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

10 In the Matter of the Claim of:

11 **Jason Kindle**

12 Claim No. G538791

Proposed Decision
(Penal Code §§ 4900 et seq.)

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14 A hearing on this claim was heard on May 31, 2006, by Kyle Hedum, Hearing Officer, who
15 was assigned to hear this matter by the Executive Officer of the Victim Compensation and
16 Government Claims Board (Board).

17 Michael J. Curls and Nichelle D. Jones, Attorneys at Law, represented claimant Jason
18 Kindle (Kindle). Kindle did not appear at the hearing and did not testify.

19 Michael Farrell, Deputy Attorney General, represented the California Department of Justice,
20 Office of the Attorney General (AG). The AG has recommended that Kindle's claim be denied.

21 **Evidence and Arguments Presented**

22 Kindle worked as a janitor for a company named Cover-All Cleaning. One of the businesses he
23 cleaned was an Office Depot store in Los Angeles. Kindle and co-worker Homer George usually
24 cleaned the store before it opened for business.

25 On Monday, November 22, 1999, the Office Depot store that Kindle cleaned was robbed. At
26 approximately 7:30 a.m., a tall, African-American man wearing large, dark sunglasses, a dark,
27 oversized coat, thick black gloves, and a hat entered the store and walked to the customer service
28 desk. He also may have been wearing a wig, a fake mustache and a fake beard or goatee. Store
29 employees Dan Freund, Michelle Jackson and Marisol Guzman were standing by the customer service

1 desk. The man pulled a gun from his coat, told them that this was a robbery, and ordered everybody
2 up front. Dan Freund, the store manager, told his employees to come to the front of the store. When
3 only three employees responded, the robber said he knew there were more people in the store. Dan
4 Freund picked up the telephone and paged the remaining employees over the intercom system. The
5 robber followed the Office Depot employees to the cash office. The robber left with approximately
6 \$15,000 in cash and \$7,000 in checks. During the robbery, the robber used the terms "red shirt" and
7 "grey shirt." Office Depot store employees wear red shirts while Office Depot store managers wear
8 grey shirts.

9 Detective Code of the Los Angeles Police Department arrived at Office Depot at around 8:00
10 a.m. on November 22, 1999. He met with Dan Freund and they reviewed videotapes of the robbery.
11 Detective Code prepared a Crime Alert bulletin showing two video stills taken from the videotape with
12 information about the robbery, including the robber's height as being between 6'4" to 6'6".

13 On December 1, 1999, Detective Code asked Dan Freund if any former or current employees fit
14 the description of the suspect. Dan Freund responded, "We have a janitor, but he is not quite as tall as
15 the suspect, and I have had no problems with him."

16 Following the robbery, Office Depot changed its weekday-opening hour from 7:00 a.m. to 8:00
17 a.m. On December 27, 1999, at approximately 7:30 a.m., a man came to the front doors of Office
18 Depot. When the doors did not open, the man started kicking them. Dan Freund saw the man and
19 believed he was the same person who had robbed the store on November 22, 1999. Dan Freund also
20 yelled a warning to his staff that the man at the door had a gun. Store employees immediately ran to
21 the rear of the Office Depot. Surveillance video showed the man leaving the store a short time later.

22 Luis Villacorta, an Office Depot employee who was also present during the robbery on
23 November 22, 1999, was about 45 feet away from the glass doors when the man attempted to enter the
24 store on December 27, 1999. Luis Villacorta told police that he had no doubt it was the same man who
25 robbed Office Depot on November 22, 1999.

26 In January of 2000, Office Depot employee Jeanette Stain, who was not working on November
27 22, 1999, met with Detective Code to review the robbery surveillance video. She told Detective Code
28 that she believed the robber was Kindle, based on his size and violent temper. She said that Kindle
29 was similar in height as the robber, and that the robber appeared to have a thin build, as did Kindle.

1 Kindle and the robber also had similar complexions, and she also had seen Kindle "hunched over" like
2 the robber was depicted as doing in the video. Jeanette Staine also told Detective Code that Kindle
3 and the robber shared a similar stride. She told Detective Code that Kindle had previously gotten very
4 upset with her when he saw her getting out of a friend's car who had given her a ride home from work.
5 She said that Kindle began swearing at her and used derogatory terms against her and her friend.
6 Kindle was upset because she had not previously accepted a ride from him.

