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

In the Matter of the Claim of:
Jeffrey Rodriguez
Claim No. G569133

**Addendum to Proposed Decision
(Penal Code § 4900 et seq.)**

On July 29, 2009, the Proposed Decision was mailed to all parties. At that time, the parties were advised that pursuant to California Code of Regulations, title 2, section 619 et seq., they may submit written argument concerning whether or not the Board should adopt the Proposed Decision.

On or about August 7, 2009, and August 10, 2009, respectively, the Board received the Attorney General's and Claimant's written arguments.

In light of the written arguments, this Addendum provides the Board with additional information to consider.

The administrative record contains two pieces of evidence from the victim, Carmelo Ramirez. The first piece of evidence is a declaration dated April 3, 2009.¹ The declaration summarizes Ramirez's testimony, or lack thereof, regarding the black leather jacket from the time of the preliminary hearing through the second trial. Before the second trial, Ramirez met with the investigating officer and the deputy district attorney. During the meeting, Ramirez was shown a black leather jacket and asked to compare it to the robber's upper garment as shown in the surveillance video. Ramirez stated that he "felt a lot of pressure from the situation and from the trial. Because of the pressure, (he)

¹ The information comes from Carmelo Ramirez's declaration dated April 3, 2009.

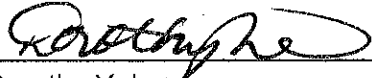
1 agreed... that the jacket on the table looked similar to the jacket worn by the robber." Thereafter, he
2 testified that the sleeve from the jacket looked similar to the clothing worn by the robber.

3 The second piece of evidence is a transcript of an interview of Ramirez on April 13, 2009, by
4 the Attorney General's Office.² During the interview, Ramirez confirmed that he identified Rodriguez as
5 the robber at the Department of Motor Vehicles (DMV) the day after the robbery. Furthermore,
6 Ramirez emphasized that he identified the robber because of his face. He stated that "I identified the
7 guy because when the guy robbed me, always I see his face," and "his face I can't forget."

8 These two pieces of evidence were considered by the Hearing Officer in rendering the
9 Proposed Decision. They support the conclusion that Rodriguez has not proven by a preponderance
10 of the evidence that he did not commit the robbery. In the declaration, Ramirez did not recant his
11 repeated identification of Rodriguez as the robber at the DMV, the preliminary hearing, and both jury
12 trials. Furthermore, Ramirez did not recant his repeated identification of Rodriguez's black hooded
13 sweatshirt and glasses as those of the robber. Instead, Ramirez confirmed on April 13, 2009, that he
14 identified Rodriguez as the robber at the DMV the day after the robbery, and emphasized that he
15 identified the robber because of his face. In sum, the declaration, which focused on the black leather
16 jacket, did not address or entirely override Ramirez's repeated testimony and identification of
17 Rodriguez as the robber.

18 It is the Hearing Officer's recommendation that Rodriguez's claim under Penal Code section
19 4900 et seq. be denied.

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21 Dated: August 31, 2009



Dorothy Y. Le
Hearing Officer
California Victim Compensation and
Government Claims Board

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29 ² The information comes from the transcript of the interview of Carmelo Ramirez (AG Exhibit 32).

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8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the Matter of the Claim of:

12 **Jeffrey Rodriguez**

13 Claim No. G569133

Proposed Decision

(Penal Code § 4900 et seq.)

14
15 **Introduction**

16 An in-person hearing on this claim was held from April 21, 2009, to April 22, 2009, in
17 Sacramento, California, by Dorothy Le, Hearing Officer, California Victim Compensation and
18 Government Claims Board.

19 The claimant, Jeffrey Rodriguez, was represented by attorneys Jill Kent and Jaime Leaños.
20 Rodriguez did not testify before the Board. However, he presented the following witnesses who
21 testified under oath: Andrew Gutierrez, Santa Clara County Public Defender; Dr. Robert Shomer,
22 expert on eyewitness identification; and Keith Norman, investigator for the Santa Clara County Public
23 Defender's Office.¹

24 The California Attorney General's Office was represented by Huy Luong and Heather Gimle,
25 Deputy Attorneys General (AG).
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28 _____
29 ¹ By agreement of the parties, Dr. Robert Shomer and Keith Norman testified telephonically.

1 The record remained open for the submittal of additional documents. Additional documents
2 were received on or about April 24, 2009, and the record closed.

3 As explained below, Rodriguez has not met the statutory requirements to receive compensation
4 under Penal Code section 4900 et seq. because he failed to prove that he did not commit the crime
5 with which he was charged.

