CALIFORNIA
CalVCB
VICTIM COMPENSATION BOARD

STATE OF CALIFORNIA
GAVIN NEWSOM, Governor

Victim Compensation Board Meeting Agenda
November 18, 2021
10:00 a.m.
400 R Street
Sacramento, CA 95812

BOARD MEETING MATERIALS

Item 1. Approval of Minutes — Action Item
Minutes of the September 23, 2021, Board Meeting
DRAFT Minutes attached

Item 2. Public Comment on Items Not on the Agenda
The Board will receive comments from the public on matters that are not on the agenda. The Board may not discuss or take any action on any item raised during public comment except to decide whether to place the matter on a subsequent agenda. (Gov. Code, § 11125.7.)
No materials for this item

Item 3. Executive Officer Statement — Information Item
Copy of CalVCB Annual Report FY 20-21 attached

Item 4. Legislative Update — Information Item
Copy of Legislative Report attached

Item 5. Contract Update — Action Item
Copy of Contract Update attached

Item 6. Shawn Young (Pen. Code, §§ 4900, et seq.) — Action Item
Copy of Proposed Decision attached

Item 7. Alice Waterman (Pen. Code, §§ 4900, et seq.) — Action Item
Copy of Proposed Decision attached

Item 8. Guy Miles (Pen. Code, §§ 4900, et seq.) — Action Item
Copy of Proposed Decision attached

ITEM 1

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California Victim Compensation Board
Open Meeting Minutes
September 23, 2021, Board Meeting

The California Victim Compensation Board (Board) convened its meeting in open session upon the call of the Chair, Gabriel Ravel, General Counsel of the Government Operations Agency, acting for, and in the absence of Yolanda Richardson, Secretary of the Government Operations Agency, via Zoom, on Thursday, September 23, 2021, at 10:00 a.m. Also present via Zoom was Member Diana Becton, District Attorney, and Member Shawn Silva, Deputy State Controller and Interim Chief Counsel, acting for and in the absence of, Betty T. Yee, Controller.

Executive Officer Lynda Gledhill, and Chief Counsel Kim Gauthier, attended in person at 400 R Street, Sacramento, California. Board Liaison, Michelle Greer, was also present and recorded the meeting.

Item 1. Approval of the Minutes of the July 15, 2021, Board Meeting

The Board approved the minutes of the July 15, 2021, Board meeting.

Item 2. Public Comment

The Board opened the meeting for public comment and Ms. Greer reminded everyone that, consistent with the Bagley-Keene Open Meeting Act, items not on the agenda may not be discussed at this time but may be put on a future agenda. (Gov. Code, § 11125.7.)

There were no public comments.

Item 3. Executive Officer Statement

Executive Officer Gledhill updated the Board on several items:

Executive Officer Gledhill described her experience earlier in the week of speaking at the virtual 2021 National Joint Training Conference for Victims of Crime Act (VOCA) Assistance and Compensation Administrators.

Ms. Gledhill noted that this is an important annual conference sponsored by the U.S. Department of Justice's Office for Victims of Crime and hosted by the National Association of VOCA Assistance Administrators and the National Association of Crime Victim Compensation Boards.

She also participated in a panel discussion focused on how different states have approached changing eligibility requirements, such as allowing other documentation than a police report to verify claims.

There is a lot of interest in this topic nationally, especially after changes in VOCA passed this summer that allow exceptions to the cooperation requirement. The new VOCA language is very similar to the state statute CalVCB has followed for several years.

Ms. Gledhill reported that the session reminded her of how important our work is and that many around the country look at CalVCB as a national leader in victim compensation.

The next topic Ms. Gledhill discussed was the Fathers and Families of San Joaquin Trauma Recovery Center in Stockton, which closed its doors on September 3. She reminded the Board that Fathers and Families was one of 12 TRCs to win two-year grant awards from CalVCB starting on July 1, but then announced it would have to shut down.

She further noted that, once the final invoice is reconciled for Fathers and Families, CalVCB will then know how much of the grant money they were allocated that did not get spent and could potentially be redistributed to other TRCs. She indicated this will be brought to the Board at a future Board meeting with a recommendation for distribution of the remaining funds to existing TRCs.

Ms. Gledhill next discussed the current working conditions in the office and the intention to return to the building to work one day a week starting in September. She indicated that plan has been put on hold until the Governor's order to test all unvaccinated employees weekly can be fully implemented.

Ms. Gledhill reminded the Board that the recent promotion of Natalie Mack to Chief Deputy Executive Officer left a vacancy on the Executive Team. She reported that the vacancy has been filled by Vincent Walker, who is the new Deputy Executive Officer for the Victim Compensation Program.

Vincent Walker comes to CalVCB from the Employment Development Department, where he spent 16 years in a variety of leadership roles. He provided oversight of various statewide programs and worked on claim management, quality assurance, policy and procedure development, and customer relations. He started with CalVCB in mid-August, and has jumped in and is hard at work on all of CalVCB's program-related issues.

Executive Officer Gledhill next gave a short presentation about VOCA.

She noted that "VOCA" stands for the federal Victims of Crime Act. Since its original passage by Congress in 1984, VOCA has provided funding for victim compensation programs and victim assistance programs across the country. In California, CalVCB handles VOCA-related compensation and Cal OES handles assistance grants.

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CalVCB has traditionally been reimbursed by the federal government for 60 percent of its VOCA-eligible claims.

The way this process works is that CalVCB pays claims, according to state statutes and regulations, and then seeks reimbursement from the federal government through VOCA for VOCA-eligible claims, which are most of the claims CalVCB receives.

The calculation for each state's VOCA award is based on the state dollars paid out for the federal fiscal year two years prior. Once the award is received, CalVCB has up to three years to spend that money.

For the last three federal fiscal years, CalVCB was awarded between $15 million and $19 million dollars each year in VOCA reimbursements.

On July 22, 2021, President Biden signed H.R. 1652, the VOCA Fix to Sustain the Crime Victims Fund Act of 2021 and the law went into effect immediately. The act made several important changes to VOCA. The most significant is an increase of the reimbursement rate from 60 percent to 75 percent.

The bill also allows exceptions to cooperation "if a program determines such cooperation may be impacted due to a victim's age, physical condition, psychological state, cultural or linguistic barriers, or any other health or safety concern that jeopardizes the victim's wellbeing."

The new exceptions are nearly identical to those already allowed by CalVCB's statute.

The federal legislation, which was several years in the making, will help California and other states who have seen steady decreases in VOCA funding. Based on our estimates, it appears these changes will increase CalVCB's federal reimbursement by $8 to $10 million dollars each year going forward. This will require CalVCB to increase the federal grant allocation amount currently authorized in the state budget. CalVCB has already submitted a request to the Department of Finance to make that adjustment.

Ms. Gledhill reminded the Board that CalVCB currently receives a General Fund backfill and noted that will likely continue in the future. This increase in federal money may mean in the future that CalVCB will need fewer dollars from the General Fund, however, it will take a few years to understand the impact of this increased reimbursement.

Item 4. Legislative Update

The Legislative update was provided by Deputy Executive Officer of the Policy, Outreach and Grants Division, Andrew Lamar.

Mr. LaMar started by noting the summary of the bills provided in the Board Meeting binder represented the status of the bills as they stood at the end of the 2021

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Legislative Session. Mr. LaMar reminded the Board that the Governor has until October 10, 2021, to sign or veto any bill that comes across his desk.

The Board also received an update on SB 299 by Assemblyman Leyva, which would compensate victims of police violence, was moved to the inactive file at the request of the author. It is now a two-year bill and will be eligible to be acted on again in 2022.

Mr. LaMar stated that the bill concerning forced sterilization was turned into a budget trailer bill, which is almost identical to AB 1077, now titled AB 137. The bill was signed by the Governor in July, establishing the Forced Sterilization Compensation Program. Victims will be able to apply for a two-year period beginning January 1, 2022.
The budget bill funding this program provided two million dollars for outreach and related costs for administering the program.

In the final days of session, Mr. LaMar stated, an additional $300,000 for outreach was added to another budget bill, SB 170, which passed and has been sent to the Governor. This bill directs CalVCB to use the money to contract with a local Los Angeles community-based organization, the Alliances for a Better Community, for study and additional outreach to eligible claimants for the Forced Sterilization Compensation Program. If the Governor signs the legislation CalVCB will work to incorporate this partnership into its implementation efforts.

Mr. LaMar reported SB 446, which would change the process for consideration of some erroneously conviction claims was passed by the legislature and is now on the Governor's desk.

Since the last Board Meeting, both of this year's erroneous conviction claims bills have been signed by the Governor. AB 1593 by Assembly Member Gonzalez contains a 5.7-million-dollar appropriation to pay the five erroneous conviction claims approved by CalVCB. Those claimants have received their payments.

Finally, Mr. LaMar stated that SB 631 by Senator Portantino, contains nearly 2 million dollars to pay one additional claim. It was signed last week by the Governor, and CalVCB is working with the Department of Finance and the State Controller's Office to process that payment.

Item 5. Proposed 2022 Board Meeting Dates

Executive Officer Gledhill asked the Board for their approval of the proposed 2022 CalVCB Board Meeting dates, continuing the meeting schedule of convening every other month for Board meetings.

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The Board approved the proposed 2022 CalVCB Board Meeting dates as follows:

- Thursday, January 20, 2022
- Thursday, March 17, 2022
- Thursday, May 19, 2022
- Thursday, July 21, 2022
- Thursday, September 15, 2022
- Thursday, November 17, 2022

Item 6. PC 4900 Claim No. 16-ECO-01, George Souliotes

This presentation was given by Chief Counsel, Kim Gauthier. Ms. Gauthier gave a brief summary of the Penal Code section 4900 claim filed by George Souliotes.

On April 8, 2015, George Souliotes submitted an application for compensation as an erroneously convicted person pursuant to Penal Code section 4900. The application is based upon Mr. Souliotes 2000 convictions for arson and murder in the first degree, which were overturned pursuant to federal habeas proceedings. According to the Proposed Decision, Mr. Souliotes has shown by a preponderance of evidence that he is not guilty of the crimes of arson or murder, as well as the lesser offense of involuntary manslaughter to which he pled following the habeas proceeding. The Proposed Decision recommends compensation in the amount of $841,820, representing $140 for each day of the 6,013 days that he was wrongfully imprisoned.

Mr. Souliotes was represented by Caitlin Weisberg of Mcclane, Bednarski & Litt. The Attorney General was represented by Deputy Attorney General Barton Bowers. Ms. Weisberg appeared via Zoom. Mr. Bowers appeared via teleconference.

Ms. Weisberg noted that the proposed decision does a great job of summarizing all of the facts related to this case. Ms. Weisberg also wanted to thank Staff Attorney Michelle Philips for her work on this matter and her thorough review of the matter and she, along with Mr. Souliotes, urged the Board to approve the proposed decision. Ms. Weisberg also thanked Deputy Attorney General Barton Bowers for his support of this claim. She then gave a history of the events in this case, which was also summarized in the proposed decision.

Mr. Ravel thanked counsel for appearing before the Board.

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Mr. Souliotes also appeared before the Board via Zoom. He thanked the Board for its consideration and indicated he is happy to start fixing his life.

Mr. Ravel thanked Mr. Souliotes for appearing before the Board.

Mr. Barton Bowers from the Attorney General's office urged the Board to adopt the proposed decision.

Mr. Ravel thanked Mr. Bowers for appearing before the Board.

The Board adopted the Proposed Decision.

Closed Session

Pursuant to Government Code section 11126(c)(3), the Board adjourned into Closed Session with the Chief Executive Officer and Chief Counsel at 10:20 a.m., to deliberate on proposed decision numbers 1-86 of the Victim Compensation Program.

Open Session

The Board reconvened in Open Session pursuant to Government Code section 11126(c)(3) at 10:25 a.m.

The Board adopted the hearing officers' recommendations for proposed decision numbers 1-86 of the Victim Compensation Program.

Adjournment

The Board meeting adjourned at 10:30 a.m.

Next Board Meeting

The next Board meeting is scheduled for Thursday, November 18, 2021.

ITEM 2

Public Comment

The Board will receive comments from the public on matters that are not on the agenda. The Board may not discuss or take any action on any item raised during public comment except to decide whether to place the matter on a subsequent agenda. (Gov. Code, § 11125.7.)

ITEM 3

Executive Officer's Statement
Information Item

ANNUAL REPORT 2020-21

CALIFORNIA
CalVCB
VICTIM COMPENSATION BOARD

OUR MISSION

CalVCB is a trusted partner in providing restorative financial assistance to victims of crime.

OUR VISION

CalVCB helps victims of crime restore their lives.

OUR VALUES

INTEGRITY We are honest and ethical.

RESPECT We treat everyone with courtesy and decency.

COMPASSION We care about victims and their well-being.

DEDICATION We serve with devotion and professionalism.

COLLABORATION We create an atmosphere of teamwork.

INNOVATION We find creative ways to solve problems and provide support.

STRATEGIC FRAMEWORK 2021-2024

CalVCB executive staff assessed the strengths and weaknesses of the organization and conducted an in-depth survey of employees. With the information they collected, they developed a strategic plan for 2021-24 with three overarching goals:

- Promote access to CalVCB services
- Improve the CalVCB experience
- Develop and engage staff to best serve victims

Titled "Strategic Framework 2021-2024," the document provides a road map for how to pursue our values and goals and fulfill our mission. "California's victims of violent crime are counting on us to support them," said Executive Officer Lynda Gledhill. "It's imperative that as an organization we strive for excellence, hold ourselves accountable to our goals and constantly work to best meet the needs of victims."

TABLE OF CONTENTS

From the Executive Officer

My first full year at CalVCB is reflected in the 2020-21 annual report, and I'm proud that it includes progress on my initial priorities, which are incorporated into our new strategic plan.

During this year, we improved how we process applications, increased communications with stakeholders and engaged our employees, all with the end goal of helping victims of violent crime restore their lives.

One of my first steps was to fill leadership vacancies, including the critical positions over our program and legal areas. Our new executive team looked at the organization from top to bottom, determining ways we could better help victims.

In the most critical area of processing victim applications, we resolved more than 13,000 unassigned applications and reduced processing times by more than 40 percent. This was done by implementing a workload tracker, allowing us to better understand where work was slowing down and create new processes to move applications effectively.

We also ramped up our efforts to collect restitution fees that fund our programs, renewed our commitment to auditing internal operations for quality assurance and created an executive committee to speed up the development of important Information Technology projects.

This year unfortunately also revolved around the Covid pandemic. Keeping employees safe was my top priority, and a majority of our employees have been teleworking nearly full-time. With staff mostly at home, I worked hard to keep employees engaged. We held regular all-staff meetings, invited prominent guest speakers to address staff and created an employee recognition program.

To improve outreach, I revived the CalVCB Advisory Committee, made up of key partners across the state. This is an opportunity to connect with those who use our services and have a dialogue about how we can work together to help victims.

One of the most significant activities of the year was a complete overhaul of the CalVCB website. The new, fully accessible site puts the needs of victims first and makes it easy for them to quickly find help.

I'm proud of these efforts, and the hard work of our employees during what was a difficult year. CalVCB will continue to focus on fulfilling our mission of providing restorative financial assistance to victims of crime.

Lynda Gledhill

Lynda Gledhill
Executive Officer

Board Members

Yolanda Richardson

Secretary of the Government Operations Agency

Yolanda Richardson, who is the Board chairperson, was appointed Secretary of the Government Operations Agency by Governor Newsom in January 2020. In her role, she oversees 12 state departments and programs essential to the effective administration of California state government. They include the Department of General Services, California Department of Technology, California Department of Human Resources (CalHR), Franchise Tax Board, California Victim Compensation Board (CalVCB), California Department of Tax and Fee Administration, FI$Cal, California Public Employees' Retirement System (CalPERS), California State Teachers' Retirement System (CalSTRS), Office of Administrative Law, State Personnel Board and the Office of Digital Innovation.

Betty T. Yee

California State Controller

Betty T. Yee, who is a standing member of the Board, was elected State Controller in November 2014, following two terms on the California Board of Equalization. Now serving as the state's chief fiscal officer, Yee also chairs the Franchise Tax Board and serves as a member of the CalPERS and CalSTRS governing boards.

Diana Becton

Contra Costa County District Attorney

Diana Becton, who was appointed to the Board by Governor Newsom in January 2021, was sworn in as the 25th District Attorney for Contra Costa County in 2017. Following her appointment from the Board of Supervisors, she was elected to the position in June 2018. Becton served for 22 years as a judge in Contra Costa County. She is the past president of the National Association of Women Judges, the nation's leading voice for women in the judiciary, and past chair of the State Bar Council on Access and Fairness.

Executive Staff

Lynda Gledhill | **Executive Officer**

The Victim Compensation Board named Lynda Gledhill the Executive Officer in May 2020. Prior to her appointment, Gledhill served as the Deputy Secretary of Communications at the Government Operations Agency. She has also served as the press secretary at the California Attorney General's Office, the Director of Communications at the Office of California Senator Ellen Corbett and a communications consultant at the Office of California Senate President pro Tempore Don Perata. Gledhill was a political reporter at the San Francisco Chronicle from 1998 to 2007.

Natalie Mack | **Chief Deputy Executive Officer**

Natalie Mack joined the California Victim Compensation Board as Deputy Executive Officer of the Victim Compensation Program in May 2020 and became Chief Deputy Executive Officer in July 2021. Before coming to CalVCB, Mack spent eight years at the Employment Development Department. Mack began her state service in November 2001. She has held positions with the State Controller's Office, Department of Corrections and Rehabilitation, Department of Health Care Services, Department of Social Services and Department of Justice.

John Cramer | **Deputy Executive Officer, Information Technology Division**

John Cramer joined the California Victim Compensation Board as Deputy Executive Officer of the Information Technology Division in December 2020. Before coming to CalVCB, Cramer served as the Chief Information Officer for the California Department of Community Services. Prior to that, he worked at the California Department of Technology, California State Lottery and California Department of Child Support Services.

Kim Gauthier | **Chief Counsel**

Kim Gauthier became Chief Counsel at the California Victim Compensation Board in June 2020. She previously served as Special Counsel/Assistant Chief Counsel for the Secretary of State, where she had also held the position of Deputy Secretary of State for Operations. Gauthier served as Chief Counsel at First 5 California, Senior Corporations Counsel for the Department of Corporations and Staff Counsel at the Department of Health Services.

Andrew LaMar | **Deputy Executive Officer Policy, Outreach and Grants Division**

Andrew LaMar joined the California Victim Compensation Board as Deputy Executive Officer of the Policy, Outreach and Grants Division in October 2020. He previously served as the Deputy Director of Communications at the California Department of Human Resources. He has held numerous communication roles at the Capitol, including in the offices of California Senator Bob Hertzberg, Superintendent of Public Instruction Tom Torlakson, the Senate Office of Research, Senate Majority Leader Ellen Corbett and Senate President pro Tempore Don Perata. He started his career as a journalist, working for several different newspapers in Oregon and California.

Vincent Walker | **Deputy Executive Officer, Victim Compensation Program**

Vincent Walker joined the California Victim Compensation Board as Deputy Executive Officer of the Victim Compensation Program in August 2021. Before coming to CalVCB, Walker spent 16 years providing oversight of a variety of statewide programs and direction regarding claim management, quality assurance, policy and procedure development, and customer relations at the Employment Development Department.

Overview

CalVCB provides compensation and support to people who are recovering from the pain and injuries caused by violent crime.

We reimburse crime-related expenses, connect victims with services and support, and do all we can to inform and empower victims.

Claims cover a number of violent crimes, including child abuse, domestic violence, human trafficking, assault, homicide, elder abuse, sexual assault, vehicular manslaughter and stalking. Financial compensation helps victims and eligible family members pay for certain crime-related costs, including medical and mental health treatment, income loss and funeral or burial expenses.

