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

9 In the Matter of the Claim of:

10 **Tommy Simmons III**

11 Claim No. G 543480

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

12 A hearing on this claim was held March 22, 2005, in Sacramento, California, by Kyle
13 Hedum, Hearing Officer, who was assigned to hear this matter by the Executive Officer of the Victim
14 Compensation and Government Claims Board (Board).

15 The claimant, Tommy Simmons III (Simmons) represented himself.

16 The California Attorney General was represented by Deputy Attorney General Michael
17 Farrell and Deputy Attorney General Jennifer M. Poe (AG).

18
19 **Evidence and Arguments Presented**

20 1. On March 23, 1995, Anthony Hogan (Hogan) and Tresheva Sherouse (Sherouse)
21 were victims of an assault. Sherouse was Hogan's girlfriend. Hogan and Sherouse were in Hogan's
22 home the morning of March 23, 1995, when four individuals seeking to rob Hogan of marijuana and
23 money assaulted Hogan and Sherouse. Hogan died as a result of the assault. Dr. Pedro Ortiz of the
24 Los Angeles County Coroner's office determined that the cause of death was multiple blunt force
25 traumas to the head causing fracture to the skull, hemorrhaging within the skull cavity and edema to
26 the brain. Hogan also sustained thermal burns to his chest, torso, abdomen, lower extremities and
27 buttocks, resulting from a flammable liquid being poured upon Hogan and set afire. Sherouse

1 suffered similar blunt force traumas to her head, resulting in a month-long coma. She was
2 hospitalized and required extensive medical care and rehabilitation to gain some semblance of
3 recovery.

4 2. Kevin Simmons (Simmons's younger brother), Archie Dixon, Robert Adams, and
5 Simmons were ultimately arrested and charged with the murder of Hogan, attempted murder of
6 Sherouse, and robbery. The trial began on November 13, 1997. Simmons was acquitted of the
7 attempted murder of Sherouse, but the jury was unable to reach a decision as to the murder and
8 robbery charges against Simmons and a mistrial was declared. The remaining defendants were
9 convicted of the charges.

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11 3. A second trial began on November 3, 1998. Simmons, as the only defendant, was
12 charged with the murder and robbery of Hogan. On November 12, 1998, Simmons was found guilty of
13 murder (Pen. Code, §187(A)) and robbery (Pen. Code, § 211). On January 29, 1999, Simmons was
14 sentenced to state prison for a term of life with the possibility of parole.

15 4. Simmons subsequently filed a petition for writ of habeas corpus. Simmons argued in
16 the habeas corpus proceeding that his conviction was erroneous due to police misconduct, false
17 testimony, and ineffective assistance of counsel. The writ of habeas corpus was granted due to
18 ineffective assistance of counsel on March 28, 2003.

19
20 5. Simmons was discharged from the jurisdiction of the California Department of
21 Corrections on August 15, 2003. Simmons was incarcerated for a total of 1,735 days following his
22 conviction.

23 6. Simmons timely filed a claim with the Board on January 21, 2004.

24 7. Gregory W. testified in the first murder trial that he arrived at Hogan's house between
25 9:00 a.m. and 10:00 a.m. on March 23, 1995. Gregory W. testified in the second murder trial that he
26 arrived at Hogan's house between 8:30 a.m. and 10:00 a.m. on March 23, 1995. In both trials, Gregory
27 W. testified that after arriving at Hogan's house and knocking on the front door, he was told by
28 someone he did not know to come back in thirty minutes because they had just done a robbery. The
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1 person that said this to Gregory W. was described as having braided hair. Gregory W. left and returned
2 approximately 45 minutes to an hour later. Gregory W. knocked on the front door and received no
3 response. He left, drove a couple of blocks, and then returned. He entered the house through the
4 unlocked front door and discovered Hogan and Sherouse on the floor. Gregory W. drove about a half-
5 mile to a nearby 7-Eleven store and called 911 at approximately 10:32 am.

