and thus his incarceration was erroneous. Gaines also argues that the jury's  
19 acquittal of the felony charges for which he was originally tried is sufficient proof that he was innocent  
20 of the crimes charged and erroneously convicted. He believes the evidence at trial proves his  
21 innocence. He contends that the Board is prohibited from denying his claim because a federal court  
22 found he was never properly charged with, or convicted of, possession of a controlled substance.  
23 Because the federal court reversed his conviction, he believes that the Board must find that he was  
24 erroneously convicted and imprisoned, and thus eligible for compensation.

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27 <sup>10</sup> The actual number of days of incarceration in state prison is 2,163 days, beginning with Gaines'  
28 conviction on May 15, 2006, and ending with his release on April 16, 2012.

1 After being provided a copy of the proposed decision, the claimant was afforded the  
2 opportunity to submit additional rebuttal argument before the Board decided the matter. In a six-page  
3 brief dated July 26, 2014, the claimant made several arguments in rebuttal to the proposed decision.  
4 Of primary importance is the argument found on page five, paragraph two, where the claimant  
5 presents the proposition that in order for the Board to make a determination on his claim,<sup>11</sup> the crime at  
6 issue must have been charged. He claims that since he was never properly charged with possession,  
7 as confirmed by the federal appellate court's holding that the trial court's jury instructions and verdict  
8 form were clearly and obviously erroneous, he is then entitled to a presumption of innocence, and thus  
9 is entitled to compensation as an erroneously convicted person.

#### 10 **AG's Argument**

11 The AG argues that the express purpose of Penal Code sections 4900-4906 is to compensate  
12 a person convicted of a felony he did not commit.<sup>12</sup> The AG notes Gaines was convicted of simple  
13 possession of a controlled substance, was incarcerated for that conviction, and Gaines fails to prove  
14 he did not commit simple possession of a controlled substance. In fact, it is indisputable that Gaines  
15 possessed cocaine base.

16 Evidence proving Gaines committed the crime of simple possession includes the testimony of  
17 three deputy sheriffs and the claimant's own testimony at trial. Gaines admitted to possessing the drug  
18 and the Board should find Gaines' other self-serving testimony unbelievable on its face, and in any  
19 event insufficiently persuasive to warrant a finding that Gaines has proved more likely than not that he  
20 did not knowingly possess a controlled substance. For lack of proof that Gaines did not commit the  
21 offense for which he was convicted, the Board should deny Gaines' claim for compensation.

22 The AG rebuts Gaines' argument that because of the federal court's decision, Gaines was  
23 never charged with the crime for which he was incarcerated. Were that true, the AG states, Gaines'  
24 argument would founder on its face, because Gaines would effectively be arguing that he was never  
25 convicted of simple possession. Given that he was convicted of no other felony, Gaines would not  
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27 <sup>11</sup> This statement refers to the Board's jurisdiction to hear and decide claims.

28 <sup>12</sup> Pen. Code, § 4900.





1 crime with which he was charged was either not committed at all, or, if committed, was not committed  
2 by him and that he sustained a pecuniary injury through his erroneous conviction and imprisonment.<sup>14</sup>  
3 "Preponderance of the evidence" means evidence that has more convincing force than that opposed  
4 to it.<sup>15</sup>

5 In reaching its determination of the merits of the claim, the Board may consider the claimant's  
6 mere denial of commission of the crime for which he was convicted, reversal of the judgment of  
7 conviction on appeal, acquittal of the claimant on retrial, or the failure of the prosecuting authority to  
8 retry claimant for the crime. However, those factors will not be deemed sufficient evidence to warrant  
9 the Board's recommendation that a claimant be indemnified in the absence of substantial  
10 independent corroborating evidence that the claimant is innocent of the crime charged.<sup>16</sup> The Board  
11 may also consider as substantive evidence testimony of witnesses the claimant had an opportunity to  
12 cross-examine, and evidence to which the claimant had an opportunity to object, admitted in prior  
13 proceedings relating to the claimant and the crime with which he was charged. Finally, the Board  
14 may also consider any information that it may deem relevant to the issue before it.<sup>17</sup>

15 A. The Board Lacks Jurisdiction on this Claim.

16 Gaines argues that the federal court held that he was erroneously charged with possession of  
17 a controlled substance. Therefore, since he was technically never charged with possession of a  
18 controlled substance, he argues he should not have been convicted of that crime, and because he  
19 spent time in prison, he was erroneously incarcerated and is deserving of compensation.

20 Gaines is correct that the federal court ruled he was never properly charged with the crime of  
21 which the jury convicted him. However, because Gaines in fact was not charged and convicted of a  
22 felony, he does not qualify for relief and the Board does not have jurisdiction on this claim. A

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24 <sup>14</sup> Pen. Code, § 4903; *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn. 7; *Tennison v.*  
25 *Victim Compensation and Government Claims Board* (2006) 152 Cal. App. 4<sup>th</sup> 1164.