Those who may qualify for assistance include survivors of crime victims who have died, persons who are legally dependent upon the victim for financial support, and members of a victim's family. Parents, grandparents, siblings, spouses, children or grandchildren of the victim are all eligible.

The first program of its kind in the nation, CalVCB was created in 1965 and has served as a model for victim service providers ever since. Over the years, its mission has grown as social awareness about the impact of violent crime and injustices has grown. CalVCB now compensates for more types of crimes and injustices than ever before.

In Fiscal Year 2020-21, CalVCB received 40,640 applications and paid $52.7 million in compensation. We know that every single claim, every single payment, can be life-changing and help a victim overcome the trauma and damages inflicted by a terrible event.

Under the leadership of Executive Officer Lynda Gledhill, CalVCB has renewed its commitment to helping victims and improving the services it provides. CalVCB adopted a new strategic plan to sharpen its focus, amplified outreach to victims and strengthened the organization with greater accountability and efficiency measures.

Every day, CalVCB staff work to assist victims of crime the best they can by following the organization's core values: **integrity, respect, compassion, dedication, collaboration and innovation.**

Overview

Fiscal Year 2020-21 Statistics

For the period July 1, 2020 – June 30, 2021

CalVCB Application and Payment Data	
Applications Received	40,640
Applications Processed	42,095
Allowed	35,119
Denied	5,792
Duplicate	1,184
Total Payments	$52,743,202

Payments by Crime Category	
Arson	$19,475
Assault	$20,473,337
Child Abuse	$4,507,289
DWI/DUI	$1,657,943
Homicide	$15,435,686
Human Trafficking	$1,554,973
Kidnapping	$390,392
Unspecified	$14,399
Other	$1,674,086
Other Vehicle	$1,978,018
Robbery	$1,995,284
Sexual Assault	$2,844,061
Stalking	$198,259
Total Payments	$52,743,202

Payments by Payment Category	
Crime Scene Cleanup	$19,719
Dental	$1,733,056
Funeral Burial	$13,546,430
Home Modification	$69,180
Income Support Loss	$10,092,615
Medical	$7,471,702
Mental Health	$15,319,640
Relocation	$3,452,355
Residential Security	$858,206
Vehicle Purchase/Modification	$180,299

Apps Received by Race/Ethnicity	
American Indian/Alaska Native	330
Asian	1,281
Black/African American	6,227
Hispanic or Latino	16,470
Multiple Races	1,547
Native Hawaiian and Other Pacific Islander	217
Not Reported	7,073
Not Yet Determined	92
Some Other Race	355
White Non-Latino/Caucasian	7,048

Victims Come First

CalVCB's principal charge is to process applications from victims and provide payments to those who qualify in a timely manner.

Faster Processing Times

By focusing on improving efficiencies, CalVCB was able to reduce the average amount of time it takes to process an application from 65 days in spring 2020 to 39 days by July 2021. The result is applications are now processed on average 40 percent faster.

In addition, CalVCB eliminated a backlog of 13,000 unassigned applications.

CalVCB worked to drive traffic to its online application system, which allows victims to fill out and submit their applications directly online, instead of mailing in paper forms. That can speed up the application process considerably. Over the course of 2020-21, online applications increased by 34 percent.

Overall, however, the number of applications submitted to CalVCB dropped by 20 percent in 2020-21 from the previous year. This occurred even though violent crime increased slightly in 2020 from the year before, according to the California Department of Justice. There is little doubt that the pandemic played a major role in this trend, as connecting with victims became more difficult.

Reaching All Victims

Victims of violent crime can also visit a Trauma Recovery Center (TRC) for immediate counseling and assistance. CalVCB funds the operation of 19 TRCs across the state. TRCs provide trauma-informed, evidence-based mental health treatment and case management services to crime victims who may not be eligible for victim compensation or may be fearful of reporting a crime to law enforcement.

The TRC model of care was developed by UC San Francisco to address the needs of crime survivors who have "fallen through the cracks" of traditional support services. As defined in statute, TRCs must meet several requirements, including:

- providing assertive outreach and engagement to underserved populations;
- serving victims of all types of violent crimes;
- treating all clients with complex problems, regardless of their emotional or behavioral issues;
- providing comprehensive mental health and support services such as crisis intervention, individual and group treatment, medication management, and substance abuse treatment; and
- using a multidisciplinary treatment team that includes psychiatrists, psychologists, social workers and marriage and family therapists.

Every year, CalVCB awards TRC grants in a competitive application process and oversees contracts with the grantees, ensuring they meet statutory requirements. In Spring 2021, CalVCB selected 12 TRCs for grants totaling $13,003,850 starting in Fiscal Year 2021-22.

TRC funding comes from the state Restitution Fund and the Safe Neighborhoods and Schools Act Fund. The grants fund TRCs for two years.

Victims Come First

Responding to Mass Violence

Mass violence events, such as the May 26, 2021, San Jose shooting that killed nine people, present major challenges for first responders and those assisting victims.

In those instances, CalVCB facilitates short-term and long-term financial recovery for crime victims and supports the local efforts of victim advocates and victim assistance networks.

Immediately after the May shooting occurred, four members of the CalVCB Mass Violence Response team deployed to San Jose.

Once there, the team met with victims who witnessed the attack and family members of those killed and helped them complete compensation applications. The CalVCB team also provided support to the Santa Clara County District Attorney's Victim Services Unit. Victims have seven years from the date of the crime, until May 25, 2028, to apply for compensation.

CalVCB continues to offer support for survivors of the July 28, 2019, shooting at the Gilroy Garlic Festival, where four people (including the gunman) were killed and 17 were wounded. As of the end of July 2021, CalVCB had issued a total of $245,521 to 123 claimants, an average of $1,996 per claimant. Victims and their families can apply for compensation through July 28, 2026.

On October 1, 2017, more than 600 people were injured in a shooting at the Route 91 Harvest Festival shooting in Las Vegas. Thirty-five of the 58 people killed were from California. As of the end of July 2021, CalVCB had issued a total of $6,245,842 to 1,717 claimants, an average of $3,638 per claimant. Victims and their families can apply for compensation through October 1, 2024.

Victims of Injustice and Human Trafficking

Victims of violent crime and mass violence are not the only victims that CalVCB helps.

Under California state law, a person erroneously convicted of a felony and incarcerated in a California state prison may file a claim with CalVCB. If the claim is approved, the Board will make a recommendation for a legislative appropriation, controlled by statute, of $140 for each day of incarceration served.

During Fiscal Year 2020-21, the Board approved five erroneous conviction claims, awarding $5,675,800.

CalVCB has recently begun compensating victims of human trafficking, too.

Beginning January 1, 2020, AB 629 authorized CalVCB to provide compensation for income loss to victims of human trafficking. CalVCB can provide compensation equal to the loss of income or support that victims incur as a direct result of their deprivation of liberty, providing up to $10,000 a year for up to two years per victim.

As of the end of July 2021, CalVCB had received 231 claims and issued $1,554,973 to 164 claimants under the new law.

Creating a Supportive Network

To effectively reach victims and assist them, it's crucial to build a wide and supportive network and to share resources and information.

Even as the COVID-19 pandemic limited the ability to meet traditionally with victims and advocates, CalVCB successfully expanded its outreach and networking efforts during Fiscal Year 2020-21.

CalVCB Advisory Committee

Executive Officer Lynda Gledhill re-established the CalVCB Advisory Committee to connect more directly with stakeholders, including district attorneys, victim service providers and victim advocates. The quarterly meetings, conducted online, provide a forum for stakeholders to address common problems and allow CalVCB to communicate about emerging victim issues.

The committee has, for instance, explored the drop-off in victim applications submitted during the pandemic and what to do about it, and how local, state and federal agencies mobilized to assist victims of the mass shooting at the Santa Clara Valley Transit Authority in San Jose.

With funding from a $2 million outreach grant from Cal OES, CalVCB hired five limited-term advocates who worked with stakeholders and assisted victims statewide. CalVCB also utilized the grant to print thousands of copies of publications providing information about CalVCB and its services, translated several publications into 14 different languages, and mailed many of the publications to people and agencies helping victims across the state. All CalVCB publications can be found on its website.

New Website

In addition, CalVCB used Cal OES grant money to overhaul its outdated and cumbersome website. CalVCB worked with vendor 10up to modernize the site, make it victim-centered and make it as easy and direct as possible to navigate. The new site launched in May 2021.

The goal of the redesign was to simplify the framework and make any information available within three "clicks." In keeping with modern standards, the new site was designed to work well on any device used to access the internet, whether that is a cell phone, tablet or desktop computer.

The most important consideration of the project was how to best meet the needs of the victim. The site is illustrated with attractive landscape images to provide a calming effect and includes a Quick Escape button so users can instantly jump off the site if they need to. The website employs Google Translate to provide instant translation into more than 100 languages.

Online Portal for Victim Advocates

To help victim advocates with the applications they file on behalf of victims, CalVCB established an online portal in August 2020.

Advocates may create an account, track the applications for which they are the representative, upload documents and bills and complete an application for a victim. The result is a faster and easier way for advocates to submit and manage victim applications they submit to CalVCB.

The portal, first provided for Fresno, San Diego, San Francisco and San Joaquin counties, is being rolled out region by region to other counties over the course of 2021 and 2022.

Strengthening Our Foundation

Improving services and the supportive network for victims starts with building a strong organizational foundation.

In Fiscal Year 2020-21, Executive Officer Lynda Gledhill fortified the organization's leadership by filling all executive positions, implemented accountability and efficiency measures throughout the agency and fostered a culture of excellence.

To improve planning and anticipate the workforce needs of the future, CalVCB developed the Workforce Strategic Plan 2021-2025. The plan capitalizes on CalVCB's biggest asset—its dedicated staff—and provides a blueprint for how the organization can continue to recruit, train and retain talented staff. It identifies upcoming organizational challenges and provides strategies for overcoming them.

Creating a Culture of Excellence

CalVCB also created the Employee Recognition Guide to provide managers with tools and guidance on how to recognize and reward excellence of their staffs. CalVCB launched an employee recognition program in spring 2021 that includes quarterly and annual awards for employees doing outstanding work.

The workforce plan and recognition guide dovetail with the Strategic Framework 2021-2024, which was developed to clearly spell out CalVCB's mission, vision and values.

During the year, Gledhill and the executive team finished implementing a reorganization of CalVCB's divisions, sections and units to better utilize resources and meet the department's mission.

Across the organization, the focus was to strive for excellence, despite the challenges created by a pandemic.

In response to the new remote working environment, CalVCB made changes in how staff is trained. Quickly after Governor Newsom's stay-at-home Executive Order went into effect, CalVCB began developing and implementing eLearning courses and other online trainings, including instructor-led classes. These new approaches have resulted in the ability to offer on-demand training to meet the needs of staff, including onboarding new staff.

Restitution Recovery Unit

To improve the collection and distribution of restitution fees and fines, the CalVCB Restitution Recovery team streamlined procedures, reduced processing times and accelerated payments to victims of crime. To further advance the processing of victim payments, Restitution Recovery is developing a new statewide restitution database.

As part of the effort, CalVCB sent a survey to county restitution partners to better understand how counties track, collect, report and remit restitution fines and orders. The survey highlighted opportunities for CalVCB to collaborate with counties and enhance restitution reporting and remitting.

Advancing IT

CalVCB created the IT Executive Governance Committee to better track technology projects and identify the most important projects to prioritize. The committee allows CalVCB to get the most out of its IT staff by strategically determining which projects to pursue.

This has enabled the department to roll out updated features every two months, including the automation required to support a new program-auditing unit. CalVCB has also released several digital enhancements, further improving the user experience for engaging and interacting with CalVCB.

Strengthening Our Foundation

Looking to the Future

CalVCB continues to explore how to grow support for victims. CalVCB has applied for federal grants to assist victims of the 2019 Gilroy shooting and enhance its online application system, and it is constantly searching for new funding opportunities.

By the Numbers

CalVCB's appropriation for Fiscal Year 2020-21 was $133.9 million.

2020-21 CalVCB Budget	
Victim Compensation	$119,736,000
Restitution Program	$14,146,000
Good Samaritan Program	$20,000

Funding Sources	
General Fund	$136,000
Restitution Fund (This includes $23,500,000 transferred from the General Fund into the Restitution Fund)	$97,687,000
Federal Trust Fund	$24,828,000
Reimbursements	$1,000,000
Safe Neighborhoods and Schools Fund	$10,251,000

CALIFORNIA
CalVCB
VICTIM COMPENSATION BOARD

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ITEM 4

California Victim Compensation Board
Legislative Update
November 18, 2021

SB 446 (Glazer) – Factual Innocence
This bill creates a new procedure that reassigns the burden of proof for granting compensation to an erroneously convicted person under Penal Code section 4900 when the underlying conviction was vacated. For this particular class of claimants, a recommendation for compensation by CalVCB is mandated without a hearing, unless the Attorney General timely objects within 45 days and provides clear and convincing evidence of the claimant's guilt. The Attorney General is strictly limited to a single 45-day extension of time to object, and the trial record is per se inadequate to satisfy the Attorney General's burden of proof. If the Attorney General declines to object within the allotted period of time, then CalVCB shall issue its recommendation within 60 days thereafter. For all other claimants, the standard procedure for section 4900 claims still applies, whereby the claimant bears the burden to prove actual innocence by a preponderance of evidence.
Status: Signed by the Governor (Chapter 490, Statutes of 2021)

AB 1593 (Gonzalez, Lorena) – Erroneous Conviction Claims Bill
This bill appropriates $5,675,880 from the General Fund to pay five erroneous conviction claims approved by CalVCB for Derrick Harris, Jeremy Puckett, Arturo Jimenez, Robert Fenenbock, and Andrew Wilson. The bill also appropriates $1,146 to the Department of General Services for the payment of claims accepted by the Government Claims Program.
Status: Signed by the Governor (Chapter 127, Statutes of 2021)

SB 631 (Portantino) – Erroneous Conviction Claims Bill
This bill appropriates $1,165,920 from the General Fund to pay the erroneous conviction claim approved by CalVCB for William Richards.
Status: Signed by the Governor (Chapter 185, Statutes of 2021)

AB 128 (Ting) – Budget Act of 2021
The Budget Act transfers $33 million from the General Fund to the Restitution Fund. Provisional language specifies that upon order of the Director of Finance, the amount available for transfer in this item may be increased by an amount sufficient to backfill the Restitution Fund if a determination is made that revenues are insufficient to support CalVCB.
Status: Signed by the Governor (Chapter 21, Statutes of 2021)

AB 137 (Ting) – State Government
This Budget Trailer Bill on State Government establishes the Forced or Involuntary Sterilization Compensation Program to be administered by CalVCB. The Program provides compensation to survivors of state-sponsored sterilization conducted pursuant to eugenics laws that existed in the State of California between 1909 and 1979 and to survivors of coerced sterilizations of people in prisons after 1979.
Status: Signed by the Governor (Chapter 77, Statutes of 2021)

SB 129 (Skinner) – Budget Act of 2021
This bill, known as Budget Bill Jr., amends the Budget Act of 2021, AB 128 (Ting), to appropriate $7.5 million to CalVCB to fund the Forced or Involuntary Sterilization Compensation Program through September 30, 2024. Up to $2 million shall be used for agency implementation and outreach costs, up to $1 million shall be used for establishment of plaques and markers, and the remaining amount shall be used for reparation payments to eligible survivors.
Status: Signed by the Governor (Chapter 69, Statutes of 2021)

SB 170 (Skinner) – Budget Act of 2021
Among other appropriations, this Budget Bill appropriates $300,000 to CalVCB for a contract with the Alliances for a Better Community for study and additional outreach to eligible claimants for the Forced or Involuntary Sterilization Compensation Program.
Status: Signed by the Governor (Chapter 240, Statutes of 2021)

AB 177 (Committee on Budget) – Public Safety
Among other provisions, this Budget Trailer Bill on Public Safety eliminates a range of fees that agencies and courts are authorized to impose to fund elements of the criminal legal system, including administrative fees that fund the cost of collecting restitution. It also eliminates all outstanding debt incurred as a result of the imposition of those fees.
Status: Signed by the Governor (Chapter 257, Statutes of 2021)

AB 1171 (Garcia, Christina) – Rape of a Spouse
This bill expands the crime of rape pursuant to Penal Code section 261 to include spousal rape, and it repeals the current spousal rape statute, Penal Code section 262. The bill makes conforming changes to Government Code section 13956 regarding CalVCB eligibility, which references the statute that is to be repealed. It also makes technical changes to meet Legislative Counsel's current drafting style.
Status: Signed by the Governor (Chapter 626, Statutes of 2021)

AB 361 (Rivas) – Open Meetings: State and Local Agencies: Teleconferences
This bill, until January 31, 2022, authorizes a state body to hold public meetings through teleconferencing and to make public meetings accessible telephonically, or otherwise electronically, to all members of the public seeking to observe and to address the state body.
Status: Signed by the Governor (Chapter 165, Statutes of 2021)

AB 1291 (Frazier) – State Bodies: Open Meetings
This bill requires a state body subject to the Bagley-Keene Open Meeting Act, when it limits time for public comment, to provide at least twice the allotted time to a member of the public who utilizes translating technology to address the state body.
Status: Signed by the Governor (Chapter 63, Statutes of 2021)

SB 299 (Leyva) – Victim Compensation: Use of Force by a Law Enforcement Officer

This bill would add to the definition of a crime compensable by CalVCB an incident occurring on or after January 1, 2022, in which an individual sustains serious bodily injury, pursuant to Penal Code section 243, or death as a result of use of force by a law enforcement officer, as defined, regardless of whether the officer is arrested for, charged with, or convicted of committing a crime. It would prohibit CalVCB from denying a claim based on a law enforcement officer's use of force due to the victim's involvement in the crime or failure to cooperate with law enforcement. It would require denial of a use of force claim for involvement when the victim is convicted of a violent crime, pursuant to Penal Code section 667.5, or a crime that caused the serious bodily injury or death of another person at the time and location of the incident, or if there is clear and convincing evidence that a victim who was killed by law enforcement committed such a crime. It would prohibit CalVCB from denying a claim based on a law enforcement officer's use of force based solely upon the contents of a police report, or because a police report was not made, and it would require CalVCB to consider other forms of evidence, as specified, to establish that a qualifying crime occurred. Further, the bill would prohibit CalVCB from denying a claim, based on any crime that caused the death of the victim, due to the deceased victim's involvement of the crime or the victim's or a derivative victim's failure to cooperate with law enforcement. Finally, it would specify that CalVCB's determination on a claim is not to be considered in an action against a law enforcement officer.

Status: Placed on the inactive file and became a two-year bill

AB 1007 (Carrillo) – Forced or Involuntary Sterilization Compensation Program

This bill would establish the Forced or Involuntary Sterilization Compensation Program, upon an appropriation of not less than $7,500,000 by the Legislature for that purpose, to be administered by CalVCB. The Program would provide compensation to survivors of state-sponsored sterilization conducted pursuant to eugenics laws that existed in the State of California between 1909 and 1979 and to survivors of coerced sterilizations of people in prisons after 1979.

Status: Failed the fiscal committee deadline

ITEM 5

California Victim Compensation Board
Contract Report
November 18, 2021

The Board has delegated to the Executive Officer the authority to execute contracts with county victim centers for the verification of victim compensation program applications; contracts with counties for assistance in the effective collection of restitution from offenders; contracts for the review and adjustment of medical bills received by the California Victim Compensation Program; and contracts for the maintenance of the Board's information technology system.

Further, the Board has delegated to the Executive Officer the authority to execute all other contracts in an amount not to exceed $200,000. All contracts in excess of $200,000 require Board approval prior to execution.

For all contracts for which the Executive Officer has delegated authority, the Executive Officer reports to the Board the substance and amount of the contract at the meeting following execution of the contract.

