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6 **BEFORE THE VICTIM COMPENSATION BOARD**  
7 **OF THE STATE OF CALIFORNIA**  
8

9 In the Matter of the Claim of:

**Board Majority's Written Decision  
(Penal Code § 4900)**

10 **Deandre Howard**

11 PC 4900 Claim No. 15-ECO-02

12 **I. INTRODUCTION**

13 On December 7, 2015, Deandre Howard (Howard) submitted an application for compensation  
14 as an erroneously convicted person to the California Victim Compensation Board (CalVCB) pursuant to  
15 Penal Code section 4900. The application was based upon Howard's convictions for first-degree  
16 murder and attempted murder, both of which were vacated during a federal habeas proceeding. A  
17 hearing was conducted on January 5, 2017, by CalVCB Hearing Officer Kyle Hedum. Counsel Corey  
18 Parker appeared by telephone on behalf of Howard, who also appeared by telephone but did not testify.  
19 Deputy Attorney General (DAG) Cliff Zall appeared on behalf of the Attorney General.

20 The hearing officer issued a proposed decision on March 13, 2017, recommending  
21 compensation be denied for insufficient evidence of actual innocence. However, a misstatement of law  
22 was discovered in the proposed decision, and the matter was re-assigned to CalVCB Hearing Officer  
23 Michelle Carrino. After independently reviewing the administrative record, a new proposed decision  
24 was issued on March 23, 2018, which recommended granting compensation in the amount of \$417,200  
25 for 2,980 days of Howard's imprisonment.

26 By a split decision, the Board voted two-to-one to reject the new proposed decision and deny  
27 compensation on April 19, 2018. A majority of the Board determined that Howard had failed to satisfy  
28 his burden of proving his innocence by a preponderance of the evidence. This Written Decision by  
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1 CalVCB Senior Attorney Laura Simpton, issued pursuant to section 619.2 of Title 2 of the California  
2 Code of Regulations,<sup>1</sup> explains the basis for the majority's decision to deny Howard's application for  
3 compensation under Penal Code section 4900.

## 4 II. PROCEDURAL BACKGROUND

5 Howard was arrested on October 24, 2002, and subsequently charged with the first-degree  
6 murder of Mark Freeman (Freeman) and the attempted murder of Arthur Ragland (Ragland), with  
7 enhancements for personally discharging a firearm.<sup>2</sup> A jury trial ensued, at which Howard testified, but  
8 the surviving victim Ragland did not. Two eyewitnesses Sergio Hernandez (Hernandez) and Diane  
9 Fontaine (Fontaine) implicated Howard, but no physical evidence linked him to the crime. On  
10 September 8, 2003, the jury found Howard guilty as charged. He was subsequently sentenced to an  
11 aggregate term of 75-years-to-life imprisonment.<sup>3</sup>

12 Howard appealed the judgment, which was affirmed by the California Court of Appeal, Second  
13 Appellate District, on November 23, 2004. Meanwhile, Howard's appellate attorney received a  
14 handwritten declaration that was purportedly signed by Ragland on September 30, 2004, which averred  
15 that Howard was not the shooter.<sup>4</sup>

16 Based upon Ragland's declaration, Howard petitioned for habeas relief in the Los Angeles  
17 County Superior Court, California Court of Appeal, and California Supreme Court. In all three petitions,  
18 Howard alleged that his trial counsel was ineffective for failing to investigate and present Ragland as an  
19 exculpatory witness. All state habeas petitions were denied.

20 Thereafter, Howard repeated this allegation of ineffective assistance of counsel in a federal  
21 petition for habeas relief. Following an evidentiary hearing in 2011, at which Ragland testified, the  
22 federal magistrate recommended granting habeas relief due to trial counsel's failure to investigate and  
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24 <sup>1</sup> Cal. Code Regs., tit. 2, § 619.2, subdivision (d), provides that, "If the board does not adopt the staff  
25 recommendation: (1) the board shall make a statement of decision that includes: (A) the decision made  
26 about the application; and (B) the reasons for the decision; and (2) board staff shall prepare a written  
27 decision consistent with the board's statement of decision."

28 <sup>2</sup> Pen. Code, §§ 187, 187/664, 12022.53, subd. (d).

29 <sup>3</sup> AG Exs. 1-2.

<sup>4</sup> AG Ex. 4; see also Decision Attachment A.

1 present Ragland as an exculpatory witness. This recommendation, which reversed both of Howards'  
2 convictions, was adopted by the district court and subsequently affirmed by the Ninth Circuit on July 19,  
3 2012.<sup>5</sup>

4 Meanwhile, Howard remained imprisoned awaiting retrial. In lieu of a second trial, the district  
5 attorney offered Howard the opportunity to plead guilty to involuntary manslaughter, with a promise of  
6 immediate release with credit for time served. Howard declined.<sup>6</sup>

7 Howard's second jury trial commenced on December 5, 2013, before the Honorable Judge  
8 Rand Rubin (Judge Rubin). Judge Rubin did not preside over Howard's first jury trial. Only Hernandez  
9 appeared to testify against Howard, as Fontaine had since died. Ragland testified in Howard's  
10 defense. The jury ultimately acquitted Howard of all charges on December 20, 2013. Howard was  
11 released from custody immediately thereafter.

12 One year later, on December 5, 2014, Judge Rubin denied Howard's motion for a finding of  
13 factual innocence under Penal Code section 1485.55.<sup>7</sup> Judge Rubin concluded that there was  
14 insufficient evidence to prove Howard's actual innocence by a preponderance. Judge Rubin expressly  
15 determined that Hernandez was an "absolutely credible, absolutely reliable" eyewitness.<sup>8</sup>

16 On December 10, 2015, Howard applied to CalVCB for compensation as an erroneously  
17 convicted offender under Penal Code section 4900. Under then-existing law, Howard requested  
18 compensation for 4,015 days of his post-conviction imprisonment in the amount of \$401,500.<sup>9</sup> The  
19 Attorney General opposed the application in a Response Letter dated September 12, 2016.

20 An informal CalVCB hearing ensued on January 5, 2017. At that time, Howard was in jail  
21 awaiting trial for armed robbery. Consequently, Howard appeared by telephone and did not testify. No  
22 new evidence was presented, and both counsel argued their case.

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24 <sup>5</sup> AG Exs. 6-8.

25 <sup>6</sup> See AG Ex. 28 at pp. 20-22.

26 <sup>7</sup> AG Ex. 9.

27 <sup>8</sup> AG Ex. 9 at p. 25.

28 <sup>9</sup> Former Pen. Code, § 4904 (West 2011 ed.) (calculating compensation at \$100 daily rate and only for  
29 period of post-conviction imprisonment).

1 On March 13, 2017, the original hearing officer's initial proposed decision recommended that  
2 compensation be denied for failing to demonstrate actual innocence by a preponderance of evidence.  
3 This proposed decision was scheduled for the Board's consideration on December 14, 2017. However,  
4 it was withdrawn after a misstatement of law was detected.

5 The matter was reassigned to a new hearing officer, who issued a new proposed decision on  
6 March 23, 2018, in favor of granting compensation. The recommended compensation totaled \$417,200  
7 for just 2,980 days of imprisonment under current law.<sup>10</sup> This calculation excluded a three-year period  
8 during which Howard was simultaneously serving a concurrent sentence for assaulting an inmate in  
9 2004.

10 The Board considered the new proposed decision at the Board Meeting on April 19, 2018. DAG  
11 Cliff Zall appeared and opposed adopting the recommendation. Counsel Parker appeared by  
12 telephone in favor of the recommendation. Howard did not appear. At that time, Howard was a fugitive  
13 from the law for failing to appear at his trial for armed robbery.

14 Parker urged the Board to disregard Howard's current robbery charge and fugitive status as  
15 entirely irrelevant to determining Howard's innocence of his prior convictions. Parker maintained that  
16 the "scholarly" decision of the federal court was entitled to greater weight than the "informal hearing"  
17 conducted by Judge Rubin when denying the motion for a finding of factual innocence. Parker also  
18 challenged the credibility of Hernandez's eyewitness identification of Howard.<sup>11</sup>

19 DAG Zall countered that Judge Rubin's determination of the exact same issue before CalVCB  
20 was entitled to greater weight than the federal court's ruling on ineffective assistance of counsel. DAG  
21 Zall noted that Judge Rubin presided over Howard's second trial and, therefore, was able to observe  
22 live testimony from both Hernandez and Ragland, whereas only Ragland testified in federal court and  
23 neither testified at the CalVCB hearing. DAG Zall maintained that Judge Rubin's determination of  
24 Howard's credibility was not only binding upon CalVCB but further compelled CalVCB to assume  
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27 <sup>10</sup> Pen. Code, § 4904 (calculating compensation at \$140 daily rate for pre- and post-conviction  
28 imprisonment).

29 <sup>11</sup> CalVCB Board Meeting (04/19/18) at 11:50-17:58.