6 **Procedural Background**

7 Rodriguez was charged with robbery with the use of a firearm at a Kragen Auto Parts, and
8 tried twice by a jury. In the first trial, the jury deadlocked and the court declared a mistrial on
9 February 28, 2003. On April 28, 2003, following a second jury trial, Rodriguez was convicted of
10 second degree robbery. He was sentenced to 25 years in prison, which included 10 years for the
11 use of a firearm and five years for having a prior conviction.² On June 14, 2006, the Court of
12 Appeals reversed the conviction based on ineffective assistance of counsel.³ On February 2, 2007,
13 the Santa Clara District Attorney, after reviewing the file and conducting further investigation,
14 requested that the charge of second degree robbery be dismissed due to insufficiency of the
15 evidence and reasonable doubt. Rodriguez was released from prison on February 5, 2007. On
16 December 19, 2007, Rodriguez was found factually innocent under Penal Code section 851.8.⁴

17 **Summary of Evidence**

18 **I. Police Report and Investigation**

19 On December 10, 2001, at approximately 9:20 p.m., Carmelo Ramirez, the assistant
20 manager of Kragen Auto Parts, was robbed at gunpoint. He was working in the back near the doors
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22 ² Rodriguez had previously been convicted of two counts of second degree robbery, and sentenced to
23 five years in prison. After serving his prison term for these two convictions, Rodriguez was released on
24 December 9, 2001, one day before the robbery at Kragen Auto Parts.

25 ³ The Court of Appeals found that defense counsel's failure to obtain funding for expert testimony on
26 eyewitness identification, and failure to introduce evidence at the second trial of alibi, lack of motive,
27 and an alternative source for the oil stain, were prejudicial.

28 ⁴ Penal Code section 851.8(c) provides, "In any case where a person has been arrested, an accusatory
29 pleading has been filed, but where no conviction has occurred, the defendant may, at any time after
dismissal of the action, petition the court which dismissed the action for a finding that the defendant is
factually innocent of the charges for which the arrest was made."

1 to the loading dock when he heard a voice from behind demanding his wallet. Ramirez turned to see
2 a man armed with a black semiautomatic handgun. After the robber made repeated demands,
3 Ramirez gave his wallet to the robber, who fled with almost \$200, Ramirez's driver's license, and
4 other personal items. During the incident, the robber pointed the gun at Ramirez, and seemingly
5 attempted to shoot him, but the gun did not fire. The robbery was captured on surveillance video.⁵

6 Within minutes of the robbery, Ramirez called the police and gave the following description to
7 the telephone operator. The robber was approximately 5 feet 5 inches tall, 175 pounds, 27 or 28
8 years old, Hispanic, and wearing a black sweater, black pants, and prescription glasses.⁶ When the
9 police officers arrived on the scene, Ramirez described the robber as a light-skinned Hispanic or
10 Black male between the age of 25 and 30. He was clean-shaven, wearing black-rimmed prescription
11 glasses, a black sweatshirt with the hood pulled over his head, and dark colored jeans. Ramirez
12 indicated that he had never seen the robber before, but would be able to identify him. While
13 Ramirez's encounter with the robber was "brief," he was approximately four to five feet away from the
14 robber.⁷

15 The next day, on December 11, 2001, Ramirez went to the Department of Motor Vehicles
16 (DMV) to replace his stolen driver's license. While waiting in line, Ramirez saw Rodriguez in the
17 same line and recognized him as the robber. Ramirez alerted the DMV clerk that the person who
18 robbed him the night before was in line behind him, and the police were called. When the police
19 responded to the DMV, the officers noted that Ramirez was very frightened, but he was sure that
20 Rodriguez was the person who had robbed him. Rodriguez was then taken into custody.

21 Detective Michael Pomeroy questioned Rodriguez regarding his whereabouts from the time
22 he was released from prison on December 9, 2001, until the time he was arrested on December 11,
23 2001. Rodriguez stated that he went to Target and Toys R Us to purchase a Playstation 2 and
24 games. He also met his parole officer, visited his aunt, and spent time at home. However, he
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26 ⁵ Copy of Surveillance Video.

27 ⁶ Transcript of 911 call from December 10, 2001 (Rodriguez Exhibit 4).

28 ⁷ Police Report (Rodriguez Exhibit 33).

1 appeared uncertain about the dates and times of those activities. Detective Pomeroy concluded that
2 Rodriguez did not provide a consistent account of his whereabouts during the time of the robbery and
3 the surrounding days.⁸

4 During the interview, Rodriguez denied committing the robbery, and explained that he was
5 confused about dates and times because he was worried.

6 After Rodriguez's arrest, an officer searched his room in the family home. The officer was
7 unable to locate Ramirez's property or the handgun, but seized a black leather jacket and a blue
8 thermal shirt, which Rodriguez was allegedly wearing on the night of the robbery. After the search,
9 the police documented the following items of clothing: a black hooded sweatshirt, a black shirt, dark
10 blue jeans, black and white tennis shoes, black-rimmed prescription glasses, a black leather jacket,
11 and a blue thermal shirt.