6 8. Alfonzo O., the thirteen-year-old son of Alicia A., testified in both murder trials that he
7 was in his mother's car the morning of March 23, 1995, when a white car pulled out in front of his
8 mother's car, nearly resulting in a collision. Alfonzo O. believed the time to be between 10:00 a.m. to
9 10:30 a.m. Alfonzo O. did not immediately identify Simmons as being in the white car that pulled out
10 in front of his mother's car on the morning of March 25, 1995. But, thirty-nine days after the murder of
11 Hogan, Alfonzo O. identified Simmons as being in the white car that nearly collided with his mother's
12 car. Alfonzo O. lived in the same neighborhood as Simmons and often played with Simmons's kids.
13 Alfonzo O. testified that the car came from the "ice cream truck" house. Alfonzo O. also testified that
14 a small child was in the car in addition to three other male occupants. Alfonzo O. testified that he told
15 his mother that he knew one of the people in the white car either the night of March 23, 1995, or the
16 next day.
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18 9. Alicia A. testified in the defendant's murder trials that the white car that nearly hit her
19 car came from the "ice cream truck" house. Alicia A. was not sure of the time, but she thought it was
20 approximately 10:00 a.m. to 10:30 a.m. Alicia A. also testified that a small black child of about three
21 to four years of age was in the white car with three other black male occupants. Alicia A. identified
22 one of the occupants of the car to be a black male with dreadlocks. Alicia A. testified that her son
23 Alfonzo O. told her, either the night of March 23, 1995, or the next day, that he knew one of the
24 people in the white car.
25

26 10. In the first murder trial, Sherouse identified Simmons as one of the assailants.
27 Sherouse did not testify in the second murder trial.
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11. Timmy S. (one of Simmons's children) testified in the murder trial that Dionte S. (another of Simmons's children) was about three years old in March 1995.

12. Tommy IV (another of Simmons's sons) testified in both the first and second murder trials that his uncle, Kevin Simmons, told him that they did a "jack move" for his dad. Tommy IV testified that Kevin Simmons told him that they robbed the "bud man", used dumbbells to beat the occupants of the home and that they "lit Hogan's ass on fire". Tommy IV testified in the murder trials that Simmons wanted Tommy IV to get detectives to buy him things and to tell Simmons's attorney when they did. Tommy IV testified that the police did not offer him a \$15,000 reward.

13. Simmons testified at the March 22, 2005 hearing that he knew Hogan because they were neighbors. He had purchased marijuana from Hogan between 20 to 50 times. His phone number was in Hogan's telephone directory. He knew that Hogan would not allow strangers into his home, especially when doing something illegal. He also introduced Hogan and Kevin Simmons prior to March 23, 1995.

14. Simmons testified on March 22, 2005, that he was aware that Hogan was planning to purchase a different home. He knew that Hogan owned multiple vehicles and he was also aware that Hogan kept an ice cream truck on his property and that Hogan sometimes would sell marijuana from the vehicle.

15. Simmons testified on March 22, 2005, that he had his young son, Dionte S., with him on March 23, 1995. He also testified that he drove directly past Hogan's home the morning of March 23, 1995.

16. Simmons testified on March 22, 2005, that he was not able to effectively serve subpoenas on Sgt. Robert Taylor (investigating officer), Sgt. Tommy Harris (investigating officer), Honorable Curtis B. Rappe (trial judge), Honorable Sam Ohta (prosecuting attorney), and Dean Gitts (Simmons's defense attorney) for their appearances at the March 22, 2005 hearing. When the AG questioned Simmons as to what Simmons had expected in the way of testimony from Judge Rappe,

1 Judge Ohta, Mr. Gitts, Sgt. Taylor and Sgt. Harris, Simmons replied that he did not know what they
2 would say.

3 17. Simmons testified at the March 22, 2005 hearing that he was self-employed at the time
4 of his arrest and conviction.

5 18. Simmons spent considerable time during the March 22, 2005 hearing arguing that he
6 was "set up" and was a victim of a conspiracy that included the judge, prosecutor, law enforcement,
7 and his own defense attorney. In support of this theory, Simmons introduced into evidence portions
8 of transcripts of the preliminary hearing, first and second trials, numerous motions, and the habeas
9 corpus proceeding. In support of their opposition to this claim, the AG submitted transcripts of the
10 preliminary hearing, both trials, habeas corpus proceeding, and numerous motions and pleadings.
11