1 Howard's testimony was accurate. DAG Zall further insisted that Howard was not credible, in light of  
2 his prior inconsistent statements, violent criminal history, and current status as a fugitive.<sup>12</sup>

3 After considering arguments from both parties, the Board voted two-to-one to reject the new  
4 proposed decision and deny compensation. The majority determined that Howard had failed to prove  
5 by a preponderance of the evidence that he was actually innocent of his convictions for murdering  
6 Freeman and attempting to murder Ragland. In support of its decision, the majority emphasized the  
7 credibility of Hernandez's eyewitness identification. The majority also suspected that "someone" had  
8 pressured Ragland to provide exculpatory testimony. The majority gave no weight to Howard's current  
9 status as a fugitive. The majority concluded that reasonable doubt of Howard's guilt did not equate to  
10 proof of Howard's innocence.<sup>13</sup>

### 11 III. FACTUAL SUMMARY

12 At approximately 8:05 p.m. on July 8, 2002, Freeman and Ragland were standing on a sidewalk  
13 near the corner of Hoover Street and 42nd Place in South Central Los Angeles, across the street from  
14 the Wine Barrel liquor store. Freeman and Ragland were known to hang out at this location, along with  
15 their friends and family. A small sedan with several occupants pulled up to the corner. The front  
16 passenger stepped out of the car and approached Freeman and Ragland. Multiple shots were fired,  
17 striking both Freeman and Ragland several times. Ten shell casings from two different calibers landed  
18 near the victims. The gunman retreated to the front passenger seat, and the car sped away. Freeman  
19 died from his injuries. Ragland was critically injured but survived.

20 Howard, who is Black, was 20 years old at the time of the shooting, stood six-feet one-inch tall,  
21 and weighed 175 pounds.<sup>14</sup> Howard also had closely cropped hair that appeared shaved.<sup>15</sup> By  
22 comparison, Freeman was 42 years old, stood six-feet six-inches tall, and weighed 280 pounds.  
23 Ragland was 31 years old, only five-feet seven-inches tall, and weighed 180 pounds.

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25 <sup>12</sup> CalVCB Board Meeting (04/19/18) at 18:03-28:17.

26 <sup>13</sup> CalVCB Board Meeting (04/19/18) at 33:04-38:12.

27 <sup>14</sup> AG Ex. 10 at p. 1 (investigation report dated 2002 describing Howard as six feet and one inch tall,  
28 weighing 175 pounds, and 20 years old); see also Howard Ex. G (booking entries from 2012 arrest  
described Howard as six feet and two inches tall, weighing 205 pounds, and 30 years old);

29 <sup>15</sup> AG Ex. 10 at p. 5; AG Ex. 15 at p. 3 (photo 5).

1 Ragland was a documented Crips gang member of the Rollin' 40s sect and his moniker was  
2 "Smurf." As of 2002, Ragland had prior convictions for multiple sexual offenses and narcotics sales.  
3 According to police records, Howard, whose full name is Deandre Maurice Howard, was also a Crips  
4 gang member of the Rollin' 40s sect and used the moniker "Lil Dre."<sup>16</sup> Howard had a 2000 felony  
5 conviction for possession for sale of a controlled substance and a 2001 felony conviction for forgery.

6 Howard was identified as the gunman who shot Freeman and Ragland by two separate  
7 eyewitnesses: Fontaine and Hernandez. In addition, local Rita Brown (Brown) heard a rumor that the  
8 shooter was a gang member known as "Lil Mo," and the shooting was prompted by a narcotics  
9 transaction that went bad. According to Brown, several Rollin' 40s members, including Ragland and  
10 Freeman, had pooled their money to buy a large quantity of drugs, but a disagreement ensued when  
11 splitting the proceeds that led to the shooting, after which the shooter supposedly fled to Sacramento.  
12 The police database of local gang members did not include any matches for "Lil Mo." Meanwhile,  
13 Freeman's former girlfriend Jennique Taylor/Boykins heard a rumor that the shooting was committed by  
14 gang members from the Five-Deuce Hoovers, who are rivals of the Rollin' 40s. She insisted that  
15 Freeman was not in a gang.<sup>17</sup>

#### 16 **A. Fontaine**

17 Fontaine was a longtime friend of Freeman. Fontaine was standing on the sidewalk  
18 approximately 15 feet away from Freeman and Ragland when the shooting occurred. Fontaine fled the  
19 scene because of an outstanding parole warrant.

#### 20 **1. First Statement**

21 Two weeks later, on July 23, 2002, Fontaine met with police and provided a statement.  
22 Fontaine saw the gunman shoot Freeman first, who grabbed his stomach and fell to the ground. Then  
23 the gunman turned to Ragland and shot him twice. The gunman returned to Freeman and shot him in  
24 the head. The gunman turned back to Ragland and shot him twice more. The suspect finally walked  
25 back to the waiting car, and it sped away. Throughout these events, Fontaine only saw the shooter's  
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27 <sup>16</sup> In 2016, Howard insisted that he was a Crips member of the W.D.C. sect, which was allied with the  
28 Rollin' 40s. He denied ever being a member of the Rollin' 40s. (AG Exs. 11 at p. 3; 28 at p. 2.)

29 <sup>17</sup> AG Ex. 27.

1 profile. Fontaine described the shooter as a young Black male, approximately five-feet 10-inches tall,  
2 with a skinny build, wearing a white muscle shirt and black belt, with closely cropped hair. Fontaine  
3 described the get-away car as white, four-door, and possibly hatchback.<sup>18</sup>

## 4 **2. Second Statement**

5 Police interviewed Fontaine again on August 29, 2002. Fontaine acknowledged that Freeman  
6 used drugs, Ragland sold drugs, and Freeman often acted as Ragland's bodyguard. Shortly before the  
7 shooting, Freeman told Fontaine that he was going to be coming into a lot of money, but he refused to  
8 elaborate. Police showed Fontaine a photographic lineup with six photographs, including one of  
9 Howard with long hair (i.e., lineup "A"). Fontaine, who was not wearing her glasses, became visibly  
10 upset and started crying but did not identify anyone.<sup>19</sup>

11 Later that day, police happened to encounter Nakia Carcamo, who was a suspect in another  
12 murder. Carcamo generally resembled the shooter's description and had just returned from  
13 Sacramento. When police sought to question him, Carcamo spontaneously stated that he knew they  
14 wanted to talk about Freeman's murder and then attempted to flee.

15 Police compiled a new photographic lineup, which included Carcamo's photograph but not  
16 Howard's (i.e., lineup "B"). They returned to Fontaine later that day and showed her lineup "B."  
17 Fontaine was wearing her glasses. Fontaine readily identified Carcamo, but not as a suspect.  
18 Fontaine referred to Carcamo as Ragland's "homeboy." Fontaine pointed out several distinguishing  
19 features between Carcamo and the shooter, which matched Howard's appearance.

20 Consequently, police rearranged the six photographs in lineup "A" and showed it to Fontaine  
21 again. This time, Fontaine positively identified Howard as the shooter. Specifically, Fontaine pointed to  
22 Howard's photograph and stated, "Yeah, now I got my glasses now and this cat look like here."<sup>20</sup>  
23 Fontaine confirmed that Howard "looks like the person" that had "the gun" and "shot" both Freeman and  
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27 <sup>18</sup> AG Exs. 10, 13.

28 <sup>19</sup> AG Exs. 10 at p. 4; 15.

29 <sup>20</sup> AG Exs. 10 at p. 4; 15; 16 at pp. 12-13.

1 Ragland.<sup>21</sup> Fontaine added that she had not previously seen the shooter in the neighborhood, where  
2 she had lived for 26 years.<sup>22</sup>

### 3 **3. First Trial Testimony**

4 At Howard's first trial in September 2003, Fontaine denied that Howard was the shooter. When  
5 asked if Howard was the person with the gun, Fontaine replied, "No, he's not the one." Fontaine further  
6 insisted that she had only identified Howard's photograph in lineup "A" as "someone that looked like  
7 it."<sup>23</sup> Fontaine claimed it was impossible for her to identify Howard from his full-face photograph  
8 because she had only observed the shooter's profile. Fontaine acknowledged she risked being shot or  
9 killed in retaliation for testifying, but Fontaine insisted this risk "wouldn't bother" her if she knew for sure  
10 the person was guilty.<sup>24</sup>

11 According to the investigating detective, Fontaine was "visibly upset" while testifying and "could  
12 hardly look at Howard." It appeared that she had realized "how dangerous" it was "to sit in front of  
13 Howard and actually testify against him."<sup>25</sup>

### 14 **4. Second Trial**

15 Fontaine passed away before Howard's second trial in 2013.<sup>26</sup> Consequently, her testimony  
16 from the first trial was read into the record. The investigating detective later recalled that, without  
17 viewing Fontaine's "body language," "it was almost worthless" having someone else read her prior  
18 testimony to the jury.<sup>27</sup>

### 19 **B. Hernandez**

20 Hernandez was the second eyewitness who identified Howard. Hernandez worked at the Wine  
21 Barrel liquor store, which was located directly across the street from the shooting. Hernandez was  
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23 <sup>21</sup> AG Ex. 16 at p. 12.

24 <sup>22</sup> AG Ex. 16 at p. 18.

25 <sup>23</sup> AG Ex. 20 at p. 654.

26 <sup>24</sup> AG Ex. 20 at pp. 643-716.

27 <sup>25</sup> AG Ex. 24 at pp. 1-2.

28 <sup>26</sup> According to public records, Fontaine died in 2008.

29 <sup>27</sup> AG Ex. 24 at pp. 1-2, 5.



1 acquainted with Ragland but did not know Howard. When the shooting occurred on July 8, 2002, at  
2 approximately 8:05 pm, Hernandez was on a break, standing outside the store in the parking lot,  
3 smoking a cigarette. The parking lot was enclosed by a wrought-iron gate with an opening for cars to  
4 enter. Approximately 35 feet separated Hernandez and the shooter. Despite the distance and the  
5 fence and the late time of day,<sup>28</sup> Hernandez was able to observe the shooter's entire face.