12 **II. Trial Court Testimony and Evidence**

13 Carmelo Ramirez

14 During the first trial, Ramirez provided a detailed account of the robbery, identified Rodriguez
15 as the robber, and identified Rodriguez's black sweatshirt and glasses as those of the robber.⁹ He
16 testified that the robber was approximately four or five feet away, wearing a black sweater with a
17 hood, jeans, and black-rimmed glasses. Ramirez did not take his eyes off of the robber from the first
18 time he saw the robber holding the gun until he handed over his wallet. He was close enough to the
19 robber to reach out and place the wallet into the robber's hand. The next day at the DMV, he saw
20 Rodriguez and recognized him as the robber. He told the responding officer that he was "very, very
21 sure" Rodriguez was the robber. Rodriguez's glasses, face, eyes, build, height, and voice were the
22 same as those of the robber. When Ramirez made eye contact with Rodriguez, he felt that "(he) was
23 in front of the person who had robbed (him)."

24 During the second trial, Ramirez testified that he focused on the robber's face. Ramirez
25 again identified Rodriguez as the robber, and identified Rodriguez's black sweatshirt and glasses as

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27 ⁸ Police Report (Rodriguez Exhibit 33); Transcript of interview of Jeffrey Rodriguez on December 11,
28 2001 (Claimant Exhibit 6).

29 ⁹ The information from the first trial comes from the trial transcripts. (AG Exhibit 16).

1 those of the robber.¹⁰ Ramirez also recognized the cuffs on Rodriguez's leather jacket, which was
2 seized from Rodriguez's room shortly after he was arrested. Ramirez recognized the cuffs of
3 Rodriguez's leather jacket after meeting with the investigating officer and the district attorney before
4 the second trial, and reviewing the surveillance video.¹¹

5 Alibi Witnesses

6 Julie Rodriguez, Jeffrey Rodriguez's sister, testified that she was at home, where both she
7 and Rodriguez lived, on the night of the robbery. At approximately 8:15 p.m., she was in the living
8 room talking with Rodriguez, his son, and former girlfriend, Eileen Navarro. At approximately 9:00
9 p.m., Julie retired to her room, but continued to see Rodriguez almost every hour throughout the
10 night.

11 Eileen Navarro testified that she was at Rodriguez's home with him on the night of the
12 robbery until approximately 11:00 p.m. She also allowed him to use her cellular telephone to place
13 calls to his uncle and aunt, at 8:41 p.m. and 8:47 p.m., respectively. She produced her cellular
14 phone bill showing the calls, which Rodriguez placed to his uncle and aunt for help setting up the
15 Playstation 2.

16 Motor Oil Stain

17 During its investigation, law enforcement inspected Rodriguez's jeans and discovered a
18 visible oil stain located on the left leg at approximately knee level. The robbery scene, being the
19 back of the Kragen store, had several containers with motor oil and various other waste oils. When
20 tested by Mark Moriyama, a criminalist for the Santa Clara County Crime Laboratory, Rodriguez's
21 jeans were found to have a dark oily-type stain on the left thigh, which was consistent with or
22 indicative of a combination of motor oil, and animal or vegetable oil or fat. During trial, Moriyama
23 testified that the jeans had not been washed since the oil deposit, as detergent would likely have
24 removed the oil.

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27 ¹⁰ The information from the second trial comes from the trial transcripts (AG Exhibit 17).

28 ¹¹ Ramirez's testimony suggested that the robber was wearing a leather jacket over the black
29 sweatshirt.

1 To provide a possible explanation for the motor oil stain, Rodriguez's aunt, Ofelia O'Brien,
2 testified that Rodriguez played basketball on the street in front of her home on December 10, 2001,
3 where there were excessive oil stains. She also served food from Kentucky Fried Chicken that
4 evening, and the family ate without napkins.

5 **III. Post-Appeal Evidence and Dismissal of Robbery Charge**

6 Following the Court of Appeal's reversal of Rodriguez's conviction on June 14, 2006, for
7 ineffective assistance of counsel, the District Attorney's Office and the Public Defender's Office
8 conducted the following investigation collaboratively.

9 Statements During the Interview

10 The recording of the police interview of Rodriguez on December 11, 2001, was transcribed.
11 While alone in the interview room, Rodriguez was found whispering to himself.¹² These statements
12 were believed to be exculpatory because Rodriguez did not know he was being recorded, and was
13 expressing disbelief that the police thought he committed the robbery.

14 Crime Re-Enactment

15 The crime was re-enacted with a person of Rodriguez's build and wearing his leather jacket,
16 to determine whether that jacket was the same one worn by the robber. The videotape of the re-
17 enactment was then compared to the Kragen surveillance videotape,¹³ and it was determined that the
18 jacket the robber was wearing was not the same as Rodriguez's leather jacket.