12 Findings of Fact

13 1. Simmons argued in the March 22, 2005 hearing that the identification by thirteen-year-
14 old Alfonzo O. was flawed because Alfonzo O. did not immediately tell law enforcement that he knew
15 Simmons was one of the people in the car that pulled out from Hogan's house. It is found that
16 Alfonzo A.'s testimony was credible and it is further found that Alfonzo O.'s failure to immediately
17 identify Simmons was adequately explained by Alfonzo O. in the earlier murder trials, as his
18 reluctance to identify his friend's father as one of the perpetrators of this crime.
19

20 2. Simmons also argued on March 22, 2005, that Sherouse identified him as one of her
21 assailants because she was coached and told by law enforcement what to say. Simmons references
22 the defense psychologist's trial testimony discussing trauma and the dynamics of memory loss. By
23 inference, Sherouse could have no memory of the events without coaching from law enforcement.
24 But Sherouse testified at the first trial that she was neither coached nor told by anyone, including law
25 enforcement, who her attackers were and that as she recovered her memory, she was able to identify
26 Simmons. It is found that Sherouse's testimony was credible and was not the result of coaching by
27 law enforcement.
28

29 3. Simmons discounts the testimony of Tommy IV by arguing on March 22, 2005, that his

son's testimony was the result of police misconduct, whereby the police offered money to Tommy IV in exchange for false testimony. It is found that Tommy IV's testimony at the first and second murder trial was credible and worthy of significant weight because there appeared to be no incentive for Tommy IV to mislead the court regarding his father's participation in a robbery and murder. It is further found that although Tommy IV offered different testimony in the habeas corpus proceeding, this testimony is given little weight because the habeas corpus testimony by Tommy IV was intended to assist his father in obtaining release from prison.

4. Simmons also argued in the March 22, 2005 hearing that a diagram drawn by Alicia A. showing the white car to be leaving the middle house was crucial to his claim of innocence. This diagram was inadvertently lost or destroyed. It is found to be true that the record indicates that Alicia A. testified about the existence of a diagram. Alicia A. also described Hogan's house at one point to be the middle house and another time as the corner house. Regardless, in both murder trials, Alicia A. identified the house from where the white car exited to be the house where the "ice cream truck" was parked. It is found that this identification is consistent with the theory that the perpetrators took Hogan's vehicle from his property.

5. Simmons testified during the March 22, 2005 hearing that he was caring for his young son Dionte on March 23, 1995. It is found that this is consistent with the testimony of Alicia A. and Alfonzo O. who testified at the murder trials that they saw a young child in the white vehicle that pulled out from the "ice cream truck" house.

6. Simmons also argued in the March 22, 2005 hearing that he had an alibi that placed him miles away from the murder scene. The alibi was based on records from a Mobil gasoline station indicating a gasoline purchase at 10:05 a.m. and another purchase inside the Mobil store at 10:06 a.m. Although Simmons claims that this is proof that he was not responsible for the robbery and murder of Hogan, it is found that the Mobil records do not contain any identifying information other than that the Mobil gas card was issued to Simmons and used at a particular time. It is also found

1 that there is neither a signature on the records with which to compare to Simmons's signature nor are
2 there any witnesses placing Simmons at this location at 10:05 a.m. and 10:06 a.m.

3 7. The AG argued in the March 22, 2005 hearing that even if Simmons was at the Mobil
4 station at 10:05 a.m. and 10:06 a.m., it was still possible for him to have been involved in the assault
5 and murder. Alicia A. and Alfonzo O. are not positive as to when the near-collision with the white car
6 occurred. Furthermore, Gregory W. testified that he was at Hogan's home anywhere from 8:30 a.m.
7 to 10:00 a.m. on March 23, 1995. It is found that if Gregory W. arrived at Hogan's home earlier rather
8 than later, there may have been sufficient time for Simmons to participate in the murder and then
9 proceed to the Mobil station.
10

11 8. Although Simmons testified at the March 22, 2005 hearing that he was self-employed
12 at the time of his arrest, it is found that he did not provide sufficient evidence to substantiate his claim
13 that he suffered pecuniary injury.