6 **1. First Statement**

7 On the night of the shooting, Hernandez described the gunman as a Black male, standing  
8 approximately five-feet seven-inches tall and weighing 150 pounds, clad in black pants, a black shirt,  
9 and a black baseball cap turned backwards. Hernandez believed the get-away car was a White Nissan  
10 with three occupants, including the shooter, all of whom were Black males.<sup>29</sup>

11 **2. Second Statement**

12 Police interviewed Hernandez again three months later in October 2002. Hernandez described  
13 the shooter as a skinny, bald, Black male in his 20s. Hernandez could no longer recall the color of the  
14 shooter's clothing or the color of the get-away car. Police showed Hernandez a photographic lineup  
15 that included a recent photograph of Howard with shorn hair (i.e., lineup "C"). Hernandez became  
16 visibly upset when he pointed to Howard's photograph and stated, "There's the one who kind of looks  
17 like him."<sup>30</sup>

18 Hernandez and his family lived in the same neighborhood where the shooting occurred. But by  
19 the time of his second statement, Hernandez had moved out of California and was living in Washington  
20 state with his brother.<sup>31</sup> Hernandez moved back to Los Angeles a few months later, but only  
21 temporarily.

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25 <sup>28</sup> The average time for the sun to set in Los Angeles on July 8 is at 8:08 pm, approximately three  
26 minutes after the shooting occurred. (See Los Angeles Almanac, *Weather: Sunrise/Sunset Times*,  
<<http://www.laalmanac.com/weather/we88b.php>> [as of May 10, 2018].)

27 <sup>29</sup> AG Ex. 10 at p. 2.

28 <sup>30</sup> AG Exs. 10 at p. 4; 15; 17 at p. 11.

29 <sup>31</sup> AG Ex. 17.

1                   **3. First Trial Testimony**

2                   At the first trial in September 2003, Hernandez testified as a witness for the prosecution and  
3 positively identified Howard as the shooter. Hernandez had no doubt that Howard was the shooter.  
4 Hernandez admitted he was scared for his life and feared for his family’s safety, most of whom still lived  
5 in the same neighborhood as the shooting.

6                   Hernandez, who was then in custody for a domestic violence incident, described a recent  
7 encounter with Howard at the Los Angeles County Jail. Hernandez and Howard happened to be in the  
8 same holding tank cell, along with approximately 20 other inmates. Hernandez recognized Howard but  
9 avoided looking at him. However, another inmate greeted Hernandez by his first name. Then, Howard  
10 approached Hernandez and said he knew Hernandez was going to testify against him. Howard even  
11 showed Hernandez some pages from a police report that summarized Hernandez’s statements.  
12 Hernandez was scared and kept quiet.<sup>32</sup>

13                   **4. Second Trial Testimony**

14                   Hernandez eventually moved back to Washington state and remained there for over six years.  
15 Hernandez nevertheless returned to California to testify at Howard’s second trial in December 2013.  
16 Again, Hernandez unequivocally identified Howard as the shooter. Hernandez was 100 percent sure.

17                   Hernandez repeated his frightening encounter with Howard in the holding tank cell in 2003.  
18 Hernandez also described a second encounter with Howard. Specifically, the day after Hernandez first  
19 testified against Howard, Hernandez was transported from jail to the courthouse on the same bus with  
20 Howard.<sup>33</sup> While exiting the bus, Howard announced, “Oh, you just straight out killed me.” The  
21 comment frightened Hernandez because “everybody’s going to find out” that he was a “snitch” who  
22 “told on” Howard.<sup>34</sup> Hernandez feared for his safety, as well as for the safety of his family members.  
23 After Howard’s comment, jail staff relocated Hernandez so that he did not encounter Howard again.<sup>35</sup>

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<sup>32</sup> AG Ex. 20 at pp. 740-804.

27 <sup>33</sup> AG Ex. 21 at p. 46.

28 <sup>34</sup> AG Ex. 21 at pp. 36-37.

29 <sup>35</sup> AG Ex. 21 at pp. 4-114.

1 After his release from jail, Hernandez eventually moved to Washington because he “got tired of  
2 seeing all the shit going on” and it scared him.<sup>36</sup> He added that testifying in this case was “the main  
3 reason” he moved away.<sup>37</sup> However, other members of Hernandez’s family continued living in the  
4 same neighborhood.<sup>38</sup>

### 5 **C. Ragland**

6 Minutes after the shooting on July 8, 2002, Ragland was transported by ambulance to the  
7 hospital for treatment of multiple gunshot wounds. Either Ragland or someone else falsely identified  
8 Ragland as “DeWayne Tate” to first responders and hospital staff, evidently because Ragland had  
9 absconded from parole.<sup>39</sup>

#### 10 **1. First Statement**

11 While Ragland was still hospitalized, police interviewed him on July 20, 2002. Ragland  
12 continued to falsely identify himself as Dewayne Tate and only admitted his true identity after police  
13 confronted him with it. Ragland denied knowing who had shot him and believed it was more than one  
14 person. Ragland confirmed the shooter or shooters arrived in a white car with three or four occupants.  
15 Ragland noted that the driver had long braids and may have been a female. Ragland claimed he did  
16 not know whether shots were fired from inside or outside the car because he “wasn’t looking back.”  
17 During this interview, some of Ragland’s responses appeared incoherent.<sup>40</sup>

#### 18 **2. Second Statement**

19 Ragland next spoke to police by telephone on August 27, 2002. During that call, Ragland  
20 described the get-away car as a white Nissan sedan with four doors. He also described the front  
21 passenger as a Black male, between five-feet seven-inches and five-feet eleven-inches tall, 18 to 27  
22 years old, with either short or braided hair, wearing a white shirt and black pants. The front passenger  
23 stepped out of the car, looked at Freeman and Ragland, pulled out a semi-automatic gun, and then  
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25 <sup>36</sup> AG Ex. 21 at p. 21.

26 <sup>37</sup> AG Ex. 21 at p. 105.

27 <sup>38</sup> AG Ex. 21 at pp. 24-25.

28 <sup>39</sup> AG Ex. 21 at p. 131 (RT (12/18/13 at 10:53 am)).

29 <sup>40</sup> AG Ex. 12.

1 started shooting. Freeman, who was positioned in front of Ragland, was struck first. The gunman  
2 continued shooting while walking towards Freeman and Ragland and then finally retreated to the  
3 waiting get-away car. Ragland insisted there was only one shooter and no shots were fired from inside  
4 the car.

5 Ragland denied being involved in a drug deal that went bad but claimed he heard that Freeman  
6 may have been. Ragland also claimed he heard that the shooter may be a Hoover gang member  
7 called "Tiny Dre." Ragland insisted that he did not recognize the shooter and, therefore, the gunman  
8 must not be from the neighborhood. When police proposed showing Ragland a lineup, Ragland  
9 indicated he was not willing to cooperate because his "life" and "freedom" were more important.  
10 Ragland stated, "I can't make my life more miserable... I can't put myself through more drama if, you  
11 know, I don't really have to." Police asked Ragland to reconsider.<sup>41</sup>

12 At the conclusion of the interview, the investigating detective opined that Ragland "knows the  
13 shooters and is being uncooperative."<sup>42</sup>

### 14 **3. Third Statement**

15 Two months after the shooting, Ragland was arrested for robbery in September 2002. While he  
16 was still in jail, police interviewed him on October 2, 2002. Police showed Ragland two different  
17 lineups, each containing six photographs. Howard's photograph with long hair was included in lineup  
18 "A." Ragland did not identify anyone in that lineup as either a suspect, friend, or associate. When  
19 shown lineup "B," Ragland solely identified the photograph of Carcamo as his friend.<sup>43</sup>

### 20 **4. 2004 Declaration**

21 While Howard's direct appeal was pending, his attorney received a declaration purportedly  
22 signed by Ragland on September 30, 2004. The declaration was entirely handwritten, yet still included  
23 Howard's case number in the Los Angeles County Superior Court (i.e., BA238200), in addition to  
24 Howard's case number in the Second District Court of Appeal (i.e., B170820). The declaration included  
25 Howard's name and address at Salinas Valley State Prison in Soledad, as well as Ragland's address at

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27 <sup>41</sup> AG Ex. 14 at pp. 4-12, 26-46.

28 <sup>42</sup> AG Ex. 11 at p. 5.

29 <sup>43</sup> AG Ex. 11 at p. 8; AG Ex. 24 at p. 2.

1 Ironwood State Prison in Blythe. The declaration noted that Howard was convicted on March 4, 2003,  
2 of the murder of Freeman and the attempted murder of Ragland, and that police interviewed Ragland  
3 about these crimes on August 27, 2002. The declaration also cited “record page 2 of 2” of the Los  
4 Angeles Police Department’s investigative report summary.

5 In the declaration, Ragland averred that, on July 2, 2002, “I was shot several times on the  
6 sidewalk at 4240 South Hoover Street while talking to victim Mark Freeman. During this occurrence I  
7 was struck by gunfire and collapsed. The suspect(s) reentered the vehicle and fled the location.”  
8 Ragland added that, when speaking to police on August 27, 2002, “I was evasive and non-cooperative  
9 but the truth remains DeAndre Howard never attempted to murder me, neither did he murder victim  
10 Mark Anthony Freeman.”<sup>44</sup> Ragland concluded, “If I was made to testify in Court to these matters I  
11 would under oath and affirmation.”<sup>45</sup> Significantly, the signature on this declaration looks dramatically  
12 different than Ragland’s signature on his fingerprint card from the Los Angeles County Jail in 1993.<sup>46</sup>

13 Approximately nine months before this declaration was written, Ragland commenced serving a  
14 six-year prison sentence for arson of an inhabited structure in January 2004.<sup>47</sup> While still incarcerated,  
15 Ragland was sentenced in 2010 to an indeterminate term of 25-years-to-life for committing a battery on  
16 a prison staff member.<sup>48</sup> Previously in 1993, Ragland was convicted of multiple forcible sexual acts  
17 and possession of a controlled substance for sale, for which he received a 12 year prison term.<sup>49</sup>

## 18 **5. Evidentiary Hearing Testimony**

19 Ragland was transported from prison to testify at Howard’s evidentiary hearing in federal court  
20 on May 9, 2011.<sup>50</sup> At the hearing, Ragland again described the get-away car as a white Nissan four-

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22 <sup>44</sup> AG Ex. 4.