19 Re-testing of Rodriguez's Jeans

20 Rodriguez's jeans were sent to the Department of Justice's crime lab for re-testing. The
21 criminalist, Boyd Lasater, tested the stain and compared it to the control samples taken from three
22 areas on the jeans. He found that the visible stain on the front left thigh was chemically similar to the
23 control samples, and concluded that "no foreign chemicals/oils were detected in the stain."
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27 ¹² See transcript of interview of Jeffrey Rodriguez on December 11, 2001 (Claimant Exhibit 6, pages
28 28-29).

29 ¹³ See photographs from crime re-enactment (Claimant Exhibit 20).

1 After the investigation, on February 2, 2007, the Santa Clara District Attorney requested that
2 the charge of second degree robbery be dismissed due to insufficiency of the evidence and
3 reasonable doubt.

4 **IV. Finding of Factual Innocence**

5 On October 19, 2007, Rodriguez petitioned for a finding of factual innocence under Penal
6 Code section 851.8. Rodriguez argued that Ramirez inconsistently testified as to the robber's height,
7 facial hair, and clothing, and changed his description of the robber over time to match Rodriguez's
8 description.¹⁴ Ramirez initially described the robber as being 5 feet 5 inches tall whereas Rodriguez
9 is 5 feet 8 inches tall. Rodriguez also argued that the video re-enactment of the robbery proved his
10 innocence because the robber was not seen wearing Rodriguez's leather jacket. Finally, Rodriguez
11 argued that the results of the chemical testing by the Department of Justice proved his innocence
12 because the criminalist concluded that "no foreign chemicals/oils were detected in the stain."

13 Deputy District Attorney Denise Raabe, on behalf of the District Attorney's Office, opposed
14 Rodriguez's petition, arguing that Rodriguez did not prove his innocence.¹⁵ His family members, who
15 offered an alibi and provided an explanation for the oily stain on his pants, were not credible. They
16 contradicted each other, and there was strong evidence that they fabricated their testimony. Ofelia
17 O'Brien, who provided a possible explanation for the motor oil stain by testifying that Rodriguez
18 played basketball on the oily street and ate greasy chicken, also testified that Eileen Navarro
19 discussed this possible explanation with O'Brien to "help" Rodriguez. In addition, Julie Rodriguez
20 was impeached at trial by her prior statement to the police, in which she stated that Rodriguez left the
21 family home on December 10, 2001. At trial, she denied making this statement and instead claimed
22 that Rodriguez did not leave the home on the night of the robbery.

23 The district attorney also argued that the inconsistencies in the victim's testimony have
24 reasonable explanations and do not damage the victim's overall credibility. Ramirez is Spanish
25 speaking, and at times, such as when he called 911, and while being interviewed by the police, he
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27 ¹⁴ Rodriguez's Petition for Finding of Factual Innocence (Claimant Exhibit 23).

28 ¹⁵ People's Opposition to Defendant's Factual Innocence Petition (AG Exhibit 2).

1 did not have the assistance of a Spanish language interpreter. The district attorney conceded that
2 Rodriguez's leather jacket did not appear to be shown in the surveillance video. However, this does
3 not negate Ramirez's overall description of the robber, and his positive identification of Rodriguez as
4 the robber. Finally, the district attorney argued that the re-testing of the jeans did not exonerate
5 Rodriguez. The oil stain is clearly visible. Although the later results showed "no foreign
6 chemicals/oils," it simply means that, as compared to the control sample, the stain had no
7 substances different than or "foreign" from the rest of the jeans.

8 The court granted Rodriguez's petition for factual innocence, concluding that the re-
9 enactment completely undermined the accuracy of the identification in this case.

10 **V. Penal Code Section 4900 Claim, Hearing, and Evidence**

11 **A. Claim**

12 On August 2, 2007, Rodriguez filed his claim for compensation with the Board, alleging that
13 he was wrongfully convicted and imprisoned for the robbery. In support of his claim, Rodriguez
14 submitted a signed declaration, dated August 2, 2007, in which he denies robbing Ramirez.¹⁶

15 **B. Testimony**

16 Despite being present during the hearing, Rodriguez did not testify. Furthermore, none of his
17 alibi witnesses testified. Rodriguez presented the following witnesses, who testified under oath:

18 Andrew Gutierrez

19 Andrew Gutierrez, Deputy Public Defender for Santa Clara County, was assigned to represent
20 Rodriguez after his conviction was reversed on appeal and the case remanded back to the trial court.
21 At the hearing, Gutierrez testified to the following, in summary. He worked collaboratively with
22 Deputy District Attorney David Pandori to "uncover the truth" about the case, which was a working
23 relationship that admittedly was not typical between their two offices. They agreed to conduct further
24 investigation, taking into consideration the Court of Appeals' decision, such as a re-examination of
25 the motor oil stain and a re-enactment of the robbery. On February 2, 2007, he and Pandori had a
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28 ¹⁶ Claimant Exhibit 9.
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1 discussion before Pandori requested that the case be dismissed. The reasons for the request were
2 as follows:¹⁷