26 <sup>15</sup> *People v. Miller* (1916) 171 Cal. 649, 652.

27 <sup>16</sup> Cal. Code Regs., tit. 2, § 641.

28 <sup>17</sup> Cal. Code Regs., tit. 2, § 641.

1 claimant must be charged with and convicted of a felony to qualify for compensation pursuant to  
2 Penal Code section 4900.

3 Penal Code section 4900 states: "Any person who, having been convicted of any crime  
4 against the state amounting to a felony and imprisoned in the state prison or incarcerated in county  
5 jail pursuant to subdivision (h) of Section 1170 for that conviction, is granted a pardon by the  
6 Governor for the reason that the crime with which he or she was charged was either not committed at  
7 all or, if committed, was not committed by him or her, or who, being innocent of the crime with which  
8 he or she was charged for either of the foregoing reasons, shall have served the term or any part  
9 thereof for which he or she was imprisoned in state prison or incarcerated in county jail, may, under  
10 the conditions provided under this chapter, present a claim against the state to the California Victim  
11 Compensation and Government Claims Board for the pecuniary injury sustained by him or her  
12 through the erroneous conviction and imprisonment or incarceration." (Emphasis added.)

13 Being charged with a felony is an element of the claim that must be proved along with the  
14 claimant's innocence of the crime of which he was convicted. Pecuniary injury must also be proved.  
15 Gaines was not convicted of a felony because he was not charged or erroneously charged. The relief  
16 he must pursue is in civil court against those individuals or entities that he feels were responsible for  
17 his incarceration. Penal Code section 4900 does not apply to his case.

18 **B. If the Board Does Have Jurisdiction Over this Claim, Gaines Has Not Proved His Innocence**  
19 **by a Preponderance of the Evidence.**

20 The second argument that Gaines makes is that he is innocent of the crime that was  
21 erroneously charged. If the Board finds Gaines was erroneously charged, this argument does not  
22 need to be addressed because the Board does not have jurisdiction over the claim. However, to  
23 thoroughly review all issues, this argument will be addressed here. Assuming the Board determines  
24 that Gaines was properly charged and convicted of felony drug possession, Gaines would be eligible  
25 for compensation if he can prove beyond a preponderance of the evidence that he was innocent of  
26 that crime, erroneously convicted, and suffered pecuniary loss.

27 Gaines provided documentary evidence from trial and appellate proceedings that he believes  
28 provides sufficient evidence that he was innocent of possessing a controlled substance. He

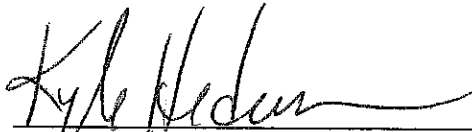
1 references the federal court that reversed his conviction and remanded his case for retrial or  
2 dismissal. Gaines also claims that he was not aware that he had a piece of rock cocaine in his sock at  
3 the time of his arrest. However, Gaines testified at his trial that, "(a)nything beyond the fact I had the  
4 pipe in my left sock and the piece of rock in my sock is bogus." This admission, along with the  
5 testimony of three deputy sheriffs, provides sufficient evidence to find that Gaines knew that he was  
6 in possession of a controlled substance and that he fails to show by a preponderance of the evidence  
7 that he was innocent.

8 It must be noted that the federal court did not find Gaines factually innocent but instead, that  
9 the charge and conviction was procedurally incorrect. Nor did the federal court find the testimony of  
10 the three deputy sheriffs to be not credible. The evidence at trial was sufficient for the jury to find  
11 Gaines guilty of felony possession of a controlled substance.

#### 12 Conclusion

13 Gaines claim is recommended for denial. First, based on arguments made by Gaines himself,  
14 this Board does not have jurisdiction for this claim. Because he was never charged with a felony,  
15 Gaines' remedy is in the civil courts, not pursuant to Penal Code section 4900. Furthermore, even if  
16 the Board did have jurisdiction, Gaines has not proven by a preponderance of the evidence that he is  
17 innocent of the crime for which he was imprisoned.

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20 Date: August 15, 2014

  
21 Kyle Hedum  
22 Hearing Officer  
23 California Victim Compensation and  
24 Government Claims Board  
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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD  
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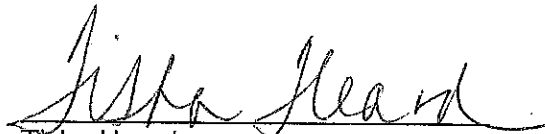
In the Matter of the Claim of:

**Rodney Gaines**

**Notice of Decision**

On October 16, 2014, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: October 17, 2014



Tisha Heard  
Board Liaison  
California Victim Compensation and  
Government Claims Board