7 Jeanette Staine also told Detective Code that sometime between Thanksgiving and Christmas,
8 Kindle asked her if she knew what was going on at Office Depot. He told her he had talked to three
9 other Office Depot employees about the robbery. Then Kindle said, "all I will have to do is go in the
10 bathroom, lay low, hide out, wait until it is cool, go out, lay everybody down because I don't want
11 anyone to get hurt." They both laughed. However, due to the nature of Kindle's statements, Jeanette
12 Staine reported the conversation to Detective Code.

13 On January 13, 2000, Detective Code learned that Kindle still worked for Cover All Cleaning and
14 still cleaned the Office Depot store where the robbery occurred. Detective Code located Kindle at
15 Office Depot and detained him. Detective Mike Bauers subsequently searched Kindle's residence. No
16 gun, disguise, or any Office Depot checks or large sums of money were located in Kindle's residence.
17 Detective Bauers did find a list, referred to at trial as the "Things To Do" list:

- 18 1) Check all (Log Book) office depots!
- 19 2) "Communication" with manager is very important!
- 20 3) Get the (money) no free rides!
- 21 4) Keep track of time you spend!
- 22 5) Keep a game plan!

23 Subsequent to the robbery, several Office Depot employees were asked to look at a photo
24 lineup of six possible suspects, with Kindle in the number one position. Dan Freund did not positively
25 identify the robber, but stated that the person shown in the number one position shared similar features
26 including the same complexion and eyebrow shape as the robber. He also stated that the person in
27 photo number one looked like his janitor. Michelle Jackson looked at the photo lineup for about ten
28 seconds, broke into tears, and told Detective Code that she was about 80% sure that the person
29 depicted in photo number one was the robber. Luis Villacorta said that the person in the number one

1 position had a strong jaw and the same complexion as the robber. He also said that the person in
2 photo number one and the robber had a similarly shaped goatee and mouth. Luis Villacorta was 50-
3 60% sure that the person in photo number one was the robber. Marisol Guzman said that she was
4 60% sure that the person in photo number one was the robber, based on mustache, beard, and eye
5 similarities. Eddie de Real was 75% sure that the person in photo number one was the robber, based
6 on same complexion, lip size, and protruding Adam's apple.

7 Kindle was subsequently charged with eight counts of robbery with use of a firearm, two counts
8 of assault with a firearm and one count of attempted robbery. In addition, Kindle was charged with
9 enhancements under Penal Code section 667(a)(1). These enhancements were based on Kindle's
10 prior criminal convictions. The District Attorney's Office dismissed the attempted robbery count after it
11 learned Kindle was cleaning a store at another location on December 27, 1999, at the time of the
12 second incident at Office Depot.

13 At trial, various Office Depot employees testified. Dan Freund testified he had doubts that
14 Kindle was the robber. Michelle Jackson identified Kindle as the man who robbed the store. Luis
15 Villacorta could not say with certainty that Kindle robbed the store. He was 40 to 50 percent "unsure."
16 Marisol Guzman was not sure that Kindle was the robber because the person who robbed Office Depot
17 was disguised. Eddie De Real could not say with certainty Kindle was the man who robbed Office
18 Depot.

19 The jury found Kindle guilty of eight counts of second-degree robbery and two counts of assault
20 with a firearm with enhancements. Kindle was sentenced to 50 years to life plus an additional 20 years
21 for the firearm enhancements.

22 The Court of Appeals reversed Kindle's conviction because it determined that Kindle's
23 constitutional rights were violated as a result of ineffective assistance of counsel. The Court also
24 determined that the trial court erred in denying a motion for a new trial based upon newly discovered
25 evidence. Kindle was released from custody on January 31, 2003. The Los Angeles District Attorney's
26 Office subsequently dismissed the case in the interest of justice.

27 Kindle's attorney argued at the hearing on this matter that Kindle could not have committed the
28 robbery because:

- 29 1. He had an alibi for November 22, 1999, and for December 27, 1999,

- 1 2. The robbery was committed by another person; specifically, Collis B.,
- 2 3. The "Things To Do" list was not a robbery list,
- 3 4. Kindle was not as tall or as heavy as the robber, and
- 4 5. The witness identifications were unreliable.

5 Kindle's alibi claim hinges on what he describes as an attempted robbery on December 27,
6 1999. Kindle argues that he was cleaning another store on December 27, 1999, the same time and
7 day that the attempted robbery took place. Kindle bolsters this argument with witness Luis Villacorta's
8 statement that he had no doubt that the man outside the store on December 27, 1999, was the same
9 man who robbed Office Depot on November 22, 1999. In addition, Kindle argues that Dan Freund also
10 believed the man outside the store on December 27, 1999, was the same person who had robbed the
11 store on November 22, 1999. Therefore, Kindle could not be the robber because he was clearly
12 elsewhere on December 27, 1999.