- 3 1) Pandori found that Rodriguez had made exculpatory statements or whispers during
4 the interview with police on December 11, 2001. Pandori found that Rodriguez was
5 whispering to himself and "expressing his incredulity that the police actually thought he
6 committed the offense" while the investigating officer was not in the room and
7 Rodriguez did not know he was being recorded.
- 8 2) Pandori conceded that the robber and Rodriguez's shoes did not match. When
9 Rodriguez was arrested at the DMV, he was wearing black and white shoes. The
10 robber, as seen on the surveillance video, was wearing black shoes.
- 11 3) Pandori conceded that Rodriguez's black leather jacket did not match the upper
12 garment worn by the robber in the surveillance video, as shown by the crime re-
13 enactment.
- 14 4) Pandori found that Rodriguez's confusion during the police interview was not evidence
15 of his guilt. Instead, Rodriguez's confusion about the dates and times was caused by
16 the detective giving Rodriguez the wrong date of the interview. Thereafter, Rodriguez
17 used the wrong date as a reference point and had to account for an extra day in
18 explaining his whereabouts.

19 Dr. Robert Shomer

20 Dr. Shomer is an expert in the area of eyewitness identifications. He testified that eyewitness
21 identifications have a low level of reliability, and under the best circumstances, may have an accuracy
22 rate of approximately 50 percent. Under stressful and life-threatening conditions, the witnesses'
23 primary concern is survival, and not accuracy. Seemingly well-intended witnesses, such as Ramirez,
24 can make mistaken identifications when subjected to such stressful conditions. As such, eyewitness
25 evidence must be tested by a valid, reliable procedure, which allows the witnesses to compare and
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29 ¹⁷ See also Declaration of Andrew Gutierrez dated July 31, 2007 (Claimant Exhibit 2).

1 distinguish between similar images. Here, because there was no procedure followed to test Ramirez's
2 accuracy, and instead Ramirez identified Rodriguez at the DMV, the identification is problematic.

3 Additionally, Dr. Shomer testified that repeated identifications can also lead to inaccuracy.
4 Each time that witnesses report about the identifications, the report becomes part of the witnesses'
5 new memory and then part of their next report. Thus, when asked to report repeatedly, the
6 witnesses are not necessarily reporting on what they perceived initially or during the crime. Instead,
7 they are reporting on their most recent memory. Here, when Ramirez identified Rodriguez at the
8 DMV, the image and description of Rodriguez became part of Ramirez's new memory, which was
9 then recalled each time he testified thereafter.

10 Keith Norman

11 Norman is an investigator for the Santa Clara Public Defender's Office. He testified that he
12 interviewed Ramirez on April 19, 2002. Ramirez stated that the robber was wearing a black
13 sweatshirt with a hood, dark pants, and black-framed prescription glasses. Ramirez did not mention
14 that the robber was wearing a black leather jacket. When Ramirez saw Rodriguez at the DMV,
15 Rodriguez looked "very similar" to the robber.

16 **C. Rodriguez's Arguments**

17 During the hearing, Rodriguez's attorneys made the following arguments in support of
18 Rodriguez's claim:

- 19 1) Ramirez's identification of Rodriguez as the robber is not credible. There are many
20 discrepancies in Ramirez's description of the robber's race, clothing, and height, and that
21 over time, Ramirez changed his description of the robber to match that of Rodriguez.
22 Furthermore, Ramirez described the robber as clean-shaven, whereas photographs of
23 Rodriguez hours before the robbery and the day after the robbery showed that he had a
24 thin-lined goatee.
- 25 2) There is lack of physical evidence linking Rodriguez to the robbery. The police searched
26 Rodriguez's room, and did not find Ramirez's wallet or other belongings, the gun, or black
27 shoes. Rodriguez had only one pair of shoes at the time of the robbery, and they were
28 white and black.

1 3) The crime re-enactment showed that the robber was not wearing Rodriguez's black
2 leather jacket.

3 4) Rodriguez did not have a motive to commit the robbery. He spent time with his family and
4 son after being released from prison, had plans to begin a job as a painter, and had no
5 need for money since he left prison with nearly \$900.

6 Rodriguez's attorneys also raised questions as to how Rodriguez would have acquired a gun
7 in a short period of time, how he would have known where to commit the robbery after having been in
8 prison, and why he would have left his family and son to commit the robbery after being separated
9 from them for almost five years.