Contractor Name and PO/Contract Number	Contract Amount and Contract Term	Good or Service Provided
Approval		
Contractor Name: California Department of State Hospitals	Contract Amount: $573,333.80 Term: 1/1/2022 – 2/29/2024	The Contractor shall make every reasonable effort to locate and share with CalVCB records that will help CalVCB verify claims of individuals sterilized in state institutions from 1953 to 1979. This was procured through an interagency agreement.
Contractor Name: TBD	Contract Amount: $249,752.66 Term: 1/1/2022 – 12/31/2024	The Contractor shall collect the outstanding fines and cost recovery owed to CalVCB in a timely manner and file legal actions to collect outstanding fines when attachable assets have been identified. This was procured through the Small Business Option solicitation.
Contractor Name: TBD	Contract Amount: $280,000.00 Term: 1/1/2022 – 12/31/2023	The Contractor shall create, organize, and coordinate a statewide outreach campaign to locate survivors of state-sponsored sterilization conducted under eugenics laws that existed in the state between 1909 and 1979, and to survivors of coerced sterilizations of people in California prisons after 1979, and notify

		them of the process to apply for victim compensation and accompanying free counseling services. This was procured through a Request for Proposal (RFP).
Informational		
Contractor Name: California State Controller's Office (SCO)	Contract Amount: $150,000.00 Term: 7/1/2021 – 6/30/2023	The Contractor shall provide access to SCO's payment delivery system for the Victim Pass Thru Program. This was procured through an interagency agreement.

ITEM 6

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Claim of:

Shawn Daryl Young

Claim Number: 19-ECO-08

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

INTRODUCTION

On April 15, 2019, Shawn Daryl Young (Young) applied to the California Victim Compensation Board (CalVCB) for compensation as an erroneously convicted person pursuant to Penal Code section 4900.[1] The application is based on Young's 2014 convictions for seven counts of sexual assault of three minor victims that occurred in 2013. In support of his claim, Young relies on the fact his convictions were reversed on appeal due to jury selection error and that, following re-trial, he was acquitted on all counts. The Attorney General (AG) objects, arguing that Young's evidence fails to demonstrate innocence by a preponderance. Andrea L. Konstad was assigned to hear this matter by CalVCB's Executive Officer. The AG was represented by Deputy Attorney General (DAG) Jennifer M. Poe. Young was self-represented. The hearing was held on September 15, 2020.

In seeking compensation as an erroneously convicted person, Young bears the burden of proving by a preponderance of evidence that he is innocent of the crimes for which he was charged, convicted, and incarcerated. Young has failed to meet that burden and does not have a court finding of factual innocence. Consequently, the Hearing Officer recommends that his claim for compensation be denied.

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

PROCEDURAL HISTORY

I. Charges and Conviction[2]

On November 27, 2013, the Siskiyou County District Attorney's Office (DAO) filed an information charging Young with a total of seven counts for the sexual abuse of three young girls, ages three, four, and five – H.Y., A.Y., and M.W, respectively.[3] Specifically, the DAO charged him with the following:

Count 1 - sexual penetration of a child 10 years of age or younger (A.Y.), in violation of section 288.7, subdivision (b);

Count 2 - lewd or lascivious conduct with a child under the age of 14 years (A.Y.), in violation of section 288, subdivision (a);

Count 3 - sexual intercourse with a child 10 years of age or younger (H.Y.), in violation of section 288.7, subdivision (a);

Count 4 - sexual penetration of a child 10 years of age or younger (H.Y.), in violation of section 288.7, subdivision (b);

Count 5 - oral copulation of a child 10 years of age or younger (H.Y.), in violation of section 288.7 subdivision (b);

Count 6 - continuous sexual abuse of a child under the age of 14 years (H.Y.), in violation of section 288.5, subdivision (a); and

Count 7 - sexual penetration of a child 10 years of age or younger (M.W.), in violation of section 288.7, subdivision (b).

On June 24, 2014, the jury found Young guilty on all counts. On August 14, 2014, he was sentenced to an aggregate determinate prison term of 18 years (upper term of 16 years for Count 6 plus a consecutive term of two years for Count 2), plus a consecutive indeterminate term of 85 years to life (25 years to life for Count 3, plus 15 years to life each for Counts 1, 4, 5, and 7), for a total of 103 years in state prison.

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[2] Attorney General (hereafter AG), Ex. 1, at pp. 2-26.

[3] For the victims' privacy, they will be referred to throughout the Proposed Decision by their initials, as they were during Young's trials. H.Y.'s date of birth is December 18, 2009; A.Y.'s date of birth is November 24, 2008; and M.W.'s date of birth is March 19, 2008.

Young submitted his Penal Code section 4900 application on April 15, 2019. He requests compensation for 1,715 days of post-conviction incarceration, which totals $240,100.00. In addition, he served a total of 332 days actual pre-conviction, which totals $46,480.00, for a combined requested amount of $286,580.00.[4] The DAG submitted her response to the claim on October 24, 2019, and CalVCB received Young's reply brief on March 13, 2020.

II. Factual Summary Overview

In 2013, Young was living in Siskiyou County with his two daughters, A.Y., aged four, and H.Y., aged three; and his wife, Christina, when he was reported to law enforcement for sexually assaulting both girls and their five-year-old friend, M.W. In 2011, two years before these allegations, while the family was living in San Bernardino County, H.Y. had alleged that Young hurt her buttocks.[5] Child Protective Services (CPS) investigated H.Y.'s 2011 allegation and each girl underwent a forensic examination. Young and Christina, who had briefly separated during this time, reunited after the forensic examinations failed to support the allegation. The couple soon moved to Texas, where they lived for an undetermined period of time before relocating to Siskiyou County in 2013.

III. First Trial (2013/2014)[6]

A. People's case

1. Shannon Harding (Harding)[7]

In May 2013, the Young family moved from Texas to Hornbrook, California, in Siskiyou County. The Young family initially lived with Young's parents, but subsequently rented a home on property that Harding was managing, and the two families became friends. Young and Christina moved into Harding's rental between July 4, 2012, and August 17, 2012. Harding and Caleb White (White) had

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[4] AG Ex. 1, at p. 22.

[5] The transcripts from the two trials contain very little information about the 2011 allegations. None of the documentation from the 2011 investigation was introduced at either trial and was not presented in this 4900 proceeding.

[6] The State of California was represented by Deputy District Attorney (DDA) Neese and Young was represented by Kathryn Barton (Ms. Barton).

[7] AG Ex. 2, at pp. 89-153.

four children, one of whom is named M.W. The three children, A.Y., H.Y., and M.W., rapidly became best friends and had a lot of play dates at the KRCE pool where the families met.[8]

On an unidentified date prior to August 22, 2013, Harding was changing M.W. out of her bathing suit and into her pajamas when she noticed an odor.[9] She asked M.W. about the odor and M.W. admitted that she was not wiping after she went to the bathroom because she had a cut on her "pee-pee" that hurt.[10] M.W. told her that A.Y.'s fingernail had cut her while the two girls were picking blackberries at the pool. A.Y. was kneeling on the ground and M.W. was standing up next to her. A.Y. tried to put her finger inside M.W.'s vagina but M.W. slapped it away. A.Y.'s fingernail scratched her on the outside of her genital area. The injury was at least a few days old because it had already scabbed over. Harding recalled that, prior to this incident, A.Y. had tried to kiss M.W., or held her down and kissed her. Harding was concerned because A.Y. had been disciplined numerous times by her parents for chasing a little boy, pinning him down, and kissing him.

The following day, Harding told Christina about the incident and asked whether she (Harding) could speak with A.Y. With Christina's permission, Harding took A.Y. back to her house to speak with her privately in one of the bedrooms. A.Y. sat on the bed and played with a hamster during their conversation. When Harding asked A.Y. about the incident at the blackberry bushes, a shy look came over A.Y.'s face and she looked down at the hamster. When Harding assured A.Y. that she was not mad at her, A.Y. admitted she touched M.W.'s "private area" with her finger. Harding asked her where she learned that things could be inserted into her vagina and A.Y. responded, "Daddy taught me." When asked what she meant by that, A.Y. stated, "This is how we show we love each other." A.Y. then told her about the "pee-pee kissing game" she played with Young when her mother was at work. A.Y. further stated that she and Young played the "game" at their former house in Texas, which she referred to as the "stinky house," at "Poppa's" house, and at her home in California; specifically, in

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[8] KRCE is the acronym for Klamath River Country Estates. (See: https://www.camp-california.com/campground/klamath-river-country-estates/ (last accessed on November 3, 2020).

[9] AG Ex. 2, at pp. 109-110. Harding stated that she could not recall the exact date. Based on subsequent testimony from other witnesses, it appears the date was August 16, 2013.

[10] M.W. referred to her vagina as her "pee-pee." AG Ex. 2, at p. 106.

Young's bedroom. During the games, Young touched the girls' "pee-pees," inserted things into their "pee-pees," and made the girls touch and kiss his penis.[11] A.Y. stated that Young told her it was not okay to tell anyone what happened and said that he might "kill Mommy" if she did. Harding stated that, while A.Y. was usually "very, very animated," she talked quietly and slowly when discussing the things that Young had done to her. When the conversation ended, A.Y. gave Harding "the hugest hug ever" and "clung on for dear life." Harding ended the conversation by telling A.Y. that it was okay to tell the truth and to tell her mother, and that she was not going to get hurt anymore.

Following her conversation with A.Y., and with Christina's permission, Harding spoke privately with H.Y. to see whether she had been experiencing the same things. H.Y. was taking a bubble bath in Harding's upstairs bathroom while Harding sat on the floor next to her. After Harding told H.Y. that it was okay to the tell the truth and that she had spoken with A.Y. about the "games" she and A.Y. had to play with Young, H.Y. splashed bubbles everywhere and avoided eye contact with Harding.[12] H.Y. then stated that she and her sister had to play the "pee-pee kissing game" with Young when Christina was not home. H.Y. stated that she did not like the game, and knew it was "yucky" and bad; however, they had to play it. She told Harding that they played the game in both the "stinky house" and at their home in Hornbrook. Harding stated that, while H.Y. was usually a "bubbly sweetheart," she became very quiet during this discussion.

Following her conversations with A.Y. and H.Y., Harding spoke with Christina. Christina sobbed and cried, and she vomited. She toggled between tearfulness and screaming, "I knew it. I knew it." Harding called law enforcement and Child Protective Services (CPS) and spoke with Siskiyou County Detective Jacques Morlet (Det. Morlet) and CPS Social Worker (SW) Angeline Brophy (Zufelt).[13]

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[11] A.Y. appeared to be referring to herself and H.Y.

[12] Harding did not tell H.Y. that A.Y. had described the "game" as the "pee-pee kissing game." Rather, she simply referred to it as the "game." AG Ex. 2, at p. 118.

[13] Between the girls' disclosures and the trial, Angeline Brophy married and changed her last name to Zufelt. Because she went by the name Zufelt throughout the criminal proceedings, the Hearing Officer has referred to her by that name throughout this Proposed Decision (PD).

After Harding spoke with law enforcement and CPS, M.W. disclosed to her that Young had touched her "pee-pee," the term she used to refer to her vagina. In about the second to third week of August 2013, she was playing with A.Y. and H.Y. at their house. When M.W. was alone with Young, he put his finger underneath her bathing suit and on her "pee-pee" one time. M.W. was scared, tried to pull away, and said, "I want my mommy." When Harding asked her to point to the area that Young had touched, M.W. put her finger just inside her vagina. Before M.W. left, Young told her she could not tell anybody what happened. Harding stated that, during the disclosure, M.W. appeared to be frightened and spoke in whispers. Harding called White and Det. Morlet, and advised them of M.W.'s disclosures.

Harding had only talked with M.W. about the incidents on a few occasions and had not spoken with Christina since Young's arraignment. Based on CPS SW Zufelt's advice and the concern of re-traumatizing M.W., she did not take her to the doctor.

2. M.W.'s Testimony[14]

M.W. was born on March 19, 2008. M.W. testified that Young touched her buttocks and vagina underneath her clothing at some point during August 2013, when she was five years old. The experience scared her, and she ran home.

3. Christina's Testimony[15]

Christina testified about several incidents that she mentioned in emails she sent to DDA Neese on June 4, 2014, and June 5, 2014. In those emails, she stated that the girls had disclosed additional details of Young's abuse over time. For example, A.Y. told her that they did not tell anyone about the "pee-pee kissing games" earlier because Young told them on five occasions that he would kill Christina if they did. On an unidentified date, Christina walked into A.Y.'s room and saw her sitting in the corner of the bedroom, with the lights off, and a jump rope around her neck. A.Y. had a "very vague, like, distant look on her face." A.Y. told Christina that "this is what [Young] would do when he would play pee-pee kissing games, he would…he would tie us up." Specifically, he would put A.Y. and

[14] AG Ex 2, at pp. 181-208, 212-222.

[15] AG Ex. 3, at pp. 269-336.

H.Y. in chairs, and tie a rope around their waists, necks, and hands. However, Christina did not recall ever seeing marks on the girls that may have been caused from being bound with rope. Young would then put carrots inside them. In addition, A.Y. and H.Y. occasionally refused to let Christina take pictures of them, stating that Young used to make them pose for pictures in multiple outfits. Finally, Christina testified that, when H.Y.'s shoulder was dislocated, H.Y. was not taken to the hospital for X-rays until she (Christina) arrived home.[16] Young had asserted that A.Y. jerked H.Y.'s arm while the girls were playing Ring Around the Rosey; however, she was suspicious of that explanation.

Christina and Young married in March of 2008, and had two children together – A.Y. and H.Y. In 2013, the family moved from Texas (the "stinky house") to Hornbrook, California, where they initially lived with Young's family. The Youngs met Harding and White and their children at the pool where Christina worked, and a friendship quickly developed. At the end of July 2013/early August 2013, the Youngs moved into a rental that Harding managed, which was next door to Harding's home. A.Y. and M.W. became best friends and played together all the time.

On August 17, 2013, A.Y. inserted her fingers inside M.W.'s vagina. After Harding told her about the incident, Christina gave Harding permission to question both A.Y. and H.Y. because the girls were very close to her. Harding took the two girls over to her house while Christina stayed outside. The girls told Harding about the "pee-pee kissing game" they played with Young. A.Y. stated that Young touched her with his hands, mouth, and carrots as a way to express his love, and that was the reason she touched M.W. H.Y. also told Harding about the "pee-pee kissing game," in which Young kissed her "pee-pee," put his penis on her face, and inserted his penis inside her vagina and buttocks. Subsequently, Christina and Harding spoke with H.Y., A.Y., and M.W. as a group.[17] Later, Christina spoke to A.Y. alone. A.Y. was visibly upset, and was shaking and crying. She admitted she had touched M.W.'s vagina because that was how Young showed he loved her, and she wanted to express her love to M.W. because M.W. was her best friend. A.Y. stated that Young had touched her

[16] Christina's testimony that H.Y.'s shoulder was dislocated differs from what she stated in her September 23, 2013, journal entry in which she noted that H.Y.'s elbow was dislocated.

[17] Harding never mentioned that she and Christina spoke with A.Y., H.Y., and M.W. as a group.

"pee-pee" and played the "pee-pee kissing game" with her.[18] During the "pee-pee kissing game," she would kiss H.Y.'s "pee-pee" and Young would kiss hers. Young also touched her "pee-pee" with his hand and mouth, and he inserted carrots inside of the girls' "pee-pees" more than one time. Neither H.Y. nor A.Y. told Christina that Young put stuffed animals or Barbie dolls in their vaginas.

Christina then spoke with H.Y., who similarly stated that, "Daddy Shawn would kiss my pee-pee and put carrots inside," and she pointed to her vagina and anus. H.Y. claimed that Young also put his penis on her face on several occasions. Like her sister, H.Y. stated that Young told her several times that, if she told anyone, he would shoot their mother. Young owned a gun, and both girls had seen him threaten Christina with it.

Subsequently, Christina told Young about the allegations while they were at their home with H.Y. A.Y. was next door playing with M.W. Harding and White were not present. Harding called the police that same day. Christina then testified on cross-examination that she confronted Young with the allegations at Harding's house. Young became very angry and called the police. After he packed his things and left, the girls disclosed his threats to kill her with a gun. Christina obtained a temporary restraining order (TRO). Since the disclosures, she had spoken about the molestations with both A.Y. and H.Y. about 30 times; however, she denied coaching them.

Prior to the disclosures, Christina and Young had fought about finances and infidelity for several days. On the date of the disclosures, they also fought about the fact that Young did not want to bring the girls to the pool that day. After the fight about Young's reluctance to bring the girls to the pool, Christina and Young walked to Harding's house where Christina, Harding, and White confronted Young with the girls' allegations.[19] Young called law enforcement and CPS.

[18] Christina stated that she and Young raised their daughters to refer to their vagina as their "pee-pee." AG Ex. 3, at pp. 287, 293.

[19] This differs from Christina's earlier testimony.

4. Christina's journal notes[20]

Christina's journal notes were not admitted into evidence during trial; however, they corroborate certain aspects of her testimony as follows:

On September 19, 2013, Christina wrote that A.Y. was withdrawn and told her that she was sad because she remembered all the "naughty things" Young had done to her and H.Y. She then spoke about the "pee-pee" games Young played with them.

On September 20, 2013, Christina wrote that H.Y. was showing signs of aggression towards other children and had bitten the neighbor boy on the arm. In addition, M.W. had told Harding and White that A.Y. and H.Y. put their fingers inside her buttocks while they were playing outside.

On September 21, 2013, Christina wrote that A.Y. would dance inappropriately and ask Christina whether she thought she (A.Y.) was sexy. When Christina asked where she had heard the term, "sexy" before, A.Y. stated that Young used to say it to her.

On September 22, 2013, Christina wrote that H.Y. continued to urinate all over her clothes and the bathroom floor, and was becoming more withdrawn, with episodes of screaming, yelling, biting, and scratching. When asked about what was upsetting her, H.Y. stated that Young would make her bend over so he could stick his tongue in her buttocks. Christina noted that she no longer allowed the girls to shower together because they would touch and kiss each other. Since Young had left, A.Y. had touched her genitals on a daily basis. A.Y. also told her to refer to Young as "Shawn," because he "was not our daddy, daddies should not play dirty games." In addition, A.Y. and H.Y. had terrible nightmares every night and frequently urinated in their shared bed.

On September 23, 2013, Christina wrote that she overheard H.Y. tell A.Y. that "bad Shawn" told her that, if she did not do "this," God would kill her. She also noted that Young was controlling, possessive, manipulative, and paranoid; and indicated that he had started carrying a loaded Glock everywhere they went. Christina also noted that, while they were living in Texas, she was called home from work one night because Young stated that H.Y. may have broken her arm while playing Ring Around the Rosie. The X-rays subsequently revealed a severely dislocated elbow.[21]

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[20] AG Ex. 7, at pp. 1061-1074. According to the file stamp on the documents, the Siskiyou County Sheriff's Office received the notes on October 3, 2013.

[21] During the 2013 trial, Christina testified that H.Y.'s shoulder was dislocated.

On September 24, 2013, Christina wrote that, when she asked H.Y. whether she missed Young, H.Y. replied, "no, he was nasty."