14 9. It is found that Simmons was convicted of murder in 1975 and sentenced to the
15 California Youth Authority. In addition, it is found that Simmons was convicted of felony drug offenses
16 in 1985, 1991, and 1995.
17

18 **Determination of Issues**

19 1. Penal Code section 4903 establishes the requirements for a successful claim for an
20 erroneously convicted felon. The claimant must prove: 1) that the crime with which he was charged
21 was either not committed at all, or, if committed, was not committed by him; 2) that he did not by any
22 act or omission on his part, either intentionally or negligently, contribute to the bringing about of the
23 arrest or conviction for the crime; and 3) that he sustained a pecuniary injury through his erroneous
24 conviction and imprisonment. (Pen. Code, § 4903.) If the claimant meets his burden of proof, the
25 Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration be
26 made for the claimant. (Pen. Code, § 4904.)
27

28 2. "Pecuniary" is defined as monetary or relating to money. (See Black's Law Dict. (6th
29 ed. 1990) p. 1131, col.1.) The fact that the injury that is required to be proved is "pecuniary" suggests

1 that the injury must be based upon monetary damages.

2 3. In 2000, the erroneously convicted felons' rate of compensation was changed to \$100.00
3 per day, which was based upon the amount of compensation that the California Department of
4 Corrections (CDC) pays when it is unable to release a prisoner on his scheduled release date.
5 (Assem. Com. On Public Safety, Analysis of Assem. Bill No. 1799 (1999-2000 Reg. Sess.) Feb. 29,
6 2000, p.2.) Despite the fact that the legislature changed its rate of compensation to be based on the
7 CDC rate (which does not require a showing of pecuniary loss), the legislature did not modify the
8 requirement in Penal Code section 4903 that the claimant demonstrate that he suffered pecuniary
9 injury. Therefore, it is concluded that that the pecuniary injury set forth in Penal Code section 4903 is
10 not presumed and must be proven.
11

12 4. The claimant has the burden of proving his innocence by a preponderance of the evidence.
13 (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)
14

15 5. In reaching its determination of the merits of the claim, the Board may consider the
16 following, but the following will not be deemed sufficient evidence to warrant the Board's
17 recommendation that the claimant be indemnified in the absence of substantial independent
18 corroborating evidence that the claimant is innocent of the crime charged: (1) claimant's mere denial
19 of commission of the crime for which he was convicted; (2) reversal of the judgment of conviction on
20 appeal; (3) acquittal of claimant on retrial; or (4) the failure of the prosecuting authority to retry
21 claimant for the crime. (Cal. Code Regs., tit. 2, § 641.¹)
22

23 6. Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to
24 which claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and
25 the crime with which he was charged, may be considered by the Board as substantive evidence. The
26 Board may also consider any information that it may deem relevant to the issue before it. (Reg.,
27 § 641.)
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29 ¹ All citations to regulations are to California Code of Regulations, title 2.

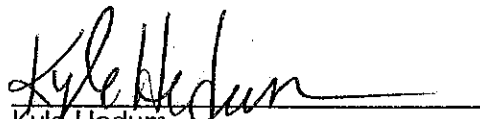
2 7. Based upon Findings of Fact numbers 1 through 7, there is sufficient evidence that Mr.
3 Simmons violated Penal Code sections 187(A) and 211. Additionally, based upon Finding of Fact
4 number 8 and the lack of evidence regarding any pecuniary injury suffered by Mr. Simmons, there is
5 insufficient evidence that Mr. Simmons sustained a pecuniary injury as a result of his incarceration.

6 After careful evaluation of all of the evidence, there is insufficient evidence that Mr. Simmons:
7 (1) did not violate Penal Code sections 187(A) and 211, (2) did not, either intentionally or negligently,
8 contribute to his arrest or conviction for those offenses, and (3) sustained pecuniary injury through his
9 erroneous conviction and imprisonment.

10 **Order**

11 Mr. Simmons's claim under Penal Code sections 4900 et seq. is denied.

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13 Date: June 2, 2005

14 
15 Kyle Hedum
16 Hearing Officer

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

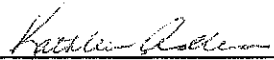
In the Matter of the Claim of:

Tommy Simmons, III
Claim No. G 543480

Notice of Decision

On July 21, 2005, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision as its Decision in the above-referenced matter. The Decision became effective on July 21, 2005.

Date: July 25, 2005


KATHLEEN ANDLEMAN
Chief Counsel
California Victim Compensation
and Government Claims Board