10 **D. AG's Arguments**

11 The AG argued that Rodriguez did not present substantial independent corroborating
12 evidence of his innocence. There is no statement or testimony from Ramirez indicating that he
13 mistakenly identified Rodriguez as the robber. Instead, Ramirez has consistently and repeatedly
14 identified Rodriguez as the robber: at the DMV, at a preliminary hearing in a crowded courtroom and
15 among a number of in-custody defendants,¹⁸ at both jury trials, and most recently during the interview
16 by the Attorney General's Office on April 13, 2009.¹⁹ Moreover, Ramirez's description of the robber's
17 face, matching that of Rodriguez, has not changed. Ramirez has consistently described the robber
18 as a light-skinned Hispanic male, in his twenties, with brown eyes, black hair, black, thick-rimmed
19 prescription glasses, and essentially clean-shaven.

20 Additionally, the alibi witnesses were not credible, especially Eileen Navarro, who had
21 substantial issues with bias. Navarro testified that Rodriguez used her cell phone to call his uncle at
22 8:41 p.m. and 8:47 p.m. on the night of the robbery for help with setting up the Playstation 2.
23 However, the AG argued that this evidence was not plausible and contradicted the testimony of his
24 uncle. During the first trial, Rodriguez's uncle testified that he saw Rodriguez playing a Playstation 2
25 earlier on December 10, 2001, and would therefore not need installation tips. Moreover, Rodriguez's
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¹⁸ Declaration of District Attorney John Luft and Detective Michael Pomeroy (AG Exhibit 7 and 8).

28 ¹⁹ Recording and Transcript of Interview with Carmelo Ramirez (AG Exhibits 31 and 32).

1 uncle admittedly was not electronically "savvy." The AG provided an alternate theory that Navarro
2 made the two calls to Rodriguez's uncle to inquire about Rodriguez's whereabouts during the time of
3 the robbery.

4 The AG also argued that the crime re-enactment does not prove Rodriguez's innocence. The
5 re-enactment narrowly focused on determining whether Rodriguez's leather jacket appeared to be
6 what the robber was wearing. However, Ramirez has repeatedly stated that the robber was wearing
7 a black sweater. Furthermore, Rodriguez did not prove that the jacket seized by the police was his
8 only jacket.

9 Rodriguez confessed to robbing two people at gunpoint in August of 1997. Those robberies
10 were similar to the Kragen robbery in that they were also committed at night, involved the use of a
11 handgun, occurred outside and with the perpetrator approaching the victims and threatening them
12 with the gun, and were robberies committed by the perpetrator acting alone.

13 Finally, Rodriguez had motive for committing the robbery. He was released from prison with
14 nearly \$900. However, that same day, he spent approximately \$400 on a Playstation 2, and the
15 remaining amount of money was not in cash. He had not started working yet, and therefore, needed
16 money.

17 Findings

18 A preponderance of the evidence supports each of the following findings:

- 19 1. Rodriguez was convicted by a jury of second degree robbery.
- 20 2. The Court of Appeals reversed the conviction based on ineffective assistance of counsel.
- 21 3. The District Attorney requested that the charge of second degree robbery be dropped
22 due to insufficiency of the evidence and reasonable doubt.
- 23 4. On December 19, 2007, Rodriguez was found factually innocent under Penal Code
24 section 851.8.
- 25 5. Carmelo Ramirez testified to and identified Rodriguez as the robber on numerous
26 occasions, including at the DMV, a preliminary hearing, both jury trials, and during an
27 interview on April 13, 2009.

6. Carmelo Ramirez testified to and identified Rodriguez's black sweater and prescription glasses as those of the robber at both jury trials.
7. Although he was present during the hearing, Rodriguez did not testify before the Board.
8. Rodriguez's alibi witnesses did not testify before the Board.

Determination of Issues

A person convicted and imprisoned for a felony may submit a claim to the Board for pecuniary injury sustained as a result of his erroneous conviction and imprisonment.²⁰ Penal Code section 4903 provides that in order to state a successful claim for compensation, the claimant must prove the following by a preponderance of the evidence:²¹

1. That the crime with which he was charged was either not committed at all, or, if committed, was not committed by him;
2. That he did not by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of the arrest or conviction for the crime; and
3. That he sustained a pecuniary injury through his erroneous conviction and imprisonment.

If the claimant meets his burden of proof, the Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the claimant.²²

California Code of Regulations, title 2, section 641, provides as follows:

In reaching its determination on the merits of the claim, claimant's mere denial of commission of the crime for which he was convicted; reversal of the judgment of conviction on appeal; acquittal of the claimant on retrial; or the failure of the prosecuting authority to retry claimant for the crime, may be considered by the Board but will not be deemed sufficient evidence to warrant the Board's recommendation that the claimant be indemnified in the absence of substantial independent corroborating evidence that the claimant is innocent of the crime charged. Testimony of witnesses who the claimant had an opportunity to cross-examine, and

²⁰ Pen. Code, § 4900.

²¹ *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and Government Claims Board* (2000) 152 Cal. App. 4th 1164. Preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People v. Miller* (1916) 171 Cal. 649, 652.)

²² Pen. Code, § 4904.