5. Christina's emails[22]

Christina's emails were not admitted into evidence during trial; however, they corroborate certain aspects of her testimony as follows:

- On April 11, 2014, H.Y. became upset when Christina took pictures of her at the beach. She told Christina, "I remember [Young] taking a lot of pictures of us Mommy and he would make us change clothes all the time." H.Y. also stated that Young made her and A.Y. watch "naked kid movies and grown-ups, too." Later that night, A.Y. told Christina that they watched "nasty" movies with Young. Specifically, "kids naked doing nasty things and grown ups, too. Humping and stuff." A.Y. and H.Y. told Christina that they hated "Young" because he was mean and used to hit them all the time. They also told her that he said he was going to kill her (Christina). A.Y. then stated that, "Daddy's [*sic*] shouldn't do things to their little kids."
- On April 21, 2014, Christina walked into A.Y.'s room and found A.Y. sitting on the bed with a jump rope tied around her neck. A.Y. told her that Young used to tie her up when they played games.[23]
- On May 9, 2014, A.Y. and H.Y. took turns kissing a female schoolmate on the mouth. When Christina asked them about it, both girls denied the behavior.
- On May 23, 2014, A.Y. and H.Y. both held down a schoolmate and kissed her on the mouth. Christina noted that both girls were suffering from nightmares, anxiety attacks, and flashbacks. They were soiling themselves, masturbating, behaving aggressively, bullying, and had difficulty sleeping.

[22] AG Ex. 8, at pp. 1075-1079. The emails, which were addressed to DDA Neese and Det. Morlet, indicate that they were sent on June 4, 2014, and June 6, 2014.

[23] Christina's email differs from her testimony in which she stated that A.Y. was sitting in a corner of the bedroom.

6. H.Y.[24]

H.Y. was born on December 18, 2009. She testified at Young's trial that she was scared and did not feel safe in the courtroom. Although the judge found H.Y. competent to testify, she declined to answer questions, stating that she did not want to talk about it. When asked whether she was afraid of a man who was in the courtroom, H.Y. stated that she was but did not want to say his name. Consequently, H.Y did not testify about any abuse by Young at his first trial.

7. A.Y.[25]

A.Y. was born on November 24, 2008. A.Y testified about several incidents of lewd conduct that occurred while living with Young in Siskiyou County in 2013 and in Texas during an unidentified period. When provided a drawing of an unclothed girl and asked where Young touched her, she drew circles around the vaginal and buttocks areas. She then testified that Young touched her "pee-pee" with his finger one time and touched her buttocks with his hand, both outside and underneath of her clothing. While they lived in California, Young also inserted a carrot into her vagina on two occasions. Young said he would kill her if she told anyone. A.Y. then identified the penis as a "pee-pee" and stated that Young showed her his penis when they lived in Texas. A.Y. testified that, right after Young showed her his penis, she told Christina what happened.

A.Y. recalled speaking with Det. Morlet and telling him that Young had touched her in both Texas and California, while H.Y. was present. She also told Det. Morlet about the carrots and that Young had threatened to kill her on two occasions if she told anyone.

8. Det. Morlet[26]

Det. Morlet was a detective with the Siskiyou County Sheriff's Office and had previously worked as a SW with Siskiyou County CPS where he received training on interviewing children, which included their body language and demeanor. He stated that, when talking about sensitive subjects, children tend to look away, become distracted, and go from smiling to serious. It is common for a child

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[24] AG Ex. 3, at pp. 345-357, 375-384, 392-397, 465-468.

[25] AG Ex. 3, at pp. 362-369, 399-422, 425-432.

[26] AG Ex. 4, pp. 469-483, 492-512, 515-545, 560-565.

who has been sexually abused by a family member to shut down and not talk. During his career, Det. Morlet had interviewed about 100 children. In his experience, when the child felt shame, fear, or embarrassment, they minimized things or tried to divert the subject elsewhere.

Det. Morlet became involved in the investigation on September 12, 2013. Before he spoke with A.Y. and H.Y., he talked briefly with Christina and Harding to get an overview of what happened. Christina advised him that Young owned a Glock pistol, which Det. Morlet determined that Young had sold on September 4, 2013. Det. Morlet then interviewed A.Y. alone. He determined that she understood the difference between telling the truth and a lie. She stated she knew that Det. Morlet was there because Young was a "bad man" and told him about Young's sexual abuse. When A.Y. stated that Young inserted carrots in her "pee-pee," she pointed towards her vagina. When they spoke about the abuse, A.Y.'s demeanor changed. She went from being animated and lively to serious, calm, embarrassed, and a bit withdrawn. Instead of being alert, with her head up, she put her face down and looked elsewhere for distractions. By comparison, her sister H.Y. refused to speak with Detective Morlet at all.

When M.W. subsequently disclosed Young's sexual abuse to Harding, Det. Morlet arranged for CPS SW Zufelt to conduct a forensic interview of M.W. on September 16, 2013, which he, a second SW, and Harding observed. Because of the consistencies between the three girls' accounts, Det. Morlet arranged for CPS SW Zufelt to conduct a forensic interview of H.Y. on September 24, 2013. Det. Morlet watched the interview from a live feed and was not in the room. Det. Morlet did not recommend that A.Y. and H.Y. have medical evaluations due to the length of time between the sexual abuse and their contact with police and CPS.

DDA Neese played for the jury the recording of Det. Morlet's forensic interview with A.Y. According to the transcript, which was introduced into evidence at trial, when Det. Morlet asked A.Y. if she knew why he wanted to speak with her, A.Y. responded, "because daddy's a bad, bad man." When Det. Morlet asked A.Y. what had happened to her recently that Young told her she could not tell anyone, A.Y. responded, "He, um, messed with me." She then stated that Young put a regular-sized carrot in her vagina one time while they were living at the "stinky house" in Texas to show A.Y. that he

loved her. Even though Young told her she could not tell anyone about the carrot, A.Y. told her mother.

9. CPS SW Zufelt[27]

CPS SW Zufelt was a Forensic Interview Specialist. She testified that it was very uncommon for young children to lie about sexual abuse. If they were going to be deceptive, they usually minimized or denied their abuse. It was "nearly impossible" to give a child under the age of five a false story that they could retain and then retell in first person. Because children under the age of five have not yet been exposed to sexual activities, they would have no knowledge that things could be inserted into a vagina or anus. Thus, they would not be able to identify with a story about penetration or insertion that someone told them in an attempt to get them to repeat it. While children do not lie about sexual abuse during spontaneous disclosures, they are capable of telling stories if they have been interviewed multiple times. If a child was repeatedly interviewed with leading questions, they could make up a story that is not true and tell it in the first person.

Further, CPS SW Zufelt testified that, while Sexual Abuse Response (SAR) exams were frequently done on young children, they generally did not reveal physical injuries because genitalia heals quickly. In addition, sexual abuse often occurs on the outside and does not involve penetration. Because the hymen is located "back from the vaginal opening" and not at the beginning, there could be some penetration without disruption to the hymen. In fact, fewer than 20 percent of the examinations produce physical evidence.

On August 29, 2013, CPS SW Zufelt interviewed both A.Y. and H.Y. separately. A.Y. went from being very friendly and entertaining, to very nervous and anxious, and started to engage in a lot of distractive behaviors. She stated that her father was "naughty" because he put "sticks and stuff in my pee-pee." The last time that Young put a carrot in her vagina, they were living in Hornbrook. A.Y. further stated that this occurred another time in a trailer but could not identify the location of the trailer. When asked whether she was afraid of Young, A.Y. looked CPS SW Zufelt straight in the eye and

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[27] AG Ex. 4 and 5, at pp. 566-646, 667-706.

said, “yes,” while her face drained of color. CPS SW Zufelt stated that A.Y.’s demeanor was unusual given her anxiety and continuous movement around the room prior to that point.

Immediately following her interview with A.Y., CPS SW Zufelt interviewed H.Y., who was three years old at that time. H.Y. sat on her lap during the interview because it helped to calm her down; however, this would not have influenced her statements. While H.Y. was very active and engaging at the beginning, she became very serious and “straight forward.” When asked who lived in her home, H.Y. stated, “[m]y dad touches my pee-pee with his finger,” and clarified that he put it inside her vagina. H.Y. stated that Young did it “a lot. More than five times.” H.Y. also stated that Young had inserted a carrot in her “pee-pee” and put his penis on her eye.

CPS SW Zufelt acknowledged that H.Y. also pointed to several toys while stating that Young had inserted them into her vagina; however, given H.Y.’s age, she was not concerned about the statements. Likewise, she was not concerned that H.Y. stated that her mother killed Young, because it is not uncommon for children to interject things they wish would have happened. Further, she was not surprised when H.Y. referred to Young’s penis as a Nutter Butter cracker because a Nutter Butter, which has a phallic shape, was lying on a nearby table. Finally, CPS SW Zufelt acknowledged that H.Y. indicated she had been inappropriately touched, “like, five times, like four days,” but testified that she did not find this concerning because H.Y. was only three years old at that time. When she asked H.Y. where Young had touched her, H.Y. pointed to the vagina and breasts on an anatomically correct doll. When she asked H.Y. where Young directed her to touch him, H.Y. pointed to the penis on the anatomically correct doll.

DDA Neese played for the jury the recording of CPS SW Zufelt’s interview with H.Y. According to the transcript of that interview, which was introduced into evidence at trial, when CPS SW Zufelt told H.Y. that she heard H.Y. did not live with Young anymore, H.Y. responded that he was “mean” to her and put “lots of stuff” in her “pee-pee.” He also touched her buttocks with a carrot and put carrots in her “pee-pee” while they lived in Hornbrook. When CPS SW Zufelt asked H.Y. whether Young had inserted anything else into her vagina, H.Y. pointed to various items in the room, including a stuffed bear, and said, “that, and that, and that.” When CPS SW Zufelt asked H.Y. whether she had seen Young’s “pee-pee,” H.Y. stated, he “put it inside my pee-pee” when they were living in the trailer in

Texas. She then stated that Young touched her "pee-pee" "like five times, like four days," and put his mouth on her "pee-pee." When CPS SW Zufelt asked H.Y. how many times Young had touched her "pee-pee" while they lived in Hornbrook, H.Y. stated, "five times, like three times." In addition, H.Y. stated she had touched his buttocks and his "pee-pee" with a carrot. When CPS SW Zufelt asked H.Y. what Young's "pee-pee" looked like, H.Y. described it as a "big giant cracker." CPS SW Zufelt showed H.Y. a drawing of an unclothed little girl and asked her to mark the areas where Young had touched her. H.Y. marked the breasts, and said he put his finger in her vagina and buttocks, and his penis in her "pee-pee." When CPS SW Zufelt asked H.Y. about whether anything had happened in the pool, H.Y. stated that Young put his finger inside her "pee-pee" while they were at a pool party. In addition, H.Y. stated that Young put his penis on her face and inside her mouth. Finally, H.Y. stated that her mom killed Young.[28]

On September 16, 2013, CPS SW Zufelt interviewed M.W. Because M.W. was an exceptionally shy child and refused to speak with her alone, Harding and White were present and M.W. stood between Harding's legs, facing CPS SW Zufelt, throughout the interview. Neither parent provided M.W. with any information. Rather, they simply encouraged her to tell the truth and use her words. When asked whether something had happened to her, M.W. pointed to her vagina and said, "[h]e did this." She then grabbed her vagina and lifted upwards. When asked whether Young told her not to tell anybody, M.W. nodded her head in the affirmative. When asked her how many times it happened, M.W. lifted up one finger. When CPS SW Zufelt asked whether Young had touched her anywhere else, M.W. shook her head in the negative.

DDA Neese played for the jury the recording of CPS SW Zufelt's interview with M.W. According to the transcript of the interview, which was introduced into evidence at trial, M.W. told CPS SW Zufelt that, on one occasion, Young put his finger inside her "pee-pee" while she was wearing a bathing suit. M.W. told her mother what happened.[29]

[28] AG Ex. 6, at pp. 993-1017.

[29] AG Ex. 6, at pp. 985-992.

B. Defense

1. Young[30]

On August 15, 2103, and August 17, 2013, Young and Christina fought about his lack of communication, and Young told Christina he was not sure whether he wanted to "grow old with her." This made Christina angry, and she left the home with H.Y. Young smoked a cigarette to calm down and went next door to Harding's home. The door was locked, which was unusual, and nobody responded to his knock. Shortly thereafter, Harding drove up and Christina exited the residence. Then Harding, Christina, and Young went to Harding's back patio where the two women told Young about the girls' sexual assault allegations. Young felt horror, shock, and disbelief. He collected a few things, called his father for a ride to his father's home so he could leave the vehicle for Christina to use, and left the property. Young subsequently called the sheriff's department and CPS, and advised them of the allegations.

Sometime thereafter, Young was served with a TRO. He acknowledged that both A.Y. and H.Y. had seen his gun, but denied he used it to threaten Christina. He further denied that he carried the gun on his person, and claimed that he kept it on the top shelf of the closet. Young then denied doing anything to his daughters with carrots, denied penetrating M.W. or his two daughters with his fingers, denied he directed the girls to touch him inappropriately, denied he kissed the three girls on their "private parts," denied playing the "pee-pee kissing games," and denied threatening them. Finally, Young stated that his children had lied in the past when they knew they were going to get into trouble.

[30] AG Ex. 5, at pp. 713-735, 746-748.

2. Discussion on the record outside of the jury's presence

During a break in Young's testimony, DDA Neese moved that she be allowed to raise the 2011 allegations that Young hurt H.Y.'s buttocks.[31] According to the record, the issue of whether the documents pertaining to the 2011 investigation were admissible was discussed in chambers prior to the trial and the court ruled that they could not be introduced into evidence. Nevertheless, DDA Neese renewed her motion and argued that, in light of Young's repeated testimony that he had "never" and "absolutely not" touched his children, kissed their private parts, or hurt them, he had opened the door to the prior accusations. Both Young and his defense counsel Ms. Barton were in the courtroom throughout this discussion. The court stated that, while physical findings were made, which were not described for the record, they were determined to be inconclusive because it could not be established that they were definitively caused by sexual abuse and no other reason. In addition, DDA Neese stated for the record that neither counsel had filed a Petition for Access to Juvenile Case File to obtain the Child Protective Services (CPS) records of the 2011 investigation in San Bernardino County. Thus, they did not have access to the CPS reports, and the only information available came from the medical records and police reports from that investigation, which were not introduced into evidence.[32] While the court granted some leeway for the purposes of challenging Young's credibility, the judge limited the line of questioning to the fact that H.Y. had complained that Young hurt her buttocks in 2011. In doing so, the court noted that they did not have the records from that examination or the

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[31] According to the transcripts from the second trial, defense counsel, Ms. Kayfetz obtained a copy of the 2011 CPS file prior to trial. While the court ruled in limine that the documents generated during that investigation could not be introduced into evidence, the court subsequently allowed Ms. Kayfetz to ask CPS SW Zufelt whether and when she had reviewed those documents prior to her 2013 interviews with the victims. During the discussion on the record, it was acknowledged that both A.Y. and H.Y. were "examined" in 2011 but there was no evidence they had been molested. A.Y. (then age three) was interviewed and, when asked whether her dad had inappropriately touched her, she said, "no." However, when A.Y. was asked about bad touches, spankings, and trouble with her "pee-pee," she did not know what a spanking was. CPS concluded the allegations were inconclusive due to the girls' young age and lack of corroborating physical evidence. During her arguments Ms. Kayfetz stated that Young was interviewed in 2011 as part of the investigation. (AG Ex 16-2, at p. 1939.)

[32] AG Ex. 5, at pp. 739-744. Neither the medical records nor the police reports were included in the Administrative Record provided for this 4900 proceeding, so the Hearing Officer was unable to review them.

experts to lay the foundation for such evidence, which presented an Evidence Code section 352 issue.[33]

3. Young (resumed)

Immediately following this discussion, Young resumed his testimony and denied he was ever alone with M.W. He further denied that H.Y. alleged in 2011 that he had hurt her buttocks. When asked for clarification, Young stated that he was never told about the allegations.

C. People's rebuttal

1. Christina[34]

In 2011, H.Y. told her that Young hurt her buttocks and Christina told Young about H.Y.'s allegations.

2. Det. Morlet[35]

When Det. Morlet interviewed Young on September 17, 2013, Young stated that he was aware of H.Y.'s 2011 allegations that he had hurt her buttocks.

D. Verdict and sentencing[36]

The jury found Young guilty on all charges. On August 14, 2014, the court sentenced him to 18 years plus a consecutive term of 85 years to life, less 380 day's credit (332 days' actual time and 48 days good time/work time).

IV. Appeal – Third District Court of Appeal (Court of Appeal) Case No. C077483[37]

On appeal, Young contended that the judgement must be reversed because the trial court lacked good cause to excuse one of the sitting jurors, the trial court violated his constitutional rights by excusing the juror in the absence of both himself and his counsel Ms. Barton, and that Counts 3 and 6

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[33] Evidence Code section 352 allows, in pertinent part, a court to exclude evidence, in its discretion, if the probative value is substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or misleading the jury.

[34] AG Ex. 5, at p. 749.

[35] AG Ex. 5, at pp. 750-753.

[36] AG Exs. 1 and 5, at pp. 22-26, 926-927, and 952-958.

[37] AG Ex. 9, at pp. 1081-1108.

(Pen. Code, §§ 288.7, subd. (a) and 288.5, subd. (a), respectively) must be reversed for insufficient evidence.[38]

The Court of Appeal generally agreed with Young, concluding that: 1) the trial court did not have good cause to excuse the juror; 2) by excusing the juror outside of Young's presence, and while he was represented by an attorney who was standing in for his temporarily ill trial counsel and who was told she was appearing to agree to a continuance on Young's behalf, the trial court violated Young's federal constitutional rights to counsel at a critical stage of the prosecution; and 3) these errors were not harmless beyond a reasonable doubt.[39] The appellate court further concluded that the evidence was insufficient to support Count 6 because it was not reasonable to infer that at least three months elapsed between the first incident of molestation and the last such incident, which was one of the three elements required to establish a violation of Penal Code section 288.5, subdivision (a). Notably, the appellate court did not characterize the evidence of molestations as insufficient, only the timing of those molestations. As the appellate court explained,

> Here, defendant was charged with and convicted of the continuous sexual abuse of H. "between May 1, 2013 and July 31, 2013." Accordingly, we must determine whether there is reasonable, credible, and solid evidence the first incident of sexual abuse perpetrated against H. in California happened early enough in May and the last such incident happened late enough in July such that at least 90 days elapsed between these incidents. While there is evidence the family moved from Texas to California "sometime in May," there was no evidence the move happened at the very beginning of the month. Thus, even assuming the last incident of sexual abuse happened on July 31, there is no substantial evidence the first such incident in California happened early enough in May for 90 days to have passed between that first incident and the last incident. For this reason, we must conclude there is not sufficient substantial evidence to support defendant's conviction in Count 6.

By comparison, the court found substantial evidence supported Young's conviction on Count 3 for engaging in sexual intercourse with H.Y. solely based upon H.Y.'s statement during the forensic

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[38] Young raised four other grounds for relief; however, the Court of Appeal did not address them in their opinion.

[39] The appellate court noted that "certain voir dire responses" by the replacement juror suggested "at least a potential bias" in favor of the prosecution. Given the young ages of the victims, including the statements that were not consistent or credible, the appellate court stated it could not conclude beyond a reasonable doubt that removal of the juror was harmless.

interview that Young had put his "pee-pee" inside her "pee-pee." The appellate court stated that, "the evidence was "sufficiently substantial" to support the jury's finding on Count 3." The appellate court further stated, "while there was no independent evidence of the specific act of intercourse alleged [against H.Y.], there was plenty of corroboration with respect to defendant's other acts of sexual abuse committed against the child victims in this case. In other words, the fact defendant inserted his fingers and carrots into both of his daughters' vaginas, played "pee-pee kissing games" with them, and also inserted his finger into M.'s vagina lends circumstantial support to H.'s statement he also inserted his penis into her vagina at the pool."[40] Accordingly, the Court of Appeal reversed the judgment and remanded for retrial on all but Count 6 if the People chose to refile.