13 Kindle also argues that he has an alibi for November 22, 1999. In support of this contention,
14 Kindle offers Homer George's testimony that he and Kindle were working at another location on
15 November 22, 1999. Kindle also argues that his employment time slips document that he was
16 employed at another location on November 22, 1999.

17 Kindle alleges that Collis B. was the man who robbed the Office Depot on November 22,
18 1999. Collis B. stood 6'7" tall and weighed 250 pounds. Prior to trial, an anonymous caller told
19 Sergeant Ron Schram of the Los Angeles County Sheriff's Department, Palmdale Station, that Collis
20 B. was the person who robbed the Office Depot on November 22, 1999. According to Kindle, Collis
21 B.'s alibi for the robbery was that he was getting married in Las Vegas at the time of the robbery and
22 that he was not in Los Angeles at the time of the Office Depot robbery. Collis B.'s marriage certificate
23 indicates that his marriage took place on October 16, 1999, and was recorded on October 21, 1999.

24 Steve Fisher testified at Kindle's motion for new trial that he owned two Cover-All Cleaning
25 franchises and was Kindle's employer, as well as Kindle's brother-in-law. Steve Fisher testified that
26 he saw Kindle write the "Things To Do" list during a refresher course the men attended. Steve Fisher
27 explained that the list pertained to items of discussion at the course.

28 Kindle argues that none of the witnesses to the robbery were absolutely certain that he was
29 the robber. They all expressed some doubt, both during the photo lineup and later at trial.

1 Kindle also argues that the witnesses had to have been mistaken because he was 6'1" in
2 height, while the robber was described as being 6'4' to 6'6" tall. The robber was described as
3 weighing over 200 pounds, while Kindle argued that he only weighed 175 pounds. Kindle also
4 argued that a facial tattoo in the form of two teardrops on his left cheekbone would have been visible
5 to Office Depot employees even if he had worn large sunglasses. Since none of the eyewitnesses to
6 the robbery described such a tattoo, Kindle argues that this is proof he did not commit the robbery.

7 Kindle also presented evidence in the form of the video stills taken at the time of the
8 November 22, 1999, robbery. These video stills show the robber standing in front of the cash office
9 door. The robber's head appears to be very close to hitting the door frame, which measures 79" in
10 height from the floor to the bottom of the door frame. Kindle argues that since he was only 73" tall, he
11 could not be the person depicted in the video stills. The video stills are grainy and less than clear.

12 The AG argued at the hearing that there is no proof that the man at the Office Depot at
13 approximately 7:30 a.m. on December 27, 1999, was there to rob the store. The AG also contests
14 Kindle's assertion that this man was the same man who robbed the store on November 22, 1999.
15 The only proof offered by Kindle is the statements by Dan Freund and Luis Villarosa, and those
16 statements must be considered in light of the fear that another armed robbery was about to occur.

17 As far as Kindle's claim that he was working elsewhere on November 22, 1999, the AG
18 presented evidence that Kindle and Homer George each maintained their own time sheets, and that
19 Homer George and Kindle would often exchange or switch schedules with no notice to their
20 employer.

21 The AG dismissed the possibility that Collis B. was the man who robbed the Office Depot on
22 November 22, 1999, because there was no evidence of any kind to support such a claim. The
23 anonymous caller provided information that could easily have been provided by Kindle, in an attempt
24 to focus blame for the robbery elsewhere.

25 Although Steve Fisher testified at Kindle's hearing for a new trial that he saw Kindle write the
26 "Things To Do" list during a Cover All Cleaning refresher course the men attended, the AG presented
27 evidence that Jeff Collard, a field consultant for Cover-All Cleaning, testified that the words "free ride"
28 and "keep a game plan" were not terminology that was used by Cover All Cleaning.
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1 The AG further argued that Kindle's disguise gave the impression of additional height and
2 weight. The AG also presented evidence that Dan Freund testified at Kindle's trial that the glasses
3 worn by the robber were deep enough to have covered Kindle's teardrop tattoo.

4 Finally, the AG presented evidence that Kindle's trial attorney testified at Kindle's motion for a
5 new trial that she made multiple attempts to contact Steve Fisher to discuss Kindle's case. She also
6 testified that she chose not to call Steve Fisher as a witness at Kindle's trial because Steve Fisher's
7 testimony would have contradicted Homer George's testimony that Homer George and Kindle were
8 working together on November 22, 1999. Kindle's trial attorney also testified that it was her
9 understanding that Kindle called Steve Fisher in an attempt to create an alibi witness for the robbery
10 of November 22, 1999.