23 <sup>45</sup> AG Ex. 4.

24 <sup>46</sup> See Board Attachment “A” (excerpts of AG Ex. 4 at p. 2 and AG Ex. 22 at p. 5).

25 <sup>47</sup> Pen. Code, § 451, subd. (b) (as described in AG Ex. 22).

26 <sup>48</sup> Pen. Code, § 4501.5 (as described in AG Ex. 22).

27 <sup>49</sup> Pen. Code, §§ 261, subd. (a)(2); 288a, subd. (c); 289; Bus. & Prof. Code, § 11351 (as described in  
AG Ex. 22).

28 <sup>50</sup> At discussed *infra*, Howard and Ragland were shackled together on the way to Howard’s evidentiary  
29 hearing, during which Howard supposedly kept the conversation “light.” (AG Ex. 28 at p. 19.)

1 door. He also described the shooter as five-feet seven-inches to five-feet eleven-inches, either bald or  
2 short hair, and wearing a white shirt and black pants. Ragland denied that Howard was the shooter.  
3 Ragland admitted knowing Howard from “around the area” at the time of the shooting and insisted he  
4 would have recognized Howard had he been the shooter. Ragland claimed that he did not inform  
5 police that he knew Howard when looking at the lineup because Howard was only an acquaintance,  
6 whereas Carcamo was “like a brother.”

7 Ragland attributed his lack of cooperation and false identification while in the hospital to his  
8 medical injuries and fear of being arrested for a parole violation. Ragland denied telling the police that  
9 he did not look back when shots were fired. Ragland also denied ever being contacted by any member  
10 of Howard’s defense and averred that he would have been willing to cooperate had he been  
11 contacted.<sup>51</sup>

12 Ragland was not asked any questions about the declaration he purportedly sent to Howard’s  
13 appellate attorney in 2004.

#### 14 **6. Second Trial Testimony**

15 Ragland was again transported from prison to testify at Howard’s second trial in December  
16 2013. Ragland was still serving a life sentence, but he claimed he had changed his lifestyle and was  
17 now a Christian. Ragland admitted during cross-examination that, at the time of the shooting, he was a  
18 member of the Rollin’ 40s gang and sold narcotics.<sup>52</sup>

19 Ragland denied that Howard shot him or Freeman. Ragland insisted that he did not recognize  
20 the shooter, who he now claimed had a ponytail. Ragland had known Howard for a couple of years  
21 from “around the neighborhood” and “hanging out” with the same people. Ragland noted that Howard  
22 had even given some money to Ragland’s mother, “probably a quarter or two or some change ... on the  
23 street.”<sup>53</sup> Ragland reiterated that the shooter was not Carcamo, who was like a brother to him.  
24 Ragland acknowledged that identifying someone who committed a crime can be dangerous, but  
25 Ragland insisted, “I ain’t never been in a situation where I had to feel that way.”

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27 <sup>51</sup> Howard Ex. H at pp. 16-38.

28 <sup>52</sup> AG Ex. 21 at pp. 138-140 (12/18/13 RT).

29 <sup>53</sup> AG Ex. 21 at p. 149 (12/18/13 RT).

1 Ragland admitted that he did not personally write the 2004 declaration. Instead, Ragland  
2 supposedly “had a jailhouse lawyer write [it] for me.” Ragland did not identify the “jailhouse lawyer,” nor  
3 did he explain how that lawyer was able to include so many details from Howard’s legal case. Ragland  
4 nevertheless insisted that he personally signed the 2004 declaration under penalty of perjury, even  
5 though his signature appeared significantly different on an official prison document from 2008.<sup>54</sup>  
6 Ragland explained the difference by claiming he was “very careful in writing the affidavit signature to  
7 make sure that somebody could read it...”<sup>55</sup> Ragland also insisted that he “sent” the signed  
8 declaration to Howard’s attorney.

9 When asked why he waited so long to exonerate Howard, Ragland claimed he would have done  
10 so earlier if only someone had contacted him. Ragland denied being uncooperative during the  
11 investigation. Ragland maintained he was always willing to talk and voluntarily met with the  
12 investigating detective to look at the photographic lineups. As for the declaration’s contrary admission  
13 that Ragland was uncooperative, Ragland insisted that the statement solely referred to his first  
14 interview while still in the hospital.<sup>56</sup> But once Ragland learned of the charges against Howard, he  
15 declined to contact the police directly about Howard’s innocence because he “thought the justice  
16 system would work.” Ragland did not ask his family members to contact the police about Howard’s  
17 innocence because “they had a collect block on the phone.”<sup>57</sup>

## 18 7. 2016 Interview

19 In 2016, the Attorney General interviewed Ragland, who was still serving a life sentence for  
20 battering a prison staff member. Ragland maintained that Howard did not shoot him or Freeman.  
21 Ragland insisted that the shooter did not even resemble Howard. When asked why Howard was  
22 identified by two separate eyewitnesses, Ragland claimed that Howard regularly sold drugs to Fontaine  
23 and Hernandez did not have a clear view.

24  
25 \_\_\_\_\_  
26 <sup>54</sup> AG Ex. 21 at pp. 163, 169 (Ragland “signed that affidavit despite the fact that it was written for you”),  
179-185 (12/18/13 RT); see also Board Decision Attachment “A”.

27 <sup>55</sup> AG Ex. 21 at p. 183 (12/18/RT).

28 <sup>56</sup> *Id.* at page 159.

29 <sup>57</sup> AG Ex. 21 at pp. 126-186 (12/18/13 RT), at pp. 117-154 (12/13/13 RT).

1 According to Ragland, he decided “to come forward” about Howard’s innocence by sending a  
2 declaration to Howard’s attorney in 2004 after his wife informed him that Howard was serving a life  
3 sentence for the shooting. Ragland denied lying to aid Howard, explaining that if someone tried to kill  
4 him, he may not “snitch,” but he would not go out of his way to help that person. Ragland insisted that  
5 he had been inconvenienced when testifying on Howard’s behalf at the federal evidentiary hearing and  
6 the second trial because he had to leave the “comforts” of his state prison cell and temporarily return to  
7 the Los Angeles County Jail.<sup>58</sup>

8 In a separate interview with Ragland’s wife Shanisha Robinson, she could not recall ever telling  
9 Ragland that Howard had been arrested for the shooting. She also denied knowing Howard. Robinson  
10 added that she had been standing near Ragland when the shooting occurred but denied seeing the  
11 shooter’s face.<sup>59</sup>

#### 12 **D. Howard**

13 Howard has consistently denied shooting Freeman or Ragland. However, other aspects of his  
14 statements have shifted over time.

##### 15 **1. First Statement**

16 On October 24, 2002, approximately three months after the shooting, police first interviewed  
17 Howard at his parole officer’s office. Howard claimed he was living on 59<sup>th</sup> Place, but he admitted  
18 previously living on 40<sup>th</sup> Place for about a year with his then-girlfriend Crystal, when Howard was 18  
19 years old. Before then, Howard moved around a lot while in foster care and juvenile detention. Howard  
20 admitted that Crystal owned a white Cavalier wagon.<sup>60</sup>

21 Howard denied shooting Freeman or Ragland. Howard also denied even knowing Freeman or  
22 Ragland by name or by gang moniker. But after observing their photographs, Howard finally admitted  
23 Ragland looked familiar. Howard still insisted he had never before seen Freeman. Howard recalled  
24 seeing Ragland “around a lot” in the neighborhood of 41<sup>st</sup> and Hoover. Howard maintained that he did  
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26  
27 <sup>58</sup> AG Ex. 23.

28 <sup>59</sup> AG Ex. 27.

29 <sup>60</sup> AG Ex. 18 at p. 29.



1 not associate with Ragland and had never spoken to Ragland, adding “I don’t [ ] even know what his  
2 voice sound like.”<sup>61</sup>

3 Howard did not recall exactly where he was when the shooting occurred, but he insisted he had  
4 not been in that neighborhood for eight months. Howard claimed he may have been working, although  
5 he provided inconsistent statements as to whether he had been employed since getting out of prison in  
6 February 2002.<sup>62</sup> Howard alternatively suggested he may have been with his parole officer, or with his  
7 girlfriend, or on the phone. Howard also denied frequenting the Wine Barrel, claiming that he was not  
8 welcome there because he looked like “one of the people that gang bangs around there....” Howard  
9 denied being a member of any gang, but he admitted wearing powder blue and dark blue, which were  
10 the gang colors for that neighborhood. Howard further denied having any nicknames, like “Dre” or  
11 “Mo,” but eventually admitted his uncle used to call him “Dre.”<sup>63</sup>

## 12 **2. First Trial Testimony**

13 Howard testified at the first trial in December 2003. By then, Howard was six-feet two-inches  
14 tall and weighed 200 pounds. Howard denied shooting Freeman or Ragland. Howard admitted that he  
15 knew of Ragland, but he claimed he did not know him “personally.”<sup>64</sup> Howard also denied that his  
16 former girlfriend Crystal had a car, despite his prior admission that she owned a white Cavalier wagon.  
17 Howard acknowledged that Crystal previously lived on 40<sup>th</sup> Place, just five blocks away from the  
18 shooting, but Howard equivocated whether he had lived there in 2001 and 2002.<sup>65</sup> Howard also  
19 claimed he could not recall where he was living at the time of the shooting, as he was supposedly “in  
20 transition” staying with different people.<sup>66</sup>

21 Howard also could not recall his whereabouts at the time of the shooting on July 8, 2002. He  
22 insisted he was not in the vicinity of the shooting, but acknowledged he may have been with Crystal,  
23

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24 <sup>61</sup> AG Ex. 18 at p. 36.