V. Siskiyou County District Attorney's Information Following Appeal[41]

In accordance with the appellate court's directive, the district attorney filed an information charging Young with the following six counts:

Count 1 - sexual penetration of a child 10 years or younger (A.Y.), in violation of section 288.7, subdivision (b);

Count 2 - lewd or lascivious conduct with a child under the age of 14 years (A.Y.), in violation of section 288, subdivision (a);

Count 3 - sexual intercourse with a child 10 years of age or younger (H.Y.), in violation of section 288.7, subdivision (a);

Count 4 - sexual penetration of a child 10 years of age or younger (H.Y.), in violation of section 288.7, subdivision (b);

Count 5 - oral copulation of a child 10 years of age or younger (H.Y.), in violation of section 288.7 subdivision (b); and

Count 6 - lewd or lascivious conduct with a child under the age of 14 years (M.W.), in violation of section 288, subdivision (a).

[40] AG Ex. 6, at pp. 1105-1106.

[41] AG Ex. 16-3, at pp. 2481-2486.

VI. Investigation prior to second trial

A. CPS SW Zufelt's interview with A.Y. on August 15, 2018[42]

A.Y. was then nine years old. She described Young as a "big jerk" and "mean" because he would tie her and H.Y. to chairs, put duct tape over their mouths, and hit them all over their bodies with a spatula and his hand while their mother was at work. Before Young hit her, he would say, "this is how you should show love." He also told her that you show love to someone by putting things in their private areas. She stated that Young had touched her vagina on both the inside and outside; however, she denied she knew about the "pee-pee kissing game." When asked whether Young used a carrot, A.Y. stated that he would take a carrot and "shove it in;" however, she also stated that he did not touch her with a carrot. A.Y. then identified Young's penis as a "pee-pee" or "private," and said that he made her touch it. These things happened "a lot" in both Texas and Hornbrook. Specifically, every time her mother was at work. Young told the girls that if they told anybody about what he did, he would kill their mother. While threatening the girls, he held his knife in his hand. He also stated that, if they told anyone, "something bad" would happen and told them about a family that had been buried in the desert near their house in Texas. A.Y. stated that when Young approached her, his pants would "go poof" and disappear. Young would let them go when Christina pulled into the driveway. A.Y. stated that Young carried bluish gloves, a knife, a gun, rope, duct tape, and his computer around with him in his backpack.

In addition, A.Y. stated that Young did all the same things to H.Y. but in a different room. Although she did not see it occur, she had heard H.Y. tell Christina that Young hit her all over her body with a spatula. In addition, H.Y. told her Young had watched a video of two Black people trying to kill a little girl.

B. CPS SW Zufelt's interview of H.Y. on August 15, 2018[43]

H.Y. was then eight years old. Young hurt her in a little wooden shack near their home in Hornbrook. Every time Christina was at work, Young tied her and A.Y. to adjacent chairs, put duct tape over their mouths, and hit them all over their bodies with a spatula. He also hit her arms with a rope.

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[42] AG Ex. 10, at pp. 1110-1160.

[43] AG Ex. 11, at pp. 1162-1199.

H.Y. did not remember playing the "pee-pee kissing game" with Young, but stated that, every time Christina went to work, he inserted carrots into both her vagina and buttocks, and touched her vagina; however, she denied that he put any other parts of his body inside her or that he asked her to put her mouth on his body. H.Y. stated that Young carried a knife, a gun, gloves, and a computer in his backpack; however, he never used them. H.Y. stated she did not remember whether Young played any games with her to show love. Young threatened to kill Christina if H.Y. told anyone what he was doing with her. He never showed her the gun but held the knife. To reinforce his threats, Young told her he killed a family and buried them in the dessert.

H.Y. further stated that, on one occasion, Young watched a movie in which two Black men hurt a little girl. The men tied the little girl to a building with long, "thick wall things" and argued over who was going to kill her. H.Y. then stated that Young had previously hit her shoulder with a baseball bat and dislocated it. When H.Y. resumed talking about the molestations, she stated that Young touched her with his hands, but denied that he touched her buttocks or asked her to put her mouth on any part of his body. When asked whether Young used something else to touch her body, H.Y. stated, "No, I don't – well my mom said that it was, that he did, but I don't think he did." She then stated, "Or he did, I don't know."

In addition, H.Y. stated that Young would also tie A.Y. to a chair and hurt her by doing all the same things he had done to her. While she had initially stated that A.Y. was tied up next to her, H.Y. then asserted that Young would hurt A.Y. in a different room; however, H.Y. heard A.Y. scream. She knew what happened to A.Y. because she had a "vision," and described visions as things that either happened in the past or had not happened yet.

C. CPS SW Zufelt's interview of M.W. on September 26, 2018[44]

M.W. was then 10 years old. She described an incident when she had returned from the pool and was wearing a bathing suit. While A.Y. and H.Y. were outside picking blackberries, Young took her into the house alone and touched the outside of her genitals beneath her bathing suit. Young told M.W.

[44] AG Ex. 12, at pp. 1200-1225.

not to tell anyone about what he did. Although she was afraid he would "do something," he did not mention any particular threat. M.W. ran outside and back to her home.

M.W. then reiterated her previous account of the incident in which A.Y. scratched her genitalia while they were picking blackberries.

D. Supervising District Attorney Investigator Yves Pike's (Investigator Pike) phone interview with White on August 28, 2018[45]

About one month after the Youngs and the Harding/White families met, the Young family moved into the rental that Harding and White managed. There was an open door policy between the two families and the children would come and go freely. Christina worked at K.R.C.E. and they frequently used K.R.C.E.'s pool.

When M.W. told Harding that Young had touched her, White and Harding were unable to get specifics because M.W. was angry and they had difficulty communicating with her. After M.W.'s disclosures, White heard Christina tell Harding that A.Y. and H.Y. had experienced urinary tract infections (UTI) for years and that the doctors never knew why.

White stated that Young always carried a backpack with him everywhere he went, which White referred to as a "murder bag." Christina, Harding, and White found it after Young left the property following the disclosures, and searched the contents. The backpack contained duct tape, rope, a shovel, a gun, and an extra magazine.

The initial police report was made on August 19, 2013. A few weeks later, M.W. disclosed to Harding that Young had touched her genitals over her swimsuit, and White called the Sheriff's Department to tell Det. Morlet what had occurred. Police arrested Young on September 17, 2013. White stated that, in the five years since the previous trial, he had not discussed Young's conduct with M.W. In addition, neither he nor Harding coached M.W. about what to say. Rather, they simply told her she had to tell the truth.

[45] AG Ex. 13, at pp. 1226-1277.

E. Investigator Pike's interview of Harding on August 9, 2018[46]

Harding reiterated her prior testimony about M.W.'s, A.Y.'s, and H.Y.'s disclosures, with some additional information. Young did not work at all during the period Harding knew him and never looked for work. He also did not have a good employment record because he either lost or quit every job he had gotten. While the Youngs lived in Texas, Christina worked full-time and had about a 45-minute commute. Before the Youngs moved from Texas to Siskiyou County, Young promised Christina he would get a job and become the primary breadwinner.

The Youngs moved to a vacant home that Harding managed. The cell phone service on the property was poor and there were no landlines. The two families had an open door policy and Harding left the doors unlocked most of the time. A.Y. and H.Y. spent most of their playtime at her home. A.Y. had acted out sexually with children her own age.

Following M.W.'s disclosure that A.Y.'s fingernail had scratched her, Harding did not talk with anyone about it that night because White was at work, they had no landline telephone, and cell coverage was poor from inside the home. The following day, Harding told Christina what happened and stated that Young had "come onto her" about one week earlier. Christina returned home and retrieved Young's backpack. Young carried this backpack with him everywhere he went and rarely let it out of his sight. Christina searched the backpack and found a gun, rope, duct tape, a military shovel, trash bags, latex gloves, a Bible, an Alcoholics Anonymous (AA) book, and a notebook that contained law enforcement dispatch codes. Harding had seen the gun before because Young had shown it to her and White. Young had told Harding that he used the notebook to study statutes in preparation for a law enforcement job; however, Harding noticed that he had highlighted codes that concerned crimes against minors, such as child abuse, sexual assault, and violence. Christina panicked because Young had previously threatened to kill her and she started to realize why her daughters were having yeast and bladder infections all the time. She became so angry and tearful that she vomited. Christina told Harding that, in the past, she had called CPS to report suspected abuse and obtained a TRO against Young. CPS had investigated but ultimately determined that the girls' repeated bladder and yeast

[46] AG Ex. 14, at pp. 1279-1408.

infections were not caused by a sexual assault. Harding was aware that Christina had separated from Young for a time while they lived in Texas.

Harding then reiterated her previous testimony about A.Y.'s and H.Y.'s disclosures to her about the molestations. After Harding told Christina about A.Y. and H.Y.'s disclosures, Christina returned to her house and confronted Young when he returned home sometime later. Young got angry and asked Harding to tell Christina that she lied about the girls' allegations. Harding, White, Young, and Christina discussed the allegations, and Young left for his parents' home. After he left, Harding saw him drive by the property several times and park where he could see the property.

Harding also reiterated her previous testimony about M.W.'s disclosure that Young had molested her. Harding described M.W.'s demeanor as quiet, worried, and embarrassed. White called Det. Morlet to report what M.W. had said.

Harding denied she coached the three girls and asserted that she just told them to tell the truth. Following the 2013 trial, she did not discuss the abuse with M.W. because M.W. was having difficulties at school, and had mood swings and rages. M.W. told her she was glad they were in A.Y. and H.Y.'s lives so that their "daddy" could not hurt them anymore.

Following the first trial, Harding and M.W. had very little contact with Christina, A.Y., or H.Y. Christina had moved to San Diego with her daughters for a while, and Harding had moved to another home. They had not stayed close.

F. Investigator Pike's interview of Christina on June 25, 2018[47]

Christina and Young had a dysfunctional relationship and they argued a lot. Young was verbally abusive, controlling, obsessive-compulsive, and reserved. While they were living in Phelan, California, in San Bernardino County, they separated on two occasions for a few months. During their separations, A.Y. and H.Y. started having repeated UTIs, which appeared to occur after they visited Young. Young contended the infections were caused by bubble baths. About this time, H.Y. told the preschool staff at Head Start, "daddy owie pee-pee" and "He's touching my pee-pee. It's owie. It's owie." The preschool staff reported the allegations to CPS and the children underwent a forensic

[47] AG Ex. 15, at pp. 1409-1644.

examination. While the examiners found bruising and rectal tearing on H.Y., the evidence was not sufficient to prove a crime had been committed.[48]

Christina then asserted that, after the girls were born, Young became obsessed with pornography, including bondage, and raped her anally. He watched pornographic movies and was focused on young-looking females. When he abused A.Y. and H.Y., he showed them graphic, violent pornography.

In addition, Christina advised police that Young owned a Glock that he kept loaded and always carried. He repeatedly threatened her life throughout the relationship. Once, he backed her into the corner, waved the gun in her face, and stated he would kill her if he found her with somebody else. A.Y. and H.Y. were nearby. Christina called police and Young was jailed for 24 hours.

Young was not motivated to get a job, was inconsistent in working, and was always changing jobs. He was unemployed for about two or three years. After the girls were born, he moved the family to Texas because he asserted there were more job opportunities there and the housing was cheaper. Around the time that A.Y. was born, Young lost his job. The girls referred to the house in Texas as the "stinky house." Although Christina contended that she was the sole breadwinner during this time, she acknowledged that Young worked as a Loss Prevention Agent at Sears for an unidentified period of time. At some point, Christina began to suspect that Young was hurting the girls. On one occasion, H.Y.'s arm was dislocated; however, Young would not take her to the hospital. A.Y. and H.Y. subsequently told her that Young had put tape over their mouths to keep anyone from hearing what was going on.

One day, while they were living in Texas, Christina returned home to find Young packing up the house. He told her they were moving to California and that he had made arrangements for them to stay at his parents' home. After they moved, Christina got a job at a nearby pool. When she worked the morning shift, A.Y. and H.Y. stayed home with Young. When they arrived at the pool in the afternoon, the girls were upset and red-faced, and their appearance was disheveled. Christina had the feeling that something was not right but had no proof.

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[48] Christina's allegations that the examiners found bruising and rectal tearing has never been supported by any corroborating documentation. In addition, Investigator Pike testified at the second trial that none of the medical records he saw reflected any such injuries.

After they moved to the house next to Harding's, A.Y. had a bad UTI and started masturbating in front of Christina. The girls also started kissing each other and became violent with other children. H.Y. started self-mutilating, biting other children at school, and masturbating with toys. After the disclosures, A.Y., H.Y., and M.W. told her that Young tied them up and fondled them. H.Y. also told her that M.W. was able to escape by climbing through a window. M.W. told her mother the same thing and Harding told her about it. Harding also told her that M.W. was masturbating and kissing other girls. After M.W. escaped and told Harding what happened, Harding brought A.Y. and H.Y. to her home to speak with them. Young was home at this time. Harding then called Christina at work and told her the girls were in danger. Harding called police before Christina arrived home. Harding and Christina then confronted Young. Young became very upset, pulled out his pistol, and waved it all around.

A.Y. and H.Y. have since disclosed more information. While they lived in Texas, Young would tie them up and put tape over their mouths so the neighbors could not hear them screaming. He also put his mouth on their "pee-pees." In Hornbrook, Young would "drag" them to a nearby wooden shack, tie them up, and hit them with spatulas. During baths, he would hold them under the water. Due to the abuse, the two girls disassociated, as a way of coping, whenever they are overwhelmed or got into trouble. They also had nightmares of the abuse and would wake up screaming, "no!" or "Shawn!"

Young took his backpack everywhere. It contained duct tape, rubber gloves, rope, a gun, a Bible, and a notebook. Young represented that they were supplies for the house. Young told her he was sexually abused when he was a boy, but did not elaborate.

VII. Re-trial (2019)[49]

A. People's Case

1. Dr. Anthony Urquiza (Dr. Urquiza)[50]

Dr. Urquiza was a licensed psychologist, a professor in the Department of Pediatrics at University of California, Davis, and the director of the CARE center, which is a child abuse treatment program. He testified about the child sexual abuse accommodation syndrome (syndrome) and its five

[49] AG Exs. 16, 16-2, and 16-3, at pp. 1646-2580. The State of California was represented by Timothy Prentiss (DDA Prentiss) and Young was represented by Lael Kayfetz, Esq., (Ms. Kayfetz).

[50] AG Ex. 16, at pp. 1654-1679, 1688-1744.

prongs: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and recantation or retraction. The syndrome is "a pattern of events that tend to co-occur" and is intended to educate. It would be inappropriate to use it to determine whether a particular child was abused.

Children who have been sexually abused do not try to retain and recall information about their victimization. Rather, they try not to think about it. Based on his research, false allegations of sexual abuse occur "relatively rarely or infrequently." One coping mechanism that children who have been sexually molested use is disassociation, which means to "disconnect a part of your current functioning."

Children with a lack of familial support or who receive family pressure to retract tend to retract their allegations. About 40 percent of children who experience multiple highly suggestive questions by a forensic interviewer would change their answer and formal interview protocols have been developed that eliminate a lot of the suggestive-type questions posed to children under the age of five or six. While it is possible that someone could get a preschool-age child to change their answers after repeated and highly suggestive questioning with a particular answer in mind, it "really takes an effort" on the interviewer's part. It is not typical or common that a child would change her answer just because she was asked an improper question. Dr. Urquiza could not speak to familial influences because there was very little research in this area. Likewise, there was little research on how the concept of false memory applied to child victims of sexual abuse; however, it would be uncommon for someone to have a false memory of an event that was either unique or implausible.

2. A.Y.[51]

A.Y., then age 10, stated that Young touched her private parts with his hand. While they were in Texas, he only touched the outside of her "pee-pee." After they moved to California, he touched both the outside and inside of her "pee-pee" with his finger. Young did not touch her anywhere else. A.Y. recalled that, in 2018, she told CPS SW Zufelt that Young had tied her to a chair with rope and duct tape, and hit her with a spatula every time her mother left the home. A.Y. also told CPS SW Zufelt that H.Y. was present when the abuse occurred; however, she was bound with rope and tape in a different room. A.Y. knew about what happened to H.Y. because she had heard H.Y. tell their mother

[51] AG Ex. 16, at pp. 1753-1775, 1779-1788.

about it on an unidentified date. H.Y. also told her that Young watched scary and violent videos on his computer, but A.Y. did not see them. A.Y. was afraid Young would take her mother away. A.Y. was scared of him because her mother told her that Young had murdered and buried an entire family.

A.Y. and H.Y. did not discuss the molestations when they were alone; however, they spoke openly about it when Christina was present. During therapy, A.Y. reenacted the events. On occasion, her mother helped with the reenactments.

3. H.Y.[52]

H.Y., then age nine, testified that "someone" placed their fingers on the inside and outside of her vagina while they lived in Texas and that "bad stuff" happened after her family moved next door to M.W. She did not remember being tied up or that Young watched anything on his computer. She sometimes had "visions" of things that either had not happened yet or had happened in the past, but she could not really tell the difference between the two.

4. CPS SW Zufelt[53]

In 2013, CPS SW Zufelt conducted infield interviews with A.Y., H.Y., and M.W., followed by forensic interviews with H.Y. and M.W.[54] Det. Morlet conducted A.Y.'s forensic interview. Prior to the 2013 trial, she reviewed Det. Morlet's notes from his interview of A.Y. While he did not use the most preferred format for his questions, she did not find any of his questions to be leading and nothing she saw would have in any way tainted or invalidated her forensic interview with A.Y. in 2018. The judge concluded that, while Det. Morlet's questions during his 2013 interview of A.Y. were not "as well crafted

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[52] AG Exs. 16 and 16-2, at pp. 1789-1817.

[53] AG Ex. 16-2, at pp. 1829-1850, 1856-1935, 1953-1960, 1964-2025. Much of CPS SW Zufelt's testimony concerns what A.Y. said to Det. Morlet during her forensic examination, and what A.Y., H.Y., and M.W. said to her during their 2013 and 2018 interviews. Because those interviews were summarized above, her recitation of what the children said has not been repeated here.

[54] A.Y.'s and H.Y.'s infield interviews took place on August 29, 2013. A.Y.'s forensic interview with Det. Morlet took place on September 12, 2013. M.W.'s forensic interview took place on September 16, 2013, and H.Y.'s forensic interview took place on September 24, 2013. CPS SW Zufelt testified that an infield interview is held in the child's school, their home, or in the SW's office. Infield interviews are not recorded and law enforcement is not welcome. (AG Ex. 16-2, at pp. 1861-1862.) A forensic interview is a more formal interview which is conducted in a specific way to maximize the amount of information the interviewer can get from a child. (AG Ex. 16-2, at p. 1858.) Forensic interviews are conducted in conjunction with law enforcement and they are usually recorded. (AG Ex. 16-2, at p. 1858.)

as [they] could have been," he did not see any indication that it was unduly suggestive or which might contaminate any future interviews.[55]

During the 2013 interview with A.Y., A.Y. stated that her father was "naughty" because he put "sticks and stuff" inside her, including a carrot, and pointed to her vagina. This occurred in Texas and Hornbrook. Young told her not to tell anyone. Throughout the interview, A.Y. was really nervous and kept "darting about the room." When asked about sexual abuse, A.Y. tried to distract CPS SW Zufelt. When asked whether she was afraid of her father, A.Y. looked straight at CPS SW Zufelt and refused to answer while the color drained from her face.[56]

H.Y. stated that Young touched the inside of her "pee-pee" over five times with carrots and his hand, and pointed to her vagina. Young touched his "pee-pee" to the "inside" of her vagina and directed her to touch it, which she did. Young also put his mouth inside her vagina. On an anatomical drawing of a male, H.Y. indicated that the penis was a "pee-pee." H.Y. also placed a Nutter Butter cracker she found on the table onto a teddy bear where a penis would be located.

During the 2013 interviews, neither A.Y. nor H.Y. mentioned spatulas, being bound with ropes and duct tape, the pornography, Young's backpack, or the video of the two people murdering a little girl.