11 Findings

12 A preponderance of the evidence supports the following findings:

- 13 1. Kindle was convicted of second degree robbery and assault, with a firearm enhancement,
14 by jury on October 16, 2000.
- 15 2. Kindle was sentenced on June 28, 2001 to 50 years to life plus 20 years.
- 16 3. Kindle was released from custody on January 31, 2003.
- 17 4. The Los Angeles District Attorney's Office dismissed charges against Kindle, in the interest
18 of justice.
- 19 5. Kindle was incarcerated 837 days subsequent to conviction.
- 20 6. Kindle suffered pecuniary injury as a result of his conviction and subsequent incarceration.

21 Determination of Issues

22 Penal Code section 4903 establishes the requirements for a successful claim for an
23 erroneously convicted felon. A person convicted and imprisoned for a felony may submit a claim to
24 the Board for pecuniary injury sustained through his erroneous conviction and imprisonment (Pen.
25 Code, § 4900). The claim must be filed within six months after judgment of acquittal or discharge,
26 granting of a pardon, or release from imprisonment (Pen. Code, § 4901). Kindle's claim was timely.

27 The claimant must prove: 1) that the crime with which he was charged was either not
28 committed at all, or, if committed, was not committed by him; 2) that he did not by any act or omission
29 on his part, either intentionally or negligently, contribute to the bringing about of the arrest or

1 conviction for the crime; and 3) that he sustained a pecuniary injury through his erroneous conviction
2 and imprisonment (Pen. Code, § 4903). If the claimant meets his burden of proof, the Board shall
3 recommend to the legislature that an appropriation of \$100.00 be made for the claimant for each day
4 of incarceration served subsequent to the claimant's conviction (Pen. Code, § 4904).

5 The claimant also has the burden of proving his innocence by a preponderance of the
6 evidence. (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)

7 In reaching its determination of the merits of the claim, the Board may consider the following,
8 but the following will not be deemed sufficient evidence to warrant the Board's recommendation that
9 the claimant be indemnified in the absence of substantial independent corroborating evidence that
10 the claimant is innocent of the crime charged: (1) claimant's mere denial of commission of the crime
11 for which he was convicted; (2) reversal of the judgment of conviction on appeal; (3) acquittal of
12 claimant on retrial; or (4) the failure of the prosecuting authority to retry claimant for the crime. (Cal.
13 Code Regs., tit. 2, § 641. 1)

14 Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to which
15 claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and the
16 crime with which he was charged, may be considered by the Board as substantive evidence. The
17 Board may also consider any information that it may deem relevant to the issue before it. (Reg., §
18 641.)

19 Kindle's alibi claim hinges on what he contends was an attempted robbery on December 27,
20 1999. Kindle argues that employees who were present at the November 22, 1999, robbery
21 subsequently told police that the person who was at the door on December 27, 1999, was the same
22 person who robbed the store on November 22, 1999. Therefore, since Kindle was clearly cleaning
23 another store on that date, he could not have been the person who attempted to rob the store on
24 November 22, 1999. However, there is no evidence that the man at the door of Office Depot on
25 December 27, 1999, was there to rob the store. The store had changed its operating hours after the
26 November 22, 1999, robbery, and the man may have been unaware of the new hours and may have
27 become upset. Notwithstanding Dan Freund's and Luis Villacorta's belief that this man was the same
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1 All citations to regulations are to California Code of Regulations, title 2.

1 man that robbed the store on November 22, 1999, it is possible that store employees were hyper-
2 sensitive following the earlier robbery and misinterpreted the actions of an unhappy customer as a
3 robbery attempt. This is demonstrated by Dan Freund's declaration, upon seeing the man at the door
4 on December 27, 1999, that the man had a gun, even though Dan Freund later admitted that he did
5 not see a gun. Therefore, there is not a preponderance of the evidence that the man at Office Depot
6 on December 27, 1999, was there to rob the store. Thus, there is not a preponderance of the
7 evidence that this man and the November 22, 1999, robber were one and the same.

8 Kindle also argues that he was working elsewhere at the time of the crime on November 22,
9 1999. In support of this contention, he offers Homer George's testimony that he and Kindle were
10 working at another location at the time of the robbery. However, Homer George admitted that he
11 does not have a specific recollection as to whether he and Kindle worked together on November 22,
12 1999. In addition, the time sheets submitted by Kindle to show that he was working at another
13 location at the time of the November 22, 1999, robbery were time sheets that Kindle kept on an honor
14 system, and such a system did not require any third-party verification. Therefore, there is not a
15 preponderance of the evidence that Kindle was working elsewhere at the time of the crime on
16 November 22, 1999.