25 <sup>62</sup> AG Ex. 18 at p. 55.

26 <sup>63</sup> AG Ex. 18 at pp. 3-72.

27 <sup>64</sup> AG Ex. 20 at p. 1260

28 <sup>65</sup> AG Ex. 20 at pp. 1243-1244.

29 <sup>66</sup> AG Ex. 20 at p. 1267.

1 who supposedly had since moved to Compton. Howard also insisted that, in July 2002, he was working  
2 full-time for a 99 Cent store.<sup>67</sup>

3 Howard flatly denied confronting eyewitness Hernandez while the two were in jail together.  
4 Howard insisted that Hernandez had lied about that encounter. Howard bolstered his claim by noting  
5 that the jail was segregated by race, but he acknowledged that the holding tank cell may include  
6 inmates from multiple races.<sup>68</sup>

7 Following his conviction, Howard was sentenced on October 10, 2003, to 75-years-to-life  
8 imprisonment. At the sentencing hearing, Howard directly addressed Freeman's family and insisted he  
9 was innocent. Howard accused Hernandez of being a "false" witness. Howard maintained that  
10 Ragland would exonerate him if only he had been called to testify.<sup>69</sup>

### 11 **3. 2016 Interview**

12 Howard did not testify at the federal evidentiary hearing in 2011, or at his second trial in 2013.  
13 In 2016, he was interviewed by the Attorney General while his counsel was present. Howard  
14 repeatedly denied shooting Freeman or Ragland. Howard also denied belonging to the Rollin' 40s or  
15 going by the moniker of "Lil Dre" or "Lil Mo." Howard did admit to being a member of the "W.D.C.," and  
16 his moniker was "Little PK." Howard acknowledged that the Rollin' 40s and W.D.C. were both allied  
17 sects within the Crips gang. Howard could not "actually say specifically who committed this crime," but  
18 he insisted that both he and Ragland knew "it was an enemy of both his gang and my gang."

19 Contrary to his prior statements to police and at trial, Howard admitted knowing Ragland as  
20 "Smurf" and recalled that Ragland had once purchased beer for him. Contrary to his trial testimony,  
21 Howard also admitted that he had confronted Hernandez about testifying against him while in the  
22 holding tank cell. Howard further admitted that he had confronted Hernandez again while on the bus.  
23 Howard insisted Hernandez was simply mistaken about his identification and suggested Hernandez  
24 may have been confused from having previously seen Howard around the neighborhood. Howard  
25

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26 <sup>67</sup> AG Ex. 20 at pp. 1233-1261, 1267-1268, 1277-1285.

27 <sup>68</sup> AG Ex. 20 at pp. 1261-1264, 1288-1294.

28 <sup>69</sup> AG Ex. 20 at pp. 2107-2111. As noted *infra*, Howard encountered Ragland in jail a few weeks before  
29 the sentencing hearing. (AG Ex. 28 at pp. 5-6.)

1 further claimed that Fontaine admitted to him during the first trial that “they’re trying to [ ] make me say  
2 it’s you and I know baby it ain’t true.”

3 Howard’s account of how Ragland came to his defense differed significantly from Ragland’s  
4 version of events. According to Howard, he encountered Ragland in jail in September 2003, shortly  
5 before Howard’s first trial commenced. The two were walking single-file in opposite directions down a  
6 hallway, along with approximately 13 other inmates. Howard hollered, “Hey Smurf, they got me on your  
7 case.”<sup>70</sup> Howard tried to continue talking to Ragland, but the guard ordered him to move along.  
8 Howard denied that his comment placed a “snitch jacket” on Ragland, adding it was a “pretty public  
9 case” so many inmates already knew about it. This encounter occurred a month before Howard’s  
10 sentencing hearing, at which Howard proclaimed that Ragland would exonerate him.

11 Howard acknowledged having indirect contact with Ragland in 2004 while the two were housed  
12 in different prisons. At that time, Howard was incarcerated in Salinas Valley State Prison with a  
13 cellmate who was a member of the Rollin’ 40s gang. Howard discovered that Ragland was  
14 incarcerated in Ironwood State Prison. Howard’s cellmate “was in communication” with some “homeys”  
15 in Ironwood State Prison and promised to make some inquiries. The result, according to Howard, was  
16 Ragland’s voluntary decision to send the exonerating declaration to Howard’s attorney. Howard denied  
17 that anyone threatened Ragland.

18 Howard admitted a second encounter with Ragland in 2011. At that time, the two were  
19 shackled together and headed to Howard’s evidentiary hearing, at which Ragland testified. Howard  
20 claimed that he purposefully kept their conversation “light.”<sup>71</sup>

#### 21 **4. 2004 Inmate Assault**

22 On October 18, 2004, Howard, along with fellow inmate Javon Charles, brutally assaulted  
23 another inmate, causing great bodily injury.<sup>72</sup> In particular, Howard and Charles both repeatedly  
24 punched and then kicked the inmate, even after the inmate was lying unconscious on the ground with  
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26  
27 <sup>70</sup> AG Ex. 28 at pp. 5-6.

28 <sup>71</sup> AG Ex. 28 (Howard Interview).

29 <sup>72</sup> Pen. Code, §§ 4500, 12022.7, subd. (a)

1 life-threatening injuries. The assault occurred in the Salinas State Valley Prison. All three inmates  
2 were originally from Los Angeles and identified as Crips gang members.<sup>73</sup>

3 Howard was initially sentenced to six years imprisonment for this offense, to be served  
4 concurrently with his convictions for murdering Freeman and attempting to murder Ragland. But after  
5 these convictions were vacated, Howard's sentence for the assault was reduced to three years  
6 imprisonment.<sup>74</sup>

### 7 **5. 2016 Armed Robbery**

8 In late 2016, Howard was arrested for armed robbery of a liquor store in Palmdale. Howard  
9 allegedly pointed a gun at the store owner, reached behind the cash register, and fled with \$10,000.  
10 Surveillance cameras recorded the robbery, and the robber appeared to be Howard. Howard pleaded  
11 not guilty. On March 1, 2018, just four days before his trial was scheduled to begin, Howard was  
12 released on bond from jail. Howard failed to appear for the trial on March 5, 2018, and he remained a  
13 fugitive as of April 10, 2018.

### 14 **E. Prosecutor's Doubts**

15 The prosecutor, who first tried and convicted Howard in 2003, doubted Howard's guilt. The  
16 prosecutor felt that Howard's trial attorney performed deficiently and "perhaps" Howard should have  
17 been acquitted. As a result, the prosecutor contacted Howard's appellate attorney, well before Ragland  
18 supposedly mailed the exculpatory declaratory in 2004. The prosecutor also thought it was "very  
19 unusual" for Howard to decline the offered plea bargain in 2013, which would have resulted in his  
20 immediate release in lieu of a second trial.<sup>75</sup>

### 21 **IV. Binding Court Findings**

22 Pursuant to Penal Code sections 1485.8 and 4903, CalVCB is bound by the factual findings  
23 rendered by the federal court when granting habeas relief, as well as the factual findings rendered by  
24 the state trial judge when denying Howard's motion for a finding of factual innocence.

25  
26  
27 <sup>73</sup> AG Ex. 29.

28 <sup>74</sup> AG Ex. 30.

29 <sup>75</sup> AG Ex. 26.

1           **A. Federal Court**

2           In 2011, the federal court made several factual findings in support of its decision to grant  
3 habeas relief. First, the federal court determined that Howard’s “trial was a close case” when  
4 evaluating whether any prejudice resulted from counsel’s failure to investigate and present Ragland as  
5 a witness.<sup>76</sup> Second, the federal court found that “Ragland was ready and willing to testify at  
6 [Howard’s] trial in a manner consistent with his evidentiary hearing testimony.”<sup>77</sup> As determined by the  
7 federal court, “Ragland’s testimony would have been more helpful to the defense than Fontaine’s  
8 testimony.” Third, the federal court recognized that Ragland “may have been subjected to  
9 impeachment on his prior felony convictions, his gang membership, his initial statement to the police,  
10 and his not telling [police] during the photographic lineup that [Howard] was not the shooter,” but the  
11 federal court had “no basis for finding that such impeachment evidence would have seriously  
12 undermined Ragland’s credibility.”<sup>78</sup> Fourth, the federal court determined that Ragland’s failure to tell  
13 [police] during the photographic lineup that [Howard] was not the shooter does not necessarily render  
14 Ragland’s testimony less credible.”<sup>79</sup>

15           Notably, the federal court did not find Howard was actually innocent. Nor did the federal court  
16 find that Ragland’s exculpatory evidence was accurate or even credible.

17           **B. State Trial Judge**

18           In 2014, Judge Rubin made several factual findings as the basis for denying Howard’s motion  
19 for a finding of factual innocence. Judge Rubin verbally issued these findings while ruling  
20 extemporaneously from the bench, just over a year after presiding over Howard’s second trial, at which  
21 Hernandez and Ragland both testified. First, Judge Rubin expressly determined that Hernandez was a  
22 credible and reliable eyewitness. Judge Rubin bolstered this determination by noting that Hernandez  
23 had moved out-of-state because of this case and had also “moved his family out of Los Angeles for fear  
24  
25

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26 <sup>76</sup> AG Ex. 6 at p. 35.