During the 2013 interview with M.W., M.W. was extremely shy and immature, and had heightened stranger anxiety. To reduce trauma, CPS SW Zufelt conducted the interview in M.W.'s home, with Harding and White present; however, their presence did not affect M.W.'s answers. M.W. stood in between her mother's legs, facing CPS SW Zufelt. When CPS SW Zufelt indicated that she understood something happened at the pool, M.W. pointed to her vagina, which she called her "pee-pee," and stated that Young reached underneath her bathing suit bottoms and put his fingers into her vagina. Young told her not to tell anyone.

CPS SW Zufelt confirmed that CPS had received two phone calls on August 19, 2013. During the first phone call, as recalled by Zufelt, Young advised them that A.Y. had pulled her swimsuit bottoms aside and inserted her fingers into "her" vagina.[57] When M.W. asked why she had done that,

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[55] AG Ex. 16-2, at pp. 1961-1962.

[56] This statement differs from CPS SW Zufelt's testimony during the first trial at which she testified that A.Y. affirmatively stated that she was afraid of Young.

[57] This statement does not match the accounts of the incident provided by all the witnesses.

A.Y. told her that this is what you do when you love someone. A.Y. later told Harding that she learned the behavior from her father. Subsequently, Christina called and stated that A.Y. had digitally penetrated M.W. She also stated that A.Y. and H.Y.'s vaginas were red and swollen, and that one of them had a UTI. She had taken them in for a medical examination and would provide CPS a copy of the report, but never did.

CPS SW Zufelt was aware there had been a prior CPS investigation into allegations that Young had sexually abused his daughters in San Bernardino County because he told her about it after she interviewed A.Y. and H.Y. in 2013.

Field interviews are just as valid as forensic interviews. While it is helpful to know information surrounding the incidents before conducting an interview, it was not essential, and the lack of information did not invalidate a forensic interview or prevent it from being fruitful. Repeated questioning is different from asking a child leading questions because leading questions give the answer to the question.[58]

5. M.W.[59]

M.W., then 10 years old, reiterated her previous statements that A.Y. tried to touch her private part; however, she initially stated she could not remember whether it was on her upper body or lower body. She subsequently stated that Young touched her vagina with his hand one time; however, she could not recall whether he touched her on the inside or outside of her vagina.

6. Harding[60]

In August 2013, M.W. told her that A.Y.'s fingernail had cut her vagina. She was concerned because A.Y. had been sexually acting out. A.Y. had laid on top of a little boy while trying to kiss him and had pinned M.W. against a wall to kiss her. With Christina's permission, Harding spoke with A.Y. who stated that she learned that things could be inserted into a vagina because, "that's the game we play with daddy, that's how he says I love you." Harding told Christina and called police. Harding, Christina, and White confronted Young with A.Y.'s allegations. Young was upset but did not "blow up,"

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[58] AG Ex. 16-2, at p. 1960, 2129-2131.

[59] AG Ex. 16-2, at pp. 2079- 2095.

[60] AG Ex. 16-2, at pp. 2160-2180.

waive a gun around, or threaten her. Harding then reiterated her previous statements about Young's backpack and its contents, and Christina's assertion that Young had threatened to kill her. She also stated that Christina told her that she and Young separated while they were in Texas, that she had initiated a CPS action, and had obtained a TRO.

Finally, Harding acknowledged she had been convicted of several crimes involving moral turpitude and was facing additional charges involving similar offenses.[61]

B. Defense

1. Renee Sexton (Sexton)[62]

Sexton is Young's older sister. In 1995, Young lived with her for a year and was the primary caretaker for her three children, aged three, five, and seven. She never saw anything that caused her concern. When she visited the Young family, he was a "very doting father, very caring, just loved being a father." A.Y. and H.Y. were not afraid of Young or hesitant to be around him.

2. Brooke Sexton (Brooke)[63]

Brooke is Young's adult niece. Young lived with her family when she was seven years old. She never observed anything that caused her concern. Young took very good care of A.Y. and H.Y., and they were not hesitant or nervous around him.

3. Christina[64]

In 2010, A.Y. was diagnosed with labial adhesions, as a result of a hormonal imbalance, which caused her labia to fuse together. Christina and Young had to apply a cream to A.Y.'s labia until the fusion released, which took "a while."

In December 2011, A.Y. and H.Y.'s daycare provider told Christina she was concerned the girls were being molested. Christina reported this to San Bernardino police and separated from Young. Both girls underwent a full forensic evaluation, which included a physical examination. There was no evidence of molestation, and she and the girls moved back in with Young. The girls then had repeated

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[61] AG Ex. 16-2, at p. 2181.

[62] AG Ex. 16-2, at pp. 2187-2194.

[63] AG Ex. 16-2, at pp. 2194-2199.

[64] AG Ex. 16-2, at pp. 2199-2250, 2278-2292.

UTIs. When H.Y. told her preschool teacher "some things" while the teacher was helping her with her potty training, CPS was contacted and they conducted an investigation.[65] Young was never arrested.

Subsequently, the family moved to Texas because it had better job opportunities, health options, and housing. Young could not keep a job and Christina was the sole provider. She continued to be concerned for her children's safety. She did not recall applying for a TRO in Texas or involving CPS, but told Harding that she did. Christina also told her parents, Harding, her therapist, and others that Young was physically violent with her.

Thereafter, they moved to Hornbrook. Christina's concerns increased because H.Y. was self-mutilating and A.Y. was aggressively masturbating. As Christina testified, sometime in August 2014, Harding called her at work and told her to come home immediately because something had happened to A.Y. and H.Y.[66] A.Y. and H.Y. were upset, red faced, scared, and disheveled. Harding told her that Young had tied up H.Y., A.Y., and M.W.; put duct tape on their mouths; and sexually molested them. M.W. had wriggled free and escaped through a window. A.Y. told her Young had put "things" inside her and made the three girls "act out on each other." When Young arrived at Harding's house, she and Harding confronted him. Contrary to her testimony at the 2013 trial and Harding's consistent statements, Christina asserted that Young responded by threatening her and pointing a gun at her somewhere between her head and her heart before returning home, packing his things, and leaving. Christina and Harding called police and CPS immediately.

Young always carried a backpack everywhere he went, which he called his emergency bag. It contained his computer, notebooks, an AA book, gloves, and rope. While Young occasionally put his gun in the backpack, he usually carried it against the small of his back, inside his waistband. When she spoke with police, she immediately told them that Young had pointed a gun at her. She also told the CPS SW about the gun, H.Y.'s self-mutilation, and A.Y.'s aggressive masturbation.

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[65] It is unclear from Christina's testimony whether there were two reports - one from the girls' daycare and one from their preschool teachers - or just one report. Based on Young's subsequent testimony that authorities conducted a welfare check during the summer of 2011 and that the girls underwent medical examinations in December of 2011, it appears that CPS received two separate reports.

[66] Christina's testimony that this occurred in 2014 was incorrect. The disclosures were made in 2013.

Young had threatened to kill her several times and bury her in the desert, and he had told H.Y. that he killed a family and buried them in the desert.

Christina acknowledged that she and Young argued shortly before the allegations came out and that he told her he was not in love with her. She was upset with him because he was not applying for jobs. She admitted telling Investigator Pike that H.Y.'s forensic examination in San Bernardino revealed rectal tearing and bruising. Finally, Christina stated she was sexually abused as a child. Her mother had not believed her, and she did not want to make the same mistakes with her children.

4. Investigator Pike[67]

Investigator Pike was a Supervising Investigator with the Siskiyou County District Attorney's Office. He was not involved in the original investigation but became involved due to Det. Morlet's unavailability.[68] He interviewed Christina in 2018.

Christina told Investigator Pike that A.Y. and H.Y.'s doctors and daycare providers in Texas and San Bernardino told her they suspected abuse; however, he did not locate any such reports from those parties. In addition, none of the records he obtained regarding the 2011 allegations documented the presence of DNA evidence, or rectal tearing and bruising.

Christina also told Investigator Pike that she had called CPS in 2013 and had taken A.Y. and H.Y. to the doctor because they had UTIs and reddened vaginas. Christina offered to provide Investigator Pike with a copy of the reports but never did. Christina also claimed to have information from Young's computer that the FBI should see; however, the FBI agent advised Investigator Pike there was nothing concerning on the computer. Christina told Investigator Pike that she had reconciled with Young, in part, to catch him if he was indeed molesting the girls.

Christina further stated that A.Y., H.Y., and M.W. had been tied up and sexually abused, and that H.Y. was self-mutilating; however, Investigator Pike had reviewed the reports of the 2013 interviews and noticed that neither Christina, nor anyone else, had mentioned anything about the girls

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[67] AG Ex. 16-2 and 16-3, at pp. 2293-2313, 2321-2324.

[68] Mr. Morlet was no longer in law enforcement at that time, having left that field several years before the 2018/2019 trial. (AG Ex. 16-2, at p. 1951.) While Ms. Kayfetz stated that Mr. Morlet was "not available," DDA Prentiss noted that the fact Mr. Morlet was no longer in law enforcement did not mean she could not call him as a witness. (AG Ex. 16-2, at p. 1951.)

being tied up until 2018. He did not conduct any follow-up investigation based on Christina's 2018 statements because she provided "quite a few different levels of new information." He did do a quick internet search but was unable to find any unsolved murder cases near where the Youngs had previously lived.

Finally, Investigator Piked stated that, in his experience, physical examinations often failed to locate physical findings in support of child abuse allegations.

5. Baljit Atwal (Dr. Atwal)[69]

Dr. Atwal was a clinical psychologist, had taught forensic psychology at the college graduate level, and performed forensic interviews. She stated that the brain's development does not reach adult volume until about age nine. Prior to age three, there is a phenomenon called childhood amnesia, which is the inability to remember things that had occurred previously. Dr. Atwal spoke about interviewer bias and suggestibility, which she stated can color the data that you get from children. Prior to a forensic interview, the interviewer should review as much documentation about the allegations as possible. This allowed for a more effective interview and minimized the number of interviews to which the child is subjected. The more interviews there are, the more suggestible it becomes, to the point of misinformation or reconstructed memory; however, there is a difference between repeated questioning and suggestive questioning. The memories that have personal significance or emotional relevance to an individual tend to be the ones that endure. Young children generally remember the gist of their experience rather than the peripheral details. This makes them more susceptible to source confusion, which can occur when the brain stores the gist of the information but not the context. Peer influence occurs when a child talks to friends or siblings who are about the same age. As a result of those interactions, the child's memory can be changed. After discussing the various ways a child's memory may become distorted, Dr. Atwal testified that a person cannot tell the difference between a child who is telling the truth and a child who is reporting the product of a suggestive questioning process because the child may truly believe that what that they are saying is true.

[69] AG Ex. 16-3, at pp. 2325-2384.

6. Young[70]

Young again testified in his defense. He reiterated his prior denials that he bound and sexually assaulted A.Y., H.Y., and M.W. He further denied beating A.Y. or H.Y., or inserting anything into their vaginas. In addition, he testified, that, during the 18 months he and Christina were separated, from about February 11, 2011, through August or September of 2012, Christina became involved with a new boyfriend, Justin. When Young learned that frequent UTIs could be a sign of "suspicious" activity, he conveyed his concerns about Justin to Christina. In late summer of 2011, the San Bernardino County Sheriff's Department conducted a welfare check of the girls when he was with them at his parents' home. The following December, he learned that Christina had the girls examined for possible molestation. Subsequently, Young and Christina reunited, and moved to Texas because he had a few employment leads. He worked full-time at Sears while they lived there. Young was surprised to hear Christina testify that she filed for a TRO in Texas because neither CPS nor law enforcement were involved with the family during the time they lived there. He acknowledged there was an incident where H.Y. hurt her elbow, but he asserted that it was injured when A.Y. held onto H.Y.'s arm while playing Ring Around the Rosy.

Subsequently, the family returned to California and moved in with his father and stepmother in Hornbrook. Christina needed surgery, which occurred on August 22, 2013, and it was more affordable in California. In addition, his parents could provide childcare.

Once in California, Christina got a job at the KRCE pool, and the Young family spent a lot of time there. They met Harding, White, and M.W. between mid to late July of 2013, and M.W and A.Y. immediately befriended each other. Harding managed property nearby and one of the residences was vacant. She suggested they move in and work on the property in lieu of rent.

Young acknowledged that he and Christina argued a lot but denied that he yelled and screamed at her or was physically violent. After an argument, he sometimes left home for a few days to process the situation. Just prior to August 17, 2013, Young and Christina had argued on and off for at least four days. Young told Christina that he did not love her, could not see himself growing old with her, and had only brought her back into his life to be closer to his children.

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[70] AG Ex, 16-3, at pp., 2384-2416.

On August 17, 2013, Young was cleaning up the property and had borrowed his father's truck to take multiple loads of debris to the dump. He took the first load very early in the morning while Christina, A.Y., and H.Y. were still asleep. When he returned and was preparing a second load, Christina and Harding confronted him. They told him that A.Y. had tried to touch M.W. because that is "how we show love." He "lost his mind" and yelled, but he did not have a gun or threaten either Harding or Christina. Young called his father and stepmother and told them to come and pick him up. He told them that Christina had again accused him of molesting the girls and that he needed to stay with them for at least 30 days while authorities investigated the allegations. When he arrived at his parents' home, he called law enforcement on their landline. The following day, he called CPS. Thereafter, he was served with a TRO that gave Christina sole legal and physical custody of the children.

C. Verdict

On March 8, 2019, the jury found Young not guilty on all counts.

VIII. CalVCB Proceedings

A. Young's Claims

In his Penal Code section 4900 claim, Young contended that he was falsely accused and wrongfully convicted. In support of his claim, he relied on the fact his conviction was reversed on appeal and that the jury at his second trial found him not guilty on all counts. He stated he suffered pecuniary injury due to his incarceration because he was a financial burden on his family and lost about $128.00 per day in potential wages.[71] Finally, Young contended that his family spent "well over" $10,000.00 to keep him "safe and hopeful," and pay for his court-ordered restitution.

B. DAG's Response

In her response, the DAG noted that Young's 4900 claim is entirely dependent upon a credibility determination. She then acknowledged that Christina, A.Y., and H.Y. had given ever-changing and progressively more damaging versions of Young's criminal conduct, which undermined the credibility of their 2018 and 2019 statements. But the DAG emphasized that M.W. and Harding have given consistent accounts of the molestations at the two trials, despite the passage of time and M.W.'s young age. In addition, A.Y. and H.Y.'s initial disclosures were consistent with Harding and M.W.'s accounts.

[71] Pecuniary injury is no longer a requirement for compensation pursuant to section 4900.

In contrast, Young's inconsistencies and false representations suggested that he lacks credibility. Accordingly, the DAG contended that Young had failed to demonstrate, by a preponderance of evidence, that he is innocent of the crimes for which he was convicted and imprisoned.

C. CalVCB Hearing

1. Young

At the hearing, Young contended that DDA Neese committed *Brady* error during the first trial when she withheld evidence of the forensic examinations that were conducted in 2011, after Christina alleged he molested A.Y. and H.Y.[72] Although his attorney had requested the document, it was never produced.[73] Young then asserted that, during the second trial, Ms. Kayfetz discovered the evidence from the forensic examination. She advised him that it "proved and concluded" that he did not molest his daughters, and that he would have been exonerated at the 2013 trial had the evidence been produced.

Second, Young took issue with the person who replaced the juror that was removed during his first trial. He contended that the replacement juror stated on his jury questionnaire that he would find the defendant guilty regardless of what the testimony showed. He then contended that the majority of the jurors believed, "if it was said, it must be true," suggesting that he was found guilty because the jury panel was biased against him.

Third, Young took issue with Det. Morlet, asserting that the officer "had it out" for him. He suggested that Det. Morlet's testimony lacked credibility, because he was allegedly investigated for an act of moral turpitude and ultimately fired from the department.[74] He then asserted that Det. Morlet's investigation was insufficient because he did not interview his (Young's) family about the allegations,

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[72] Under *Brady v. Maryland* (1963) 373 U.S. 83, prosecutors are required to disclose to the defense any materially exculpatory evidence possessed by the prosecution team. The failure to disclose such evidence may result in reversible error. According to the information in the transcripts, the 2011 allegations involved H.Y. only, although both girls were examined.

[73] Young's allegation that DDA Neese refused to provide defense counsel with a copy of records that she requested is false, as discussed *infra*.

[74] Young did not present any evidence supporting this allegation.

did not ask about Christina's mental health, and failed to follow proper interview protocols when he interviewed A.Y. and H.Y.[75]

Fourth, Young suggested that H.Y.'s statements during her 2013 interview were tainted because CPS SW Zufelt let H.Y. sit in her lap during her interview, and laughed and joked with her.

Fifth, Young denied that he molested any of the three girls and noted that the jury at the second trial had all the facts before them when they found him not guilty on all counts. Nevertheless, he was imprisoned for six years during which time he was in constant fear for his life.

Sixth, Young asserted that he worked in Texas until the time Christina quit her job when they moved to California.

Finally, Young testified that, on August 17, 2013, he got up at about 7:00 a.m. and went to the dump. About three hours later, or approximately 10:00 a.m., his life was ruined when he was confronted with a lie. He reiterated that he sustained financial loss but acknowledged that he did not bring any proof of those losses, such as receipts from his family, because he never asked his family for them and did not know what to expect during the 4900 proceedings.

2. DAG's Cross-Examination

When questioned about Det. Morlet's termination, Young acknowledged that this incident occurred after his (Young's) case was over and was not related to his case. When asked about the documentation from the 2011 forensic examinations of the children, Young contended that DDA Neese hid those records from Ms. Barton; however, he also contended that Ms. Neese advised Ms. Barton that there were no such records.[76] Subsequently, the documentation was "discovered" in 2018 when Ms. Kayfetz asked San Bernardino County for a copy of the reports from the 2011 forensic examinations and was advised that they had sent a copy in 2013. During Young's second trial, Ms. Kayfetz was allowed to introduce the records into evidence.[77] In explaining why he lied during the 2013 trial about his awareness that H.Y. had alleged he hurt her buttocks, Young asserted that his attorney

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[75] Contrary to Young's representation, Det. Morlet did not interview H.Y.

[76] Young's *Brady* claim is baseless, as explained *infra*.

[77] Young's representation that the 2011 records were introduced into evidence is incorrect. Rather, the court simply allowed Ms. Kayfetz to ask CPS SW Zufelt whether she had reviewed the 2011 reports prior to her 2013 interviews with A.Y. and H.Y and, if so, when she reviewed them.

had told him to do so.[78] Finally, Young acknowledged that he lied while he was in prison when he told the other inmates that he was convicted of murder, rather than child molestation.

3. Follow-up questions by the Hearing Officer and DAG

When asked how many days he served in custody pre-conviction, Young asserted he was incarcerated about one year. Although he could not recall the exact date, he speculated that he was arrested on September 20, 2013, and remained incarcerated until March 8, 2018.

When asked about the apparent conflict between his statement that he had possession of his parents' truck at the time of the confrontation and his statement that, while he had borrowed his parents' truck, he had to call them for a ride to their home after the confrontation, Young provided a different account of the events. When he returned from his first trip to the dump, he picked up Christina and the two girls, and returned the truck to his parents' home to exchange it for their car. When asked for clarification by the DAG, Young estimated that there had been about a two to three hour gap between the time he returned from the dump and the time the accusations were made. Young then stated that the dump opened at 8:00 a.m. and speculated that they returned the truck to his parent's home at about 10:00 a.m. to 10:30 a.m. Upon further questioning, Young stated that the allegations were made between three to six hours after they returned from his parents' home. During that time, he played with the children and did yard work and general clean up. Christina was at Harding's house throughout this time. At some point, Young noticed that he had not seen his children playing outside for about 45 minutes. He went to Harding's house and knocked on the door. Christina exited the home and accused him of molesting their daughters.