1 evidence to which the claimant had an opportunity to object, admitted in prior proceedings
2 relating to the claimant and the crime with which he was charged, may be considered by the
3 Board as substantive evidence. The Board may also consider any other information that it may
4 deem relevant to the issue before it.

5 It is determined that Rodriguez has not proven by a preponderance of the evidence that he is
6 innocent of the crime with which he was charged. Rodriguez presented three witnesses to discredit
7 Ramirez's testimony and positive identification of Rodriguez as the robber. While evidence was
8 offered during trial to show reasonable doubt as to Rodriguez's guilt, such evidence is not affirmative
9 proof of innocence, or substantial independent corroborating evidence as required by California Code
10 of Regulations, title 2, section 641. Of note, none of the witnesses had personal knowledge of the
11 relevant events, and instead, testified to their work or opinions on the case well after the robbery.

12 The robbery was a face-to-face encounter, during which Carmelo Ramirez had an opportunity
13 to and did observe the armed robber. While the encounter was "brief," Ramirez was standing
14 approximately four to five feet away. Furthermore, Ramirez testified that did not take his eyes off of
15 the robber from the first time he saw the robber holding the gun until he handed over his wallet. He
16 was close enough to the robber to reach out and place the wallet into the robber's hand. On the
17 night of the robbery, Ramirez stated to the police that he had never seen the robber before, but
18 would be able to identify him. As a result of Ramirez's observations during the robbery, he thereafter
19 testified to and identified Rodriguez as the robber on numerous occasions, including at the DMV, a
20 preliminary hearing, both jury trials, and during an interview on April 13, 2009. Such testimony by
21 Ramirez, whom Rodriguez had an opportunity to cross-examine during both jury trials, may be
22 considered by the Board as substantive evidence.²³

23 Careful review of the evidence shows that Ramirez's testimony and statements regarding the
24 robber has overall been credible. Within minutes of the robbery, he described the robber as
25 approximately 5 feet 5 inches tall, 175 pounds, 27 or 28 years old, Hispanic, and wearing a black
26 sweater, black pants, and prescription glasses. This was consistent with the image of the robber in
27 the surveillance video, which Ramirez did not have the benefit of when he gave the description.
28 When the police officers arrived on the scene, Ramirez described the robber as a light-skinned

29 ²³ Cal. Code of Regs., title 2, § 641.

1 Hispanic or Black male between the age of 25 and 30, clean-shaven, wearing black-rimmed
2 prescription glasses, a black sweatshirt with the hood pulled over his head, and dark colored jeans.
3 While there are discrepancies in Ramirez's descriptions over time, they do not entirely override his
4 repeated positive identification of Rodriguez as the robber, and Rodriguez's prescription glasses and
5 black sweatshirt. It is noted that the jury weighed Ramirez's testimony, found it to be credible, and
6 found Rodriguez guilty of robbery beyond a reasonable doubt.

7 The record is largely absent of testimony or statements from Rodriguez. Although there are
8 two pieces of evidence, they are assigned little weight. First, there is the transcript of Detective
9 Pomeroy's interview of Rodriguez on December 11, 2001. During the interview, Rodriguez denied
10 committing the robbery, and stated that he went to Target and Toys R Us, met his parole officer,
11 visited his aunt, and spent time at home. However, after evaluating Rodriguez's credibility, Detective
12 Pomeroy concluded that Rodriguez was not credible because he did not provide a consistent account
13 of his whereabouts during the robbery and the surrounding days. Second, Rodriguez submitted a
14 signed declaration, dated August 2, 2007, in which he denies committing the robbery. However, the
15 declaration is also given minimal weight.

16 As indicated above, despite being present during the entire hearing, Rodriguez chose not to
17 testify and did not deny committing the robbery before the Board. Without such testimony, the Board
18 could not evaluate Rodriguez's credibility, and the allegations that he had no motive, that he only had
19 one pair of shoes that were white and no black shoes, that the visible oil stain on his jeans were not
20 from the crime scene but from playing basketball in the street and eating chicken, are unsupported.
21 Furthermore, to date, Rodriguez has not provided a credible, consistent, and complete account of his
22 whereabouts during the robbery.

23 None of Rodriguez's alibi witnesses testified before the Board, which was notable especially
24 in light of the arguments by Deputy District Attorney Denise Raabe and the AG that the alibi
25 witnesses, being family members and Rodriguez's former girlfriend, were inherently biased and not
26 credible. They contradicted each other, and there was strong evidence that they fabricated their
27 testimony. Without their testimony at the hearing, Rodriguez has not provided a credible alibi, and
28 the witnesses' trial testimony alone is not substantial independent corroborating evidence that
29 Rodriguez is innocent.