27 <sup>77</sup> AG Ex. 6 at p. 36.

28 <sup>78</sup> AG Ex. 6 at p. 38.

29 <sup>79</sup> AG Ex. 6 at p. 39.

1 in this case.”<sup>80</sup> Second, Judge Rubin characterized Fontaine as “a typical recanting witness” who was  
2 “evasive.” As support, Judge Rubin noted that he had “watched her body language.”<sup>81</sup> Third, Judge  
3 Rubin found it “hard to believe” that Ragland “on his own” sent the exonerating letter to Howard’s  
4 appellate attorney, suggesting instead that perhaps “someone contacted [Ragland].”<sup>82</sup> Judge Rubin  
5 added, “To say that Arthur Ragland is absolutely crystal clear and God’s gift to the witness profession  
6 that this is not the person, I just don’t see it exactly that way.”<sup>83</sup> Overall, Judge Rubin agreed with the  
7 second jury that insufficient evidence proved Howard’s guilt beyond a reasonable doubt. Nevertheless,  
8 Judge Rubin declined to find Howard innocent under the mere preponderance standard, largely based  
9 upon the “absolutely credible, absolutely reliable” testimony from Hernandez.<sup>84</sup>

## 10 V. DETERMINATION OF ISSUES

11 Penal Code section 4900 allows any person, who has been convicted and imprisoned for a  
12 felony offense, to apply for compensation from CalVCB. To prevail, the applicant bears the burden to  
13 prove, by a preponderance of the evidence, that (1) the crime with which he was charged was either  
14 not committed at all, or, if committed, was not committed by him, and (2) he sustained injury through his  
15 erroneous conviction and imprisonment.<sup>85</sup> “Preponderance of the evidence” means evidence that has  
16 more convincing force than that opposed to it.<sup>86</sup>

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18 <sup>80</sup> AG Ex. 9 at pp. 9, 23. Contrary to Judge Rubin’s finding, the evidence showed that only Hernandez  
19 moved, not his family. Actually, Hernandez’s family remained in the same neighborhood, which added  
20 to Hernandez’s fear for their safety. Nonetheless, CalVCB is bound by the judge’s determination.  
(Pen. Code, § 4903, subd. (b).)

21 <sup>81</sup> AG Ex. 9 at p. 24. Contrary to Judge Rubin’s finding, Fontaine died before the second trial and,  
22 therefore, it was not possible for the court to have viewed her body language. Fontaine’s testimony  
23 from the first trial was read to the jury during the second trial, which prompted the investigating  
24 detective to note that the absence of Fontaine’s body language rendered the reading of testimony  
almost worthless. Thus, the court may have mistakenly recalled the detective’s comment about  
Fontaine’s body language. Regardless, CalVCB is bound by the judge’s determination. (Pen. Code, §  
4903, subd. (b).)

25 <sup>82</sup> AG Ex. 9 at pp. 5-6, 24.

26 <sup>83</sup> AG Ex. 9 at p. 6.

27 <sup>84</sup> AG Ex. 9 at p. 25.

28 <sup>85</sup> Pen. Code, §§ 4903, subd. (a), 4904.

29 <sup>86</sup> *People v. Miller* (1916) 171 Cal. 649, 652.

1           When determining whether the applicant has satisfied his burden of proof, the Board may  
2 consider the “claimant’s denial of the commission of the crime; reversal of the judgment of conviction;  
3 acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant of the  
4 crime....” However, none of these circumstances may be deemed sufficient evidence to warrant a  
5 recommendation for compensation “in the absence of substantial independent corroborating evidence  
6 that claimant is innocent of the crime charged.” The Board may also “consider as substantive evidence  
7 the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence  
8 admitted in prior proceedings for which claimant had an opportunity to object.” Ultimately, the Board  
9 may consider “any other information that it deems relevant to the issue before it,” even if inadmissible  
10 under the traditional rules of evidence, so long as “it is the sort of evidence on which reasonable  
11 persons are accustomed to rely in the conduct of serious affairs.”<sup>87</sup>

12           Typically, the Board’s decision whether or not to grant an application for compensation is based  
13 upon the hearing officer’s proposed decision, plus any written rebuttal argument from the parties, as  
14 well as any additional evidence and argument presented at the Board Meeting.<sup>88</sup> The Board is free to  
15 adopt or reject the proposed decision, in whole or in part.<sup>89</sup> If the Board does not adopt the proposed  
16 decision, then under subdivision (d) of section 619.2 of Title 2 of the California Code of Regulations,

- 17           (1) the Board shall make a statement of decision that includes: (A) the decision made  
18           about the application; and (B) the reasons for the decision; and  
19           (2) board staff shall prepare a written decision consistent with the board’s statement of  
20           decision.

21           The Board is also permitted, if it so chooses, to “decide the case itself after reviewing the record,  
22 including a transcript of the hearing.” The Board may even “decide the case itself by conducting a  
23 hearing to take additional evidence or argument” or, alternatively, “order the hearing officer to take  
24 additional evidence or argument....”<sup>90</sup>

25 \_\_\_\_\_  
26 <sup>87</sup> Cal. Code Regs., tit. 2, § 641, subds. (a)-(c).

27 <sup>88</sup> Cal. Code Regs., tit. 2, §§ 619.1; 619.4.

28 <sup>89</sup> Cal. Code Regs., tit. 2, §§ 619.2, subd.(c), 619.5, subd. (b).

29 <sup>90</sup> Cal. Code Regs., tit. 2, §§ 619.5, subd. (c)(1), (c)(3)-(4).

1 Here, a majority of the Board declined to adopt the proposed decision and determined, instead,  
2 that Howard had failed to satisfy his burden of proving his innocence by a preponderance of the  
3 evidence. As required by subdivision (d)(1) of section 619.2,<sup>91</sup> the majority stated several reasons for  
4 its decision to deny compensation, which included Hernandez's credible identification and the  
5 suspicious circumstances of Ragland's exonerating statements. Subdivision (d)(2)'s requirement of a  
6 "written decision" is satisfied by this writing, which was prepared by CalVCB staff in accordance with  
7 the Board's determination.

#### 8 **A. Hernandez's Identification**

9 When denying compensation, the Board majority primarily relied upon Judge Rubin's binding  
10 determination that Hernandez was a credible eyewitness. Contrary to the Attorney General's position,  
11 a finding of credibility or reliability is not equivalent to a finding of accuracy.<sup>92</sup> A court's credibility  
12 determination requires CalVCB to assume that the witness sincerely testified to the best of his  
13 recollection, but it does not compel CalVCB to assume the witness' recollection is correct. CalVCB  
14 therefore recognizes that Hernandez's credible identification might actually be mistaken. Nonetheless,  
15 as explained below, this possibility is too remote under the circumstances to satisfy Howard's burden of  
16 proving actual innocence by a preponderance.

17 Hernandez consistently and repeatedly identified Howard as the shooter. Hernandez first  
18 identified Howard from a photographic lineup in October 2002. Hernandez identified Howard a second  
19 time while testifying at Howard's first trial in September 2003. Hernandez identified Howard a third time  
20 while testifying in Howard's second trial December 2013, for which Hernandez traveled all the way from  
21 Washington. Hernandez provided these unequivocal identifications despite fearing for his safety, as  
22 well as his family's safety. Hernandez's fears were founded, in part, upon his encounters with Howard  
23 in jail immediately before and after testifying against Howard.

24  
25  
26 <sup>91</sup> Cal. Code Regs., tit. 2, §§ 619.2, subd. (d)(1)(A)-(B).

27 <sup>92</sup> See Merriam-Webster Online Dict. (2018) < <https://www.merriam-webster.com/dictionary/reliable> >  
28 [as of May 10, 2018] (defining "credible" as "offering reasonable grounds for being believed," "reliable"  
29 as "dependable; giving the same result on successive trials," and "accurate" as "free from error;  
conforming exactly to truth"); see also CALJIC No. 226 (evaluating credibility).



1 Admittedly, Hernandez's original description of the shooter's height at five-feet seven-inches  
2 was significantly shorter than Howard's then-height of six-feet one-inch. Nonetheless, this six-inch  
3 discrepancy may be readily explained by Freeman's comparatively large size of six-feet six-inches.  
4 Alternatively, Hernandez simply may not be good at estimating heights, given Fontaine's estimate that  
5 the shooter was five-feet 10-inches tall, and Ragland's estimate that the shooter was five-feet 11-  
6 inches. Overall, Hernandez credibly identified Howard as the shooter.

7 The likely accuracy of Hernandez's identification is significantly bolstered by the separate and  
8 independent identification by Fontaine. When Fontaine initially viewed a photographic lineup that  
9 included Howard, she became visibly upset. When Fontaine next viewed that lineup with her glasses  
10 on, she selected Howard's photograph.<sup>93</sup> The "doctrine of chances" substantially diminishes the  
11 likelihood that both Fontaine and Hernandez were mistaken when they selected only Howard's  
12 photograph as the shooter from different photographic lineups.<sup>94</sup>

13 Other details further corroborate Hernandez's identification of Howard. In particular, one  
14 witness heard a rumor that the shooter was known as "Lil Mo," and Howard's middle name is Maurice.  
15 Similarly, Ragland told police that he heard a rumor the shooter was called "Tiny Dre," and Howard's  
16 gang moniker was "Lil Dre." Another rumor suggested that the shooting occurred over a drug deal, and  
17 both Ragland and Howard sold drugs, while Freeman used drugs, often worked as Ragland's body  
18 guard, and had bragged about coming into some money shortly before his death. In addition, Howard  
19 knew Ragland, and he also knew the area where the shooting occurred. Also, Howard admitted to  
20 police that his former girlfriend owned a white Cavalier wagon, while Fontaine described the get-away  
21 car as a white wagon, and Ragland thought the driver may have been a female. Finally, Howard  
22 offered no evidence of an alibi.