Young stated that he generally had his gun with him at all times; however, he did not have it with him on August 17, 2013. Rather, he had locked it up in the home where the children could not get to it.

When asked about the highlighted numbers in his notebook that appeared to be Penal Code sections for sex crimes, Young stated that he had written his bank balance at the top of the page in his

[78] This statement is not in the recording from the CalVCB hearing. The recorder temporarily stopped when the batteries ran out, which went unnoticed for a very brief moment. Young continued to testify during this short lapse and the Hearing Officer heard him assert that his attorney told him to lie. DAG Poe subsequently raised Young's claim during her closing remarks, which is on the recording.

notebook, and it coincidentally matched the rape code - a fact which he stated that Det. Morlet had found "fascinating." Young acknowledged that he had written a lot of "police codes" in his notebook, and asserted that he had been studying them to train for a job in either law enforcement or private security. He denied that he had highlighted any of them.

DETERMINATION OF ISSUES

Absent an express court finding of factual innocence, CalVCB may recommend compensation after a hearing only if the claimant proves, by a preponderance of the evidence, that: 1) the crime with which he was charged was either not committed at all, or, if committed, was not committed by him; and 2) he sustained an injury through his erroneous conviction and imprisonment.[79] "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it.[80] If the claimant satisfies this burden of persuasion, then the CalVCB shall recommend to the Legislature an award of compensation equal to $140 per day for every day spent in custody.[81] The AG may introduce evidence in opposition to the claim.[82]

CalVCB hearings are not governed by traditional rules of evidence.[83] Instead, CalVCB may consider the "claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant of the crime…."[84] However, none of these circumstances may be deemed sufficient evidence to warrant a recommendation for compensation "in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged."[85] CalVCB may also "consider as substantive evidence the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence

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[79] §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims Board* (2006) 152 Cal.App.4th 1164.

[80] *People v. Miller* (1916) 171 Cal. 649, 652.

[81] § 4904.

[82] § 4903, subd. (a).

[83] See Cal. Code Regs., tit. 2, § 615.1, subd. (a) ["The formal hearing provisions of the Administrative Procedure Act … do not apply"].

[84] Cal. Code Regs., tit. 2, § 641, subd. (a).

[85] Cal. Code Regs., tit. 2, § 641, subd. (a).

admitted in prior proceedings for which claimant had an opportunity to object."[86] Ultimately, all relevant evidence is admissible in a CalVCB hearing "if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs,"[87] even if a common law or statutory rule "might make its admission improper over objection in any other proceeding."[88] CalVCB "may also consider any other information that it deems relevant to the issue before it."[89]

CalVCB's broad authority to consider all relevant evidence when deciding a claimant's application for compensation is expressly limited by Penal Code section 4903. Specifically, subdivision (b) of section 4903 provides:

> "In a hearing before the board, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial…, or an application for a certificate of factual innocence…shall be binding on the Attorney General, the factfinder, and the board."

Plainly understood, section 4903 binds CalVCB to any factual findings rendered by a court when granting habeas relief, granting a motion for new trial, or granting a certificate of factual innocence even if the evidence before CalVCB overwhelmingly supports a contrary determination.[90] Significantly, this enumerated list omits any findings rendered by an appellate court on direct appeal.

Nonetheless, CalVCB may be bound by an appellate court's determinations on direct appeal under the doctrine of res judicata, which bars the parties and their privies from relitigating claims that were, or could have been, raised in a prior proceeding.[91] The related doctrine of collateral estoppel similarly precludes relitigation of the same issues and arguments that were already decided in the prior proceeding.[92] Thus, an appellate court's determination of an issue or claim between a claimant and the

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[86] Cal. Code Regs., tit. 2, § 641, subd. (b).

[87] Cal. Code Regs., tit. 2, § 641, subd. (c).

[88] Cal. Code Regs., tit. 2, § 641, subd. (d).

[89] Cal. Code Regs., tit. 2, § 641, subd. (f).

[90] See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1045 (explaining process of statutory interpretation "begin[s] with the statutory language, which is usually the most reliable indicator of legislative intent").

[91] *Noble v. Draper* (2008) 160 Cal.App.4th 1, 10-12.

[92] *Ibid*.; see also 7 Witkin, Cal. Proc. 5th, Judgement: Res Judicata, § 413 (Supp. 2008).

Attorney General is binding in a subsequent CalVCB proceeding and may not be reconsidered on the same or different grounds that were, or could have been, previously presented on appeal. Despite these binding determinations, the claimant continues to bear the burden of proof to demonstrate actual innocence by a preponderance of the evidence.

For the reasons set forth below, the Hearing Officer recommends that Young's application be denied because he has failed to prove, by a preponderance of evidence, that he is actually innocent of sexually assaulting H.Y., A.Y., and M.W.

I. No Binding Court Determination of Innocence

CalVCB recognizes that the appellate court's determinations are binding under principles of res judicata and collateral estoppel. But as explained below, those determinations do not establish Young's innocence of child sexual abuse by a preponderance of evidence.

In reversing Young's judgment on appeal, the appellate court determined that the trial court did not have good cause to excuse the juror and that, doing so in the absence of Young and his defense counsel violated Young's constitutional rights. This binding determination of constitutional error, however, has no relevance to proving Young's innocence in this administrative proceeding.

The appellate court further determined that the evidence was insufficient to support the conviction for Count 6, continuous sexual abuse of a child (H.Y.) under the age of 14 years, in violation of section 288.5, subdivision (a). Section 288.5, subdivision (a) requires three or more acts of substantial sexual conduct over a period of "not less than three months in duration." While the prosecution does not need to prove the exact dates the sexual offenses occurred, the evidence must be sufficient to demonstrate that the statutory elements have been satisfied.[93] Accordingly, the prosecution's evidence must demonstrate that: 1) there were three or more acts; and 2) that at least three of the acts occurred within a three-month period. Absent the presence of both elements, a defendant cannot be convicted of violating section 288.5, subdivision (a).

The appellate court's decision, therefore, binds CalVCB to conclude that there was insufficient evidence presented at trial to prove, beyond a reasonable doubt, that Young committed three or more separate acts of substantial sexual conduct with H.Y. within a three-month period. But this binding

[93] *People v. Mejia* (2007) 155 Cal.App. 4th 86, 97.

determination is not, at all, equivalent to an affirmative finding of actual innocence. Indeed, the appellate court's determination was entirely based upon the lack of evidence to show that at least 90 days passed between the first and third molestations of H.Y., rather than the quality of evidence showing that three molestations occurred. Moreover, the appellate court expressly found substantial evidence to support Young's separate conviction of having sexual intercourse with three-year old H.Y. Accordingly, CalVCB remains free to determine whether or not the evidence presented in this administrative proceeding satisfied Young's burden to prove he is more likely innocence, than guilty, of lewdly touching H.Y., A.Y., and M.W.[94]

II. Young has not demonstrated actual innocence by a preponderance of evidence

Young's evidence in support of his Penal Code section 4900 application largely duplicates the evidence presented at trial. He continues to deny any guilt and proclaim his innocence; however, he does not offer any new evidence to corroborate his account. After a thorough review of the entire administrative record, it is determined that Young has failed to demonstrate his innocence of the enumerated child sexual abuse offenses upon which his application is based, by a preponderance of evidence.

A resolution of Young's claim under Penal Code section 4900 necessarily turns upon a finding of credibility with respect to Young, the three minor victims, Christina, CPS SW Zufelt, and Harding. Contrary to Young's denials of culpability, Harding and M.W.'s statements from the initial disclosures and trial in 2013 through the 2018/2019 trial have remained consistent, with no significant deviation over the five-year time span. While Christina's, A.Y.'s, and H.Y.'s statements have changed so significantly that they now lack credibility, the girls' initial disclosures in 2013, as reflected in Harding's testimony, Det. Morlet's 2013 testimony, A.Y. and H.Y.'s 2013 interviews, and CPS SW Zufelt's testimony, appear credible. Notably, both A.Y. and H.Y. gave Harding, Det. Morlet, and CPS SW Zufelt the same account of what happened. In addition, their accounts of what occurred are similar to M.W.'s consistent testimony that Young touched her vagina and then warned her to stay silent.

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[94] Senate Bill 446 (effective January 1, 2022), which created a new procedure that reassigns the burden of proof for granting compensation under section 4900 when the underlying conviction is vacated, does not impact the Proposed Decision as Young's conviction was reversed on appeal and not by way of petition for writ of habeas corpus.

Significantly, the jurors at Young's first trial, who had the opportunity to hear the testimony first-hand, observe the parties' demeanor, and heard the recordings of M.W.'s, A.Y.'s, and H.Y.'s 2013 interviews, clearly found Harding, M.W., A.Y., H.Y., Det. Morlet, and CPS SW Zufelt more credible than Young when they unanimously voted to convict him on all counts. Moreover, a comparison of Young's testimony from both criminal trials, his statements to law enforcement at the time of his arrest, and his testimony at the CalVCB hearing, reflects numerous inconsistences and baseless allegations, which undermine his credibility.

A. M.W.'s statements and testimony are credible

M.W.'s disclosures, statements, and testimony have been consistent, with only minor deviations, throughout the five years of criminal proceedings against Young, all of which lends credibility to her account. In addition, the manner in which she first disclosed the molestations further supports a finding that she is credible.

First, M.W.'s statements have been consistent. She told her mother, without prompting, that Young had touched her vagina and buttocks one time, beneath her bathing suit. Shortly thereafter, she participated in an interview with CPS SW Zufelt, Det. Morlet, and another SW. When asked whether something had happened to her, M.W. immediately pointed to her vagina and stated that Young put his finger inside her "pee-pee. M.W. denied that Young touched her anywhere else and stated that it happened only one time. Young's actions scared her and she ran home. Before she left, Young told her not to tell anyone or there would be an unidentified consequence. Subsequently, M.W. testified at the 2013 trial that Young had touched her buttocks and her "pee-pee" underneath her bathing suit. During her 2018 interview with CPS SW Zufelt, M.W., then age 10, again stated that Young reached underneath her bathing suit and touched her vagina. The only difference was that she said he touched the outside of her vagina only. She then reiterated her previous statement that Young had told her not to tell anyone what happened and indicated she was afraid that he would "do something." Finally, M.W. testified at the 2018/2019 trial that Young had tried to touch her vagina with his hand; however, she could not recall whether he touched the inside or outside of her vagina.

Second, the spontaneous nature of M.W.'s disclosures about the incidents with A.Y. and Young, as well as her accompanying behavior and demeanor, fully supports a finding of credibility.

The sequence of events that led to the filing of criminal charges against Young began with a concerned parent's observation and an innocent child's revelation that had nothing to do with Young. On August 16, 2013, as Harding was changing a sleepy M.W. from her swimsuit into her pajamas, she noticed an odor emanating from M.W.'s bottom and asked the child about it. M.W. admitted that she was not wiping because she had a cut on her "pee-pee" which hurt. When Harding asked her the origin of her injury, M.W. told her that A.Y.'s fingernail had cut her skin when A.Y. had tried to put her finger inside M.W.'s vagina and M.W. slapped her hand away. M.W. revealed nothing more until September 16, 2013, approximately one month after A.Y. and H.Y. disclosed the fact that Young had molested them, when she timidly approached her mother and asked whether she could reveal something that Young told her not to. M.W. then disclosed to her mother that Young had touched her vagina and buttocks, and she put her finger just inside her vagina to demonstrate what happened. While she disclosed the molestation to Harding, M.W. appeared to be frightened, worried, and embarrassed; and spoke in whispers. During her 2013 forensic interview with CPS Zufelt, Det. Morlet, and another SW, M.W. pointed to her vagina and said, "he did this" while disclosing that Young put his finger inside her vagina. She then grabbed her vagina and lifted upwards.

Third, there is no evidence that M.W. was in any way coached prior to making her statements. Her initial disclosures about A.Y. touching her vagina as a way to show her love and that Young had also touched her (M.W.'s) vagina were completely spontaneous. Prior to her revelation that A.Y. had cut her vagina, there had been no discussions, suggestions, or accusations that Young, or anyone, had inappropriately touched one or more of the three girls during the time the Youngs lived in Hornbrook. In addition, there is no evidence that, prior to her disclosure that Young had touched her vagina, M.W. was approached and questioned in any way about whether Young or another adult had touched her. Finally, during the five-year period between the two trials, Christina had no access to M.W., and both Harding and White told Investigator Pike in 2018 that they had not discussed the molestation with M.W. in the intervening years because they did not want to prolong the trauma. Rather, they had only told her to tell the truth.

Fourth, there is no evidence that White or Harding's presence during M.W.'s 2013 interview impacted the credibility of her statements. In fact, CPS SW Zufelt testified that Harding's presence

was necessary because M.W. was an exceptionally shy child and refused to speak with CPS SW Zufelt alone. Moreover, she believed that it would have caused M.W. additional trauma to be alone with her. Throughout the interview, M.W. stood in between her mother's legs for comfort and faced away from Harding. The only comments her parents made to her were that she should use her words and tell the truth. They did not tell her what to say.

Given the spontaneous manner in which M.W. made her disclosures to Harding, her demeanor, and her accompanying actions, as well as the consistency of her statements, M.W.'s testimony is credible.

B. Harding's statements and testimony are credible

Like M.W., Harding's statements and testimony have been consistent throughout the five years of criminal proceedings against Young. With every interview and trial, her account of M.W.'s unprompted disclosure while she was changing M.W.'s clothes, and subsequent revelation of Young's inappropriate touching, has not wavered. Likewise, her statements about her conversations with A.Y. and H.Y., and their disclosures to her, has not wavered.

At the first trial, Harding testified that she learned A.Y. had scratched M.W.'s vagina after she noticed that M.W.'s genitals had an odor which suggested that she was not properly cleaning herself. When she questioned M.W. about it, M.W. told her that A.Y. had tried to touch her vagina and that she (M.W.) was cut when she slapped A.Y.'s hand away. Because Harding had observed A.Y. acting out sexually, she was concerned and wanted to discuss what had occurred with Christina; however, she did not mention M.W.'s disclosure that night. The following day, Harding spoke with Christina about the incident for the first time. Immediately afterwards, she spoke privately with A.Y. and H.Y. Although A.Y. appeared embarrassed when asked about whether she had touched M.W., she admitted that she had done so. When Harding asked A.Y. where she had learned that things could be inserted into a vagina, A.Y. responded, "Daddy taught me" and clarified that, "This is how we show we love each other." A.Y. then told Harding about the "pee-pee kissing game" that she played with Young while Christina was at work. During the game, Young would touch her vagina, "insert things" into her vagina, and make her touch and kiss his penis. In addition, A.Y. stated that Young told her not to tell anyone and threatened to kill her mother if she did.

When Harding subsequently talked to H.Y. and stated that she had already spoken with A.Y., H.Y. spontaneously told her about the "pee-pee kissing games" that she and A.Y. "had to play" with Young when Christina was at work, which she described as "yucky" and bad. Harding then clarified during her testimony at the 2013 trial that she did not mention the activity by name but merely referred to it as "the game."

Harding further testified that, soon after A.Y. and H.Y.'s disclosures, M.W. approached her and disclosed that Young had touched her "pee-pee" and buttocks underneath her clothing.[95] M.W. indicated that it had occurred on only one occasion, and demonstrated by putting her finger just inside her vagina. Before M.W. left Young's home, Young warned her she would be in trouble if she told anyone.

Five years later, during her 2018 interview with Investigator Pike, Harding again reiterated the same accounts of M.W.'s disclosures that she had been touched by A.Y. and by Young, as well as A.Y. and H.Y.'s disclosures that Young had inappropriately touched them. She also reiterated that she had been concerned to learn that A.Y. had touched M.W.'s vagina because A.Y. had been acting out sexually with other children her age. With respect to her conversations with A.Y. and H.Y., Harding added that both girls told her that touching someone else's genitals was how you expressed your love for them and that they had learned this from Young. Finally, she stated that Young had told M.W. that she would get into trouble if she told anyone what happened.

Subsequently, at the 2018/2019 trial, Harding reiterated, albeit briefly, her previous statements about the circumstances surrounding M.W.'s disclosure that A.Y. had touched her vagina and of her concern because of A.Y.'s sexual behavior with her peers. She then elaborated on A.Y.'s behavior by stating that A.Y.'s parents had found her lying on top of a little boy while trying to kiss him, and that A.Y. had pinned M.W. against a wall and tried to kiss her. Based on M.W.'s revelation, Harding then spoke with A.Y. who advised her about the "game" she and H.Y. played with Young, and stated that it was how he told them he loved them.

[95] According to the evidence, M.W. disclosed the molestation about four weeks after A.Y. and H.Y. told Harding that Young was molesting them.

Thus, while Harding added minor details to her statements over time, her representations as to the three girls' disclosures of inappropriate touches followed by threats to remain silent has remained the same, which lends credibility to her accounts of what occurred.[96]

Finally, while there is evidence that Harding had prior convictions and pending charges at the time of the 2018/2019 trial, there is no reason to believe that they undermine the credibility of her representations as to what the three girls told her. Not only does she have no reason to fabricate the allegations, the consistency of her statements over the course of Young's criminal proceedings, which match M.W.'s repeated accounts of what occurred, as well as A.Y. and H.Y.'s initial disclosures to her, Det. Morlet, and CPS SW Zufeld, support a finding that she is a credible witness.

C. A.Y.'s and H.Y's credibility

It is uncontroverted that A.Y. and H.Y.'s statements during their 2018 interview with CPS SW Zufelt and their testimony during the second trial, lack credibility. Indeed, DAG Poe has acknowledged such. However, the fact that their 2018/2019 accounts lack credibility does not necessarily undermine the credibility of their initial disclosures to Harding, Det. Morlet, and CPS SW Zufelt; or A.Y. and H.Y.'s testimony during the 2013 trial.

In 2018, A.Y. and H.Y. reported for the first time that Young had physically abused them and exposed H.Y. to a violent video. During their 2018 interviews with CPS SW Zufelt, they stated that Young had tied them up with rope to adjoining plastic chairs, put duct tape over their mouths, and beat them all over their bodies with a spatula. On one occasion, Young showed H.Y. a violent video. In addition, A.Y. and H.Y. stated that Young held a knife in his hand while threatening that he would kill their mother and that something bad would happen if they told anyone about what he had done to them. The girls also asserted that, to reenforce the seriousness of his threats, Young told them he had murdered an entire family and buried them in the desert. While A.Y. then repeated the allegations of physical abuse at the 2018/2019 trial, H.Y. testified that she did not remember being tied in a chair or watching any videos on Young's computer.

[96] During the 2018/2019 trial, neither attorney asked Harding about M.W.'s disclosure that Young sexually molested her by touching her vagina.

In addition, CPS SW Zufelt testified on cross-examination that A.Y. and H.Y.'s references to spatulas, being bound with ropes and duct tape, and being exposed to a violent video of two people murdering a little girl, were never mentioned in 2013. In fact, she stated that the first time she had heard about potential physical abuse was in 2018.

Thus, A.Y. and H.Y.'s 2018 allegations of physical abuse lack credibility.

Notwithstanding A.Y. and H.Y.'s credibility issues in 2018, there is significant reason to accept their 2013 disclosures to Harding, Det. Morlet, and CPS SW Zufelt, as credible. Not only were their statements made close in time to the crimes, but there was no opportunity for anyone to coach them prior to their 2013 disclosures to Harding and no evidence of coaching prior to their forensic interviews and A.Y.'s testimony in 2013. Harding had just learned the night before A.Y.'s and H.Y.'s disclosures to her that Young had touched them inappropriately and that A.Y. had touched M.W.'s vagina. At that point, she was unaware of what motivated A.Y.'s behavior and, while concerned, she did not suspect anything more sinister. Harding did not speak to either A.Y. or H.Y., or Christina at that time. The following day, she first advised Christina that M.W. told her that A.Y. had touched her vagina. Immediately after that conversation, she spoke with A.Y. about the incident and learned for the first time that Young had been molesting A.Y. and H.Y. Harding then spoke with H.Y. who confirmed, without prompting, what her sister had said about the "pee-pee kissing games." Thus, there was no opportunity for anyone to coach the girls prior to their initial disclosures of the molestations.