1 Although the court found Rodriguez factually innocent pursuant to Penal Code section 851.8, it
2 is determined that the Board is not bound by that finding, nor does the statute authorize a finding of
3 factual innocence where a conviction has occurred.²⁴ In *Tennison v. California Victim Compensation*
4 *and Government Claims Board*,²⁵ the Court addressed a scenario similar to this case, and concluded
5 that public policy would not be served by binding the Board to the finding of factual innocence where
6 the petitioner was not entitled to the relief sought by the motion. The Court stated that "the statute
7 simply does not apply to persons who have been convicted of a crime, unless the conviction has been
8 reversed due to insufficiency of the evidence- which is the functional equivalent of an acquittal at
9 trial."²⁶ Here, Rodriguez's conviction was reversed due to ineffective assistance of counsel, which is
10 not the functional equivalent of an acquittal.

11 Furthermore, the *Tennison* Court held that the Board is not bound by a factual innocence
12 finding as they serve different public interests, and there is no potential overlap between Penal Code
13 section 851.8 and Penal Code section 4900 proceedings.²⁷ Penal Code section 851.8 establishes
14 procedures for sealing and destroying records of a person found factually innocent, but *only if a*
15 *conviction has not occurred*.²⁸ On the other hand, Penal Code section 4900 affords relief to any
16 person *convicted* of any crime, who can demonstrate his or her innocence. Thus, the two statutes are
17 "mutually exclusive," and binding the Board by the finding of factual innocence would not serve to
18 promote judicial economy.²⁹

19 Nonetheless, the administrative record contains the evidence which Rodriguez submitted in
20 support of his petition for a finding of factual innocence, particularly the evidence relating to the crime
21 re-enactment, and the evidence the District Attorney's Office submitted in its opposition. While the
22

23 ²⁴ The administrative record contains pre-hearing briefs and oral arguments on this issue.

24 ²⁵ (2007) 152 Cal.App.4th 1164, 1178.

25 ²⁶ *Ibid.* (citing *People v. McCann* (2006) 141 Cal.App.4th 347, 351-354.)

26 ²⁷ *Tennison v. California Victim Compensation and Government Claims Board*, *supra*, 152 Cal.App.4th
27 at pp. 1177-1180.

28 ²⁸ *Id.* at 1179.

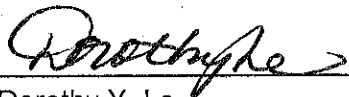
29 ²⁹ *Ibid.*

1 crime re-enactment shows that the robber did not appear to be wearing Rodriguez's leather jacket, it
2 does not undermine Ramirez's repeated identification of Rodriguez's black hooded sweatshirt and
3 glasses as those of the robber, nor his overall description of the robber. Moreover, the evidence is
4 offered to again discredit Ramirez's testimony and positive identification of Rodriguez as the robber.
5 However, such evidence is not affirmative proof, or substantial independent corroborating evidence of
6 innocence.

7 Therefore, in consideration of all the evidence before the hearing officer, it is determined that
8 Rodriguez has not proven by a preponderance of the evidence that he did not commit the robbery.
9 The issues of whether he intentionally or negligently contributed to his arrest or conviction, and whether
10 he suffered pecuniary injury, need not be addressed.

11 Rodriguez's claim under Penal Code section 4900 et seq. is denied.

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13 Dated: July 29, 2009



Dorothy Y. Le
Hearing Officer
California Victim Compensation and
Government Claims Board

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

In the Matter of the Claim of:

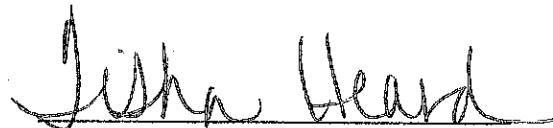
Jeffrey Rodriguez

Claim No. G569133

Notice of Decision

On September 17, 2009, the California Victim Compensation and Government Claims Board adopted the attached Addendum to Proposed Decision and Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: September 21, 2009



Tisha Heard
Board Liaison
California Victim Compensation and
Government Claims Board

MAILING LIST
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PROOF OF SERVICE BY MAIL/E-MAIL

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Case Name: Jeffrey Rodriguez

Case No: G569133

I, Benedicte Lewis, declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 400 R Street, Sacramento, California 95814.

On September 21, 2009, I served the following: Proposed Decision, Addendum and Notice by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail addressed as follows:

See attached Interested Parties List

BY MAIL: I am readily familiar with my employer's practice for the collection and processing of correspondence/documents for mailing with the United States Postal Service. Under their practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after the date of deposit for mailing in this affidavit.

BY FACSIMILE: I personally sent the above-described documents via FAX to the addressee(s), with a confirming copy by First Class Mail.

BY PERSONAL SERVICE: I delivered such envelope(s) by hand to the offices of the addressee(s).

BY EXPRESS MAIL: I personally deposited such document in the Express Mail depository at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 21, 2009, at Sacramento, California.


BENEDICTE LEWIS