23  
24  
25 <sup>93</sup> AG Ex. 16 at p. 12.

26 <sup>94</sup> See *People v. Spector* (2011) 194 Cal.App.4<sup>th</sup> 1335, 1379-1380 ("doctrine of chances" requires  
27 consideration of "the objective improbability of a coincidence in assessing the plausibility of a  
28 defendant's claim that ... he or she was accidentally enmeshed in suspicious circumstances"); see *also*  
29 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241 ("doctrine of chances" holds "similar  
results to do not usually occur through abnormal causes; and the recurrence of a similar result ... tends  
to negative accident or inadvertence of self-defense or good faith or other innocent mental state").

1 On balance, Hernandez’s credible and reliable identification of Howard as the shooter heavily  
2 weighs against Howard’s claim of innocence.

3 **B. Ragland’s Exonerating Statements**

4 By comparison, Ragland’s exonerating statements are not persuasive. The Board majority  
5 doubted Ragland’s veracity and noted the possibility that “someone got to him” in prison. The  
6 majority’s concern is supported by Judge Rubin’s binding determination that it is “hard to believe” that  
7 Ragland “on his own” sent the exonerating declaration to Howard’s appellate attorney in 2004.<sup>95</sup>

8 Indeed, the declaration is suspect on its face. Most telling, the signature on the declaration is  
9 entirely different than Ragland’s signature on his jail fingerprint card.<sup>96</sup> In addition, the declaration  
10 includes information that Ragland could not have possibly known (i.e., the page number on the police  
11 investigative report).<sup>97</sup> The declaration also includes additional information about Howard’s criminal  
12 proceedings not likely to be known by Ragland (i.e., the precise date of Howard’s conviction, the  
13 superior court case number, the appellate court case number, and Howard’s current prison address).  
14 Moreover, it is unclear how Ragland could have learned the name and address of Howard’s appellate  
15 attorney while still incarcerated.

16 Suspicions about Ragland’s supposed declaration are further heightened by Howard’s own  
17 recent statements. Tellingly, Howard recently admitted that, in 2004, his cellmate had “homeys” in the  
18 same prison as Ragland and his cellmate promised to make some inquiries on Howard’s behalf.<sup>98</sup>  
19 According to Howard, his cellmate was “gonna make sure that he’s (Ragland) doing what he’s  
20 supposed to do... you know what I mean.”<sup>99</sup> Howard suggested that Ragland authored the declaration  
21 simply because of his good conscience and not as a result of any threats. However, when Ragland  
22 was asked why he decided to provide a declaration on Howard’s behalf, he did not mention anything  
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25 <sup>95</sup> AG Ex. 9 at pp. 5-6, 24.

26 <sup>96</sup> Board Decision Attachment “A” (excerpts of AG Ex. 4 at p. 2 and AG Ex. 22 at p. 5).

27 <sup>97</sup> By comparison, Howard admitted having his own copies of the police reports while in jail. (AG Ex. 20  
28 at pp. 1262-1263.) He also admitted doing his own legal work while in prison. (AG Ex. 28 at p. 19.)

29 <sup>98</sup> AG Ex. 28 at pp. 7-8.

<sup>99</sup> AG Ex. 28 at p. 8.

1 about Howard's cellmate's inquiries. Instead, Ragland claimed that he simply decided to provide the  
2 declaration after learning from his wife that Howard was serving a life sentence for his attempted  
3 murder.<sup>100</sup> More puzzling, Ragland's wife had no recollection of doing so and did not recognize  
4 Howard's name.<sup>101</sup> These differing versions of events from Howard and Ragland render both "hard to  
5 believe...."

6 Additional suspicious circumstances surround Ragland's testimony at the 2011 federal  
7 evidentiary hearing. Unbeknownst to the federal court, Howard and Ragland were shackled together  
8 while being transported to that evidentiary hearing.<sup>102</sup> Immediately thereafter, Ragland testified under  
9 oath that Howard did not shoot him or Freeman. Despite Howard's insistence that his earlier  
10 conversation with Ragland was "light," it is entirely possible that Howard either coerced or enticed  
11 Ragland to testify accordingly. This possibility appears even more plausible in light of Howard's jail  
12 hallway encounter with Ragland in 2003, which may have placed a "snitch jacket" on Ragland.<sup>103</sup> Such  
13 a scenario would be consistent with Howard's two encounters with Hernandez while in the holding tank  
14 cell and then on the bus.

15 Disbelief of Ragland's federal court testimony is not barred by the federal court's factual  
16 findings. Significantly, the federal court did not issue any findings concerning Ragland's overall  
17 credibility or the veracity of his exculpatory testimony. Rather, the federal court merely determined that  
18 Ragland's credibility – whatever level it may be – would not have been "seriously undermined" by the  
19 available impeachment evidence of Ragland's prior felony convictions, gang membership, and  
20 inconsistent statements to police.<sup>104</sup> The federal court further determined that it had "no reason to  
21 disbelieve" Ragland's testimony on the limited issue of whether Ragland would have been willing to  
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25 <sup>100</sup> AG Ex. 23 at pp. 1-2.

26 <sup>101</sup> AG Ex. 27 at p. 1.

27 <sup>102</sup> AG Ex. 28 at p. 19.

28 <sup>103</sup> AG Ex. 28 at pp. 10-11.

29 <sup>104</sup> AG Ex. 6 at p. 38.

1 testify on Howard's behalf at the first trial had he been asked to do so.<sup>105</sup> Neither of these binding  
2 determinations compels CalVCB to accept Ragland's exculpatory testimony as true.

3         Similar doubts undermine Ragland's exculpatory testimony at Howard's second criminal trial in  
4 2013. Whatever motivation led Ragland to testify favorably for Howard at the federal hearing likely  
5 persisted during the second trial. And after having already testified under oath at the federal  
6 evidentiary hearing, Ragland was necessarily motivated to testify consistently at the second trial to  
7 avoid a perjury charge.

8         Moreover, aspects of Ragland's testimony during the second trial flatly contradict Howard's own  
9 version of events, which in turn undermine both of their credibility. For instance, Ragland admitted that  
10 he knew Howard long before the shooting occurred from hanging around the same people and Howard  
11 once gave Ragland's mother some money. By comparison, in his first statement to police, Howard  
12 denied knowing Ragland's name or ever hearing Ragland speak. At his first trial, Howard reiterated  
13 that he did not "personally" know Ragland. Howard did not testify at the federal evidentiary hearing or  
14 at his second trial. But in his 2016 interview, Howard finally admitted that he did know Ragland and  
15 even recalled that Ragland once purchased him some beer. Howard did not acknowledge whether he  
16 had ever given money to Ragland's mother.

17         Ragland's criminal history raises some doubts as to the reliability of his exculpatory evidence.  
18 In 1992, at the age of 22, Ragland was convicted of felony possession for sale.<sup>106</sup> One year later in  
19 1993, at the age of 23, Ragland was convicted of multiple forcible sexual offenses, including rape and  
20 oral copulation, for which he received a 12 year term of imprisonment.<sup>107</sup> Eleven years later, in 2004,  
21 Ragland was convicted of arson of an inhabited structure and sentenced to six years imprisonment.<sup>108</sup>  
22 Six years later, in 2010, Ragland was convicted of battery upon a prison staff member, for which he is  
23 currently serving an indeterminate sentence of 25 years to life.<sup>109</sup> These felony convictions do not  
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25 <sup>105</sup> AG Ex. 6 at p. 17 n.16.

26 <sup>106</sup> Health & Saf. Code, § 11351; AG Ex. 22.

27 <sup>107</sup> Pen. Code, §§ 261, 288a, 289; AG Ex. 22.

28 <sup>108</sup> Pen. Code, § 451, subd. (b); AG Ex. 22.

29 <sup>109</sup> Pen. Code, § 4501.5; AG Ex. 22.

1 necessarily render Ragland incredible, as the federal court conclusively determined. Nonetheless,  
2 Ragland's persistent willingness "to do evil" is difficult to reconcile with his sudden willingness to  
3 exonerate Howard.<sup>110</sup> If Howard was actually innocent, Ragland would not have remained silent for so  
4 long after viewing Howard's photograph in September 2003 and then encountering Howard in jail that  
5 same month.

6 Finally, Ragland's continued refusal to identify the shooter further undermines his credibility.  
7 When the shooting occurred, Ragland and Freeman were standing together on a street corner where  
8 they were well-known to hang out. The shooter arrived by car and purposefully walked towards  
9 Freeman and Ragland. Of the 10 shots fired, all were aimed at Freeman and Ragland. No shots were  
10 fired at any of the bystanders located just 15 feet away, which included Fontaine, Freeman's former  
11 girlfriend, and Ragland's wife. After Freeman and Ragland were each struck by multiple bullets, the  
12 shooter returned to the waiting car, and it sped off. Clearly, this was not a random shooting. Ragland's  
13 insistence that he has no idea who shot him or why, not even after all these years, is not believable. As  
14 the investigating detective initially opined, Ragland "knows the shooters and is being uncooperative."  
15 By refusing to identify who shot him, Ragland weakens his claim that Howard did not.

16 Overall, the inconsistencies between Ragland and Howard's version of events, as well as the  
17 implausibility of Ragland's testimony concerning his purported declaration and continued inability to  
18 identify the shooter, raise serious doubts as to Ragland's credibility. Consequently, Ragland's  
19 exculpatory statements fail to prove that Howard is more likely innocent than guilty.