17 Kindle posits the theory that Collis B. was the man who robbed the Office Depot on November
18 22, 1999. Records indicate that Collis B. stands 6'7" tall and weighs 250 pounds. According to
19 Sergeant Schram, the anonymous caller said that Collis B. was the person who robbed the Office
20 Depot on November 22, 1999. After speaking with the anonymous caller, Sergeant Schram formed
21 the opinion that this person was attempting to divert responsibility for the robbery to aid Kindle, who
22 was currently in custody.

23 According to Kindle, Collis B.'s alibi was that he had gotten married in Las Vegas at the time
24 of the robbery and that he did not return to California until just before Christmas. Kindle presented a
25 copy of Collis B.'s marriage certificate indicating that Collis B. was married in Clark County, Nevada,
26 on October 16, 1999. The fact that Collis B. was married on October 16, 1999, does not lead to the
27 conclusion that he was the robber. Kindle presented no proof that Collis B. was even in the state of
28 California at the time the Office Depot was robbed. In addition, law enforcement conducted an
29 interview of Collis B. on August 24, 2000. Since no charges were filed against Collis B. for the

1 November 22, 1999, robbery, it can be presumed that law enforcement was satisfied that Collis B. did
2 not commit the Office Depot robbery. Therefore, there is not a preponderance of the evidence that
3 Collis B. was the man who robbed the Office Depot on November 22, 1999.

4 The evidence indicates that Kindle stood approximately 6'1" to 6'2" tall. The robber was
5 described as being about 6'2" to 6'6" tall. Kindle weighed approximately 185 pounds. The robber
6 was described as weighing over 200 pounds. The robber altered his height, weight and facial
7 features by the use of a disguise. Additional layers of clothing and a hat made the robber seem
8 larger than he really was. Adding facial hair, a wig, and large sunglasses assisted in the
9 transformation. The fact that a facial tattoo was not observed by witnesses may be the result of the
10 disguise or other means of concealment. In addition, Kindle argues that none of the witnesses were
11 without doubt. While it is true that the witnesses to the robbery were not absolutely certain that
12 Kindle was the robber, their lack of certainty must be considered in light of the robber's significant
13 disguise. Therefore, based on eyewitness testimony, it is determined that Kindle has not shown
14 proven by a preponderance of the evidence that he was not the robber.

15 Kindle submitted video stills taken from the surveillance video showing a tall man wearing
16 bulky clothes, wig, and a hat standing in the doorway of the cash office. The cash office door frame
17 measured 79" in height from the floor to the bottom of the door frame. Although the video stills are
18 lacking in clarity, it appears that the top of the robber's hat comes close to hitting the top of the door
19 frame. It should be noted that the robber's hat in these video stills adds significant height to the
20 robber. Taking this into consideration along with the likelihood that the robber was also wearing a
21 wig, Kindle has not proved by a preponderance of the evidence that he was not the person depicted
22 in these video stills. It should also be noted that these same video stills were shown to the jury at
23 Kindle's trial, and the jury was convinced beyond a reasonable doubt that Kindle was the individual
24 depicted in the video stills.

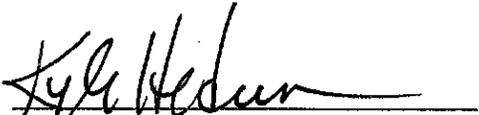
25 Finally, the robber on November 22, 1999, demonstrated some knowledge of the inner
26 workings of Office Depot. He knew that managers wore grey shirts. He robbed the store on a
27 Monday, prior to the weekend's deposits being picked up. He also knew that not all of the Office
28 Depot employees came to the customer service counter when ordered by Dan Freund.

1 After careful evaluation of all of the evidence and based on the above-analysis, it is
2 determined that there is not a preponderance of the evidence that: the man at Office Depot on
3 December 27, 1999, and November 22, 1999 were one and the same; Kindle was working elsewhere
4 at the time of the crime on November 22, 1999; Collis B. was the man who robbed the Office Depot
5 on November 22, 1999; eyewitness identifications were faulty; and that Kindle was not the person
6 depicted in the Office Depot video stills. Therefore, it is determined that Kindle has not proven by a
7 preponderance of the evidence that the crimes with which he was charged were not committed by
8 him.

9 **Order**

10 Jason Kindle's claim under Penal Code sections 4900 *et seq.* is denied.

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12 Date: October 23, 2006

13 
14 Kyle Hedum
15 Hearing Officer
16 Victim Compensation and
17 Government Claims Board