### 20 **C. Howard's Credibility**

21 Similar doubts impeach Howard's credibility. When evaluating Howard's credibility, the majority  
22 expressly noted that it was not relying upon Howard's current fugitive status on charges for armed  
23 robbery. Indeed, Howard has not yet been convicted of this offense, which allegedly occurred 14 years  
24 after the murder of Freeman and the attempted murder of Ragland. This new armed robbery charge,  
25 as well as Howard's flight, are not probative of Howard's guilt or innocence for the 2002 shooting.

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28 <sup>110</sup> *People v. Castro* (1985) 38 Cal.3d 301, 315 (defining "moral turpitude" in context of felony  
29 impeachment to include "general readiness to do evil").

1           Nonetheless, Howard's demonstrated willingness to lie, even under oath, ultimately precludes  
2 confidence in his protestations of innocence. Most significantly, Howard lied under oath when testifying  
3 at the first trial that he never confronted Hernandez in the holding tank cell. Howard also lied under  
4 oath when he denied personally knowing Ragland. In addition, Howard falsely testified that his  
5 girlfriend did not have a white car, when he had previously admitted to the police that she did. Howard  
6 also lied to police multiple times during his first interview, wherein he denied knowing Ragland's name  
7 or ever hearing Ragland's voice, given his later admission that he knew Ragland and Ragland had  
8 even purchased him a beer. Howard further lied to police when he denied being a gang member, given  
9 his subsequent admission that he was a Crips member of the W.D.C. sect.

10           In addition to his own lies, it appears that Howard may have fabricated Ragland's exonerating  
11 declaration.<sup>111</sup> This declaration includes detailed information about Howard's case not otherwise  
12 available to Ragland, in addition to a signature that does not match Ragland's, and it was inexplicably  
13 mailed directly to Howard's appellate attorney. Neither Ragland nor Howard have offered any  
14 satisfactory explanation to account for all of these suspicious circumstances. If the 2004 declaration  
15 was falsified, it tends to suggest that the contents were also false.

16           Finally, Howard's prior felony convictions impeach his credibility. In 2001 at the age of 19,  
17 Howard was convicted of forgery.<sup>112</sup> Significantly, Howard's forgery offense arose from signing the  
18 name of another person on an official document, knowing he lacked authority to do so, with the intent to  
19 defraud.<sup>113</sup> Howard received a 16 month prison sentence for this conviction and was released on  
20 parole in February 2002. Five months later in July 2002, Freeman and Ragland were shot. Two years  
21 later in 2004, Howard and a fellow Crips inmate viciously assaulted another Crips inmate, which  
22 resulted in a conviction for assault with deadly weapon plus an enhancement for inflicting great bodily  
23 injury.<sup>114</sup> Howard's demonstrated willingness to lie and readiness to do evil, even against fellow Crips  
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26 <sup>111</sup> See Board Decision Attachment "A."

27 <sup>112</sup> AG Ex. 30.

28 <sup>113</sup> Pen. Code, § 470, subd. (a).

29 <sup>114</sup> Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).

1 members, at a period close in time to the murder of Freeman and attempted murder of Ragland, tend to  
2 undermine his claims of innocence.

3 For all of these reasons, Howard's repeated denials of guilt are not persuasive.

4 **D. Reasonable Doubt of Guilt**

5 The Board majority recognized that the jury reasonably doubted Howard's guilt. Indeed, as  
6 found by the federal court, Howard's first trial was a "close case," even with live testimony from both  
7 eyewitnesses.<sup>115</sup> The case was even closer in Howard's second trial, where the jury acquitted Howard  
8 after hearing Ragland's exculpatory testimony. As Judge Rubin subsequently observed, "The jury did  
9 the right thing, in that they believed this was not proven beyond a reasonable doubt."<sup>116</sup>

10 But as the Board majority explained, insufficient evidence to convict does not necessarily  
11 equate to proof by a preponderance of innocence. Judge Rubin reached this very conclusion after  
12 presiding over Howard's second trial when denying Howard's motion for a finding of factual  
13 innocence.<sup>117</sup> The judge's denial is not determinative of this CalVCB proceeding, but it is one factor the  
14 majority may consider.<sup>118</sup>

15 **E. Overall Evidence Fails to Prove Innocence**

16 After considering all of the incriminating and exculpatory evidence detailed above, the Board  
17 majority ultimately determined that Howard had failed to prove his innocence by a preponderance. The  
18 inculpatory evidence most notably included Hernandez's credible identification of Howard as the  
19 shooter. The likely accuracy of Hernandez's identification is significantly enhanced by Fontaine's  
20 separate identification. The incriminating weight of both identifications is bolstered by Howard's  
21 familiarity with Ragland and the shooting location, their common vocation selling drugs, the absence of  
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24 <sup>115</sup> AG Ex. 6 at p. 35.

25 <sup>116</sup> AG Ex. 9 at p. 25.

26 <sup>117</sup> AG Ex. 9 at pp. 23-25.

27 <sup>118</sup> See Pen. Code, § 1485.55, subd. (e) (barring any presumption in CalVCB proceeding from  
28 claimant's failure to make or obtain a favorable ruling on a motion for a finding of factual innocence);  
29 see also Sen. Com. On Public Safety, Analysis of Sen. Bill 618 (2013-2014 Reg. Sess.), as amended  
April 15, 2013, p. 14 (justifying binding CalVCB to court factual findings because "trial courts are trained  
jurists with substantial trial experience" whereas "hearing officers are not judges").

1 any alibi for Howard, and the fact that Howard's girlfriend's vehicle matched the get-away car's  
2 description.

3 On the other hand, the exculpatory evidence included Ragland's exonerating testimony, as well  
4 as Howard's protestations of innocence. However, none of this evidence was persuasive due to their  
5 poor credibility. The exculpatory evidence also included the prosecutor's doubt of Howard's guilt, as  
6 well as Howard's subsequent rejection of a plea bargain for immediate release. Judge Rubin  
7 discounted the significance of the rejected deal by noting that Howard surely "had an attorney advising  
8 him that Mr. Ragland was coming in to say it wasn't him also."<sup>119</sup>

9 All in all, the majority determined that Howard's exculpatory evidence did not outweigh the  
10 incriminating evidence. Insufficient evidence proved that Howard was more likely innocent, than guilty,  
11 of murdering Freeman and attempting to murder Ragland. As a whole, the evidence failed to exonerate  
12 Howard of his two convictions for murder and attempted murder, even though those convictions were  
13 no longer legally valid.

14 **VI. CONCLUSION**

15 In sum, the Board majority denied Howard's claim for compensation. He failed to demonstrate  
16 by a preponderance of evidence that he was actually innocent of the crimes with which he was  
17 charged and convicted. The Board majority, therefore, determined that Howard is not eligible for  
18 compensation under Penal Code section 4900.

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20 Date: May 17, 2018

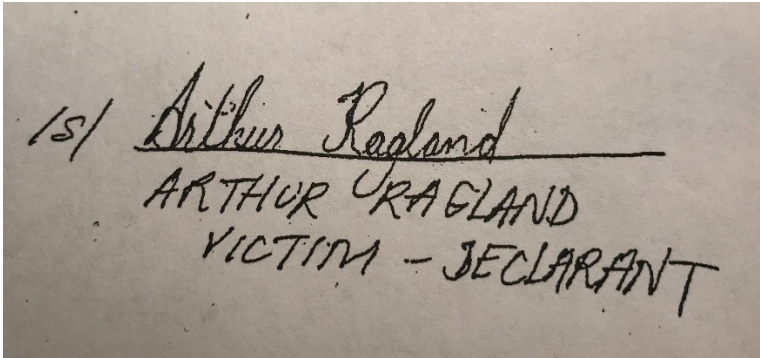
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22 Laura Simpton  
23 Senior Attorney  
24 California Victim Compensation Board

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29 <sup>119</sup> AG Ex. 9 at p. 10.

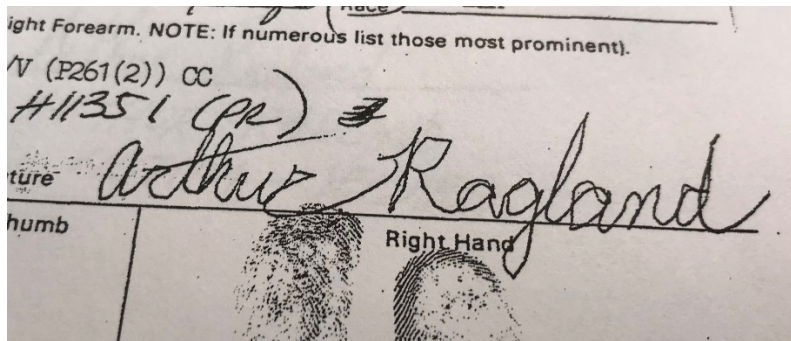


BOARD ATTACHMENT "A"

- Excerpt of AG Ex. 4 at p. 2 (Ragland 2004 Declaration)



- Excerpt of AG Ex. 22 at p. 5 (Ragland 1993 Jail Record)



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**BEFORE THE VICTIM COMPENSATION BOARD  
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

**Deandre Howard**

PC 4900 Claim No. 15-ECO-02

**Board Majority's Written Decision  
(Penal Code § 4900)**

On August 16, 2018, the California Victim Compensation Board adopted the attached Written Decision in the above-referenced matter.

Date: August 20, 2018

\_\_\_\_\_  
Michelle Greer  
Board Liaison  
California Victim Compensation Board