In addition, the spontaneity of A.Y. and H.Y.'s disclosures to Harding, Det. Morlet (A.Y. only), and CPS Zufelt in 2013 adds to the credibility of those early statements. Before there had been any mention of suspected sexual abuse occurring within the Young family while they lived in Hornbrook, A.Y. admitted that she touched M.W.'s private area and told Harding about the "pee-pee kissing game" that she played with Young when her mother was gone. She stated that, during the game, Young would touch her vagina, "insert things" into her vagina, and make her touch and kiss his penis. Following these incidents, Young threatened to kill A.Y.'s mother if A.Y. told anyone about what happened. When A.Y. spoke with Det. Morlet and he asked whether she knew why he was there, A.Y. immediately stated, "because daddy's a bad, bad man" because he "messed with me." She then elaborated by stating that Young inserted a carrot into her vagina to show her that he loved her. When

A.Y. underwent a forensic interview with CPS SW Zufelt about nine days later, she volunteered that Young was “naughty” because he put “sticks and stuff” into her “pee-pee,” and referred to a carrot.

Following her conversation with A.Y., Harding spoke privately with H.Y. After telling H.Y. that she had already talked with A.Y. and that A.Y. had mentioned a “game” that she and H.Y. had to play with Young, H.Y. spontaneously stated that she and her sister were forced to play the “pee-pee kissing game” with him when their mother was not home. She further stated that she knew the “game” was bad and called it “yucky.” Subsequently, CPS SW Zufelt asked H.Y. who the other people were that she lived with, H.Y. volunteered that, “my dad touches my pee-pee with his finger.”

In addition to the contents of A.Y. and H.Y.’s 2013 statements, there are the observations of the adults who spoke with them in 2013. Harding, who was the first individual to speak with A.Y., testified that, while A.Y. was usually “very, very animated,” she grew quieter and talked slower when describing what Young had done. When their conversation ended, A.Y. gave Harding a hug that Harding described as “the hugest hug ever” and stated that it was like she was “[clinging] on for dear life.” Similarly, CPS SW Zufelt stated that, during her interview with A.Y., the child went from being friendly and entertaining, to “very nervous” and anxious, at which time, she started to engage in a lot of distractive behaviors. When CPS SW Zufelt asked A.Y. whether she was afraid of Young, A.Y. locked eyes with her, the color drained from her face and she responded that she was. In addition, Det. Morlet testified that, during her forensic interview, A.Y. went from animated and lively to serious, calm, embarrassed, and a bit withdrawn. Instead of being alert, with her head up, she put her face down and looked elsewhere for distractions. As testified to by CPS SW Zufelt, Det. Morlet, and Dr. Urquiza, it is common for a child to disassociate and engage in distractive behaviors when talking about a sensitive subject, such as a child who has been sexually abused by a family member.

Likewise, Harding was the first individual to speak with H.Y. in 2013. She testified that, while H.Y. was usually a “bubbly sweetheart,” she became very quiet during the conversation. While talking about the “pee-pee kissing game,” she avoided eye contact with Harding. CPS SW Zufelt described a similar demeanor change during her 2013 interview with H.Y. When she spoke with H.Y., the little girl went from being very active and engaging, to “very serious” and “straight forward.” While H.Y. took

the stand during the 2013 trial and refused to answer most of the questions posed to her, she did admit that she was afraid of a man who was in the courtroom.

In addition to the demeanor during their disclosures, there is evidence of A.Y.'s sexualized behavior which predated her disclosures. Harding had seen A.Y. hold M.W. down and try to kiss her. She was also aware that A.Y.'s parents had disciplined her numerous times for chasing a little boy, pinning him down, and kissing him. A.Y.'s behavior, when viewed with the benefit of hindsight, further supports the credibility of her 2013 disclosures. As CPS SW Zufelt stated during the 2013 trial, children under the age of five have not yet been exposed to sexual activities and are generally unaware of such things. Thus, such behaviors by a four-year-old suggested that she was inappropriately exposed to sexual activities.

Finally, the fact that H.Y. told CPS SW Zufelt that Young had inserted various toys into her vagina, described Young's penis as having the appearance of a Nutter Butter cracker, and stated that Christina had killed Young, does not undermine the credibility of her 2013 statements. CPS SW Zufelt testified that she was not worried about these statements given H.Y.'s young age (then age three); the fact that a Nutter Butter cracker, which has a phallic shape, was lying on a nearby table; and the fact that it is common for children to interject things they wish would have happened. Moreover, Dr. Atwal testified in 2018 that young children tend to remember the gist of their experiences rather than the peripheral details. The memories that tend to endure in a child's mind are those that have personal significance or emotional relevance to the child. While there are several fanciful details in H.Y.'s 2013 statements, the fact that she volunteered the same information about the "pee-pee kissing game" with Young while Christina was gone immediately after A.Y.'s disclosure of the same information to Harding, supports a finding of credibility with respect to those aspects of her 2013 statements.

D. Christina lacks credibility

As has been acknowledged by Investigator Pike, DDA Prentiss during the 2018/2019 trial, and DAG Poe, Christina's statements have changed so significantly since her initial statements in 2013 that she lacks all credibility. Christina's 2013 testimony was, for the most part, consistent with Harding's unwavering testimony; however, her 2018 statements added numerous and increasingly disturbing details to her accounts of the molestations that neither Harding nor M.W. ever mentioned,

and A.Y. and H.Y. did not mention in 2013. Specifically, she told Investigator Pike in 2018 that all three girls disclosed that Young had tied them up before he sexually assaulted them. She alleged that M.W. told Harding about how she was tied up but managed to escape through a window, and that Harding then relayed the information to her. She further asserted that, as time went by, A.Y. and H.Y. also told her that Young placed duct tape over their mouths, hit them with spatulas, and held them under water during their baths. In contrast, neither Harding nor M.W. ever mentioned, at any time, that the girls were bound and physically abused.

As to the circumstances surrounding the disclosures of the sexual assaults, Christina's accounts have, again, been both inconsistent and in conflict with Harding's consistent accounts. In 2013, Christina testified that she was at home when Harding approached her about M.W.'s disclosure that A.Y. had cut her vagina. With her permission, Harding then spoke with A.Y. and H.Y. who disclosed that Young had molested them. Afterwards, Christina also spoke with them; following which, she confronted Young alone. She denied that either Harding or White were present. However, in 2018, she told Investigator Pike that she was at work when A.Y. and H.Y. disclosed the molestations. Harding learned of the molestations when M.W. escaped from Young through a window and ran to tell her what happened. Harding then collected A.Y. and H.Y., and brought them back to her house before calling Christina and telling her she needed to come home. Young was home when these events occurred. When Christina arrived home, she and Harding confronted Young. Young angrily waved a gun around and pointed it at her. During the 2018/2019 trial, she reiterated her statement that she and Harding confronted Young when he arrived at Harding's home. In contrast, Harding has consistently testified that Christina was home when the disclosures were made. In fact, she had spoken with Christina both before and after the disclosures. She has also consistently stated that all four adults – Christina, Young, White, and herself – were present during the confrontation. Contrary to Christina's assertions regarding the gun and threats, Harding had never mentioned this before and, in fact, testified at the 2018/2019 trial that Young did not "blow up," waive a gun around, or threaten anyone.

Likewise, Christina's accounts of the 2011 investigation have also changed. During her 2018 interview with Investigator Pike, Christina claimed that, when A.Y. and H.Y. underwent forensic

examinations in 2011, the examiners found bruising and rectal tearing on H.Y. However, she subsequently testified during the 2018/2019 trial that the examiners did not find any evidence of molestation.

With respect to Young himself, Christina has also painted an increasingly darker persona than what she had described before. While she initially testified about a dysfunctional relationship and lots of arguments, in 2018, she reported that Young was obsessed with young females and pornography involving young looking females, and asserted that he had constantly pointed out young girls that he liked. She also "recalled" an incident in which Young allegedly stroked himself when a young-looking female friend showed them her newly-pierced genitals. As with many of her other statements, she had never mentioned any of this before.

At the same time that Christina reported additional, darker details about Young, she also described increasingly concerning behavior by A.Y. and H.Y. In 2018, she told Investigator Pike that, prior to A.Y.'s and H.Y.'s disclosures, she had a growing awareness something inappropriate was going on. She asserted that, when the girls arrived at the pool with Young, they were upset, red-faced, and disheveled, and that Young told her the girls cried the entire time she was away from them. She further asserted that A.Y. and H.Y. started kissing each other and acting out in other ways, such as masturbating in front of her or with toys; self-mutilating; and biting other children in school. However, Christina did not include any of those damning details in her initial statements.

Finally, Christina admitted during the 2018/2019 trial that she had lied to Harding when she told her she had obtained a TRO against Young and contacted CPS during the time they lived in Texas.

As a result of these numerous inconsistences and contradictions, Christina lacks credibility.

E. Young lacks credibility

Although Young has repeatedly denied the allegations that he molested the three girls, he has made numerous inconsistent and false statements about the circumstances surrounding those allegations throughout his criminal and CalVCB proceedings. Consequently, Young lacks credibility.

First, Young has admitted that he lied during the 2013 trial. Thus, even though he swore to testify truthfully, he denied that he knew of H.Y.'s 2011 allegations at the time they were made when he was, in fact, aware of them.

During the 2013 trial, Young denied that H.Y. alleged in 2011 that he had hurt her buttocks. He also denied that he was ever told about the allegations. However, during that same trial, Det. Morlet testified that, when he interviewed Young on September 17, 2013, prior to the 2013 trial, Young told him that he was, in fact, aware of those allegations. Likewise, at the 2018/2019 trial, CPS SW Zufelt testified that, when she interviewed Young in 2013, he also told her about the CPS investigation in San Bernardino County in 2011. Following her testimony, Young then took the stand and testified, for the first time, that he was aware of the allegations in 2011 because authorities conducted a welfare check on A.Y. and H.Y. during the summer of 2011 when he had visitation, and he knew there was an investigation in December 2011. Significantly, Young's own attorney stated on the record that Young was actually interviewed during the 2011 investigation. Subsequently, when Young was asked at his CalVCB hearing about his inconsistent testimony surrounding the 2011 allegations, he blamed his defense counsel Ms. Barton for the fact that he perjured himself. Specifically, he contended that Ms. Barton told him to lie and deny that he had any prior knowledge of the 2011 allegations. However, a review of the record demonstrates the fallacy of his assertion.

During the 2013 trial, when Young was questioned about his knowledge of the 2011 allegations, he contended that he had no prior knowledge of those allegations. However, Young's denial came immediately after a discussion on the record, outside of the jury's presence, pertaining to DDA Neese's renewed request that she be allowed to introduce the 2011 police reports from San Bernardino County and medical records from the girls' forensic physical examinations. Young was present during this discussion and was likely aware that the issue had been raised and discussed before trial when the judge ruled, in limine, to exclude that information. In addition, both Det. Morlet and CPS SW Zufelt testified in 2013 that Young himself had apprised them of the allegations. Even more damning, defense counsel at the 2018/2019 trial stated on the record that Young was, in fact, interviewed during the 2011 investigation. Therefore, Young unhesitatingly lied on the stand, in the presence of both attorneys and the court. Further, while Young has attempted to avoid responsibility for the lie by asserting that his defense counsel Ms. Barton told him to do so, no respectable attorney would tell her client to take the stand and lie about something that had just been discussed on the

record. Indeed, this would have constituted a violation of the Rules of Professional Conduct.[97] Thus, Young has demonstrated a track record of repeatedly failing to take responsibility for his actions and placing the blame onto others, which completely undermines his assertions that he is not lying in this 4900 proceeding when he denies that he molested A.Y., H.Y., and M.W.

Second, Young testified at his CalVCB hearing that, in preparing for the 2013 trial, his defense counsel Ms. Barton requested a copy of the 2011 forensic medical evaluations conducted on A.Y. and H.Y. He then asserted that DDA Neese committed *Brady* error when she refused to produce them. While he could not remember precisely what DDA Neese gave as her reason for not producing the documentation, he contended that it was either because she claimed there were no reports of the forensic examinations or that she claimed she was unable to get them. Thus, Young alleged that his first trial attorney, Ms. Barton, was unaware the reports existed. Young then asserted that, during the 2018/2019 retrial, a copy of the report from the 2011 forensic evaluations was "discovered" in the court's records, which bore a file stamp indicating they had been received in 2013. He contended that, after his second trial counsel, Ms. Kayfetz, reviewed the documents, she told him they "proved and concluded" that A.Y. and H.Y. had not been molested. He further contended that she told him that, had those documents been introduced into evidence at the 2013 trial, they would have exonerated him.

Contrary to Young's allegations, all parties involved in the 2013 trial were fully aware of the 2011 molestation allegations involving H.Y. and had access to the reports of the forensic examinations. Not only were the allegations and evidence discussed in chambers prior to trial but, DDA Neese renewed her request to introduce that evidence following Young's testimony on direct that he had "never" and "absolutely not" inappropriately touched the three girls. Significantly, Young was present during that discussion. Further, in renewing her request that the 2011 allegations be admissible, DDA Neese made it clear for the record that neither counsel had subpoenaed the CPS reports themselves so the only relevant evidence they had were the medical records of the forensic examinations and police reports. Thus, both Young and his counsel Ms. Barton were well aware of

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[97] Cal. Rules of Professional Conduct, rule 1.2.1.

the 2011 allegations and had access to the records of the medical examinations. In addition, contrary to Young's assertion that the reports would have exonerated him during the 2013 trial, the trial transcripts reflect that the court noted that the findings from the physical examinations, which were never identified for the record, were found to be inconclusive of abuse.[98] In any event, it defies logic to assert that a forensic examination would definitely prove that a molestation did not occur, especially a molestation that occurred two years after the 2011 investigation. While an examination can result in findings that support such an allegation, the lack of findings does not prove the reverse.

Third, in recounting the events that occurred just prior to the confrontation between Christina, Harding, and himself, Young has given several different accounts. At the first trial, he testified that, on August 17, 2013, he and Christina had argued. When he told her he was not sure he wanted to "grow old with her," Christina took H.Y. and went to Harding's home. After he smoked a cigarette to calm down, he went to Harding's home, as well. Harding arrived shortly thereafter and he, Christina, and Harding went into Harding's backyard where the women confronted him about the sexual assault allegations. He then called his father for a ride to his parents' house so he could leave the car for Christina to use. In contrast, Young testified at the 2018/2019 trial that he borrowed his father's truck with the intention of taking multiple loads of debris to the dump. When he returned from his first run and was preparing his second load, Christina and Harding confronted him with the allegations. He called his father and stepmother and told them to come and pick him up. Subsequently, Young testified at his CalVCB hearing that, when he returned from one trip to the dump, he, Christina, H.Y., and A.Y. all got into the truck and drove it back to Young's father's home where they exchanged vehicles. The Young family then returned to their home in their own car. After Christina and Harding confronted him with the allegations, he called his father and asked for a ride to his house. Thus, Young's accounts of the events leading up to the confrontation about the sexual abuse allegations are inconsistent, and further undermine his credibility.

Fourth, Young testified in 2013 that he never carried his gun on his person. Rather, he asserted that he kept it on the top shelf of the closet. However, during his CalVCB hearing, he

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[98] AG Ex. 5, at pp. 740-741.

testified that he generally had his gun with him at all times. While he then claimed that he did not have the weapon on him on August 17, 2013, Christina, Harding, and White found the weapon inside his backpack, which both Harding and White have stated that Young carried with him at all times.

Fifth, Young asserted that the replacement juror at the 2011 trial stated on his jury questionnaire that he would find the defendant (Young) guilty of the charges regardless of the testimony. In fact, he asserted that most of the jury was biased against him. However, Young has failed to produce any evidence supporting his allegations. Further, his assertions about the replacement juror misrepresents the juror's responses. As the appellate court conclusively observed in its opinion, only "some" of the replacement juror's voir dire responses "suggested" at least a "potential bias" in favor of the prosecution, which is not a foregone conclusion.[99] In any event, if the juror indicated he had a predetermined belief in Young's guilt, it is simply not reasonable to think that defense counsel, the prosecutor, and the judge would all allow that juror to sit in judgment of an accused person.

Sixth, Young's assertion that the CPS records were submitted into evidence during the 2018/2019 trial is patently false. As is reflected in the transcript, the judge excluded those documents from evidence but allowed defense counsel to use the existence of those documents to ask CPS SW Zufelt two questions only - whether she had reviewed those documents prior to her interviews with the girls and, if so, when.

Seventh, while Young has repeatedly denied that he touched A.Y.'s, H.Y.'s, and M.W.'s vaginas, or threatened them to ensure their silence, Harding and M.W. have consistently testified otherwise. Given the circumstances surrounding their statements, there is no reason to disbelieve M.W.'s account, Harding's account, or Harding's account of what A.Y. and H.Y. disclosed to her before there was any opportunity for them to be coached. Indeed, A.Y and H.Y. subsequently provided those same accounts to two disinterested third parties - Det. Morlet and CPS SW Zufelt.

In addition to Young's ever-changing accounts and false statements, he has made numerous unsupported allegations which further undermine his credibility.

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[99] *People v. Young* (2017) 17 Cal.App.3d 451, 470.

First, while Young asserted that Det. Morlet failed to follow proper interview protocols when he interviewed A.Y. and H.Y., he has not presented any corroborating evidence. In fact, his representation that Det. Morlet even interviewed H.Y. is incorrect. In any event, CPS SW Zufelt, who is an expert in forensic interviewing, testified that she did not see anything improper with Det. Morlet's questions. Moreover, the trial court stated on the record that there was "nothing unduly suggestive" in Det. Morlet's manner of questioning A.Y.

Second, Young has asserted that Det. Morlet's investigation was lacking because he did not interview his (Young's) family and did not inquire into Christina's mental health; however, he provided no documentation demonstrating how those lines of inquiry would have affected law enforcement's decisions to arrest, charge, and prosecute him.

Third, Young has asserted that he sustained income loss at the rate of $128.00 per day and that his family paid some unidentified expenses on his behalf which totaled about $10,000.00; however, he has never produced the documentation to back up those assertions. Even though he claimed at his CalVCB hearing that he did not provide any evidence, such as receipts, because he did not know that he should, he has had over a year to submit them but has chosen not to do so. Because the DAG noted those deficiencies during the hearing as support for her argument that Young lacked credibility, one would expect that he would have submitted that evidence to the Board, regardless of whether pecuniary injury is a requirement for compensation. That he did not suggests that his claims were just another baseless assertion.

F. Acquittal Does Not Prove Innocence

Finally, it must be remembered that an acquittal is not sufficient to demonstrate factual innocence by a preponderance of evidence. Rather, it simply shows that the DDA failed to establish guilt beyond a reasonable doubt, which is a significantly higher burden than preponderance of the evidence. While Young has made many false representations and superfluous arguments in support of his Penal Code section 4900 claim, he has failed to produce anything concrete, outside of the reversal and acquittal.

While the second trial in 2018/2019 resulted in an acquittal, there were some significant differences in the evidence presented. First, unlike the jury at the first trial, the jury at the second trial

was presented with inconsistent accounts of A.Y.'s and H.Y.'s molestations. While Harding's account of what the girls told her on August 17, 2013, has remained consistent from the 2013 trial through the 2018/2019 trial, Christina has clearly embellished her account to include bondage, physical abuse, pornography, and violent videos. Those embellishments were then repeated by A.Y. during her testimony at the second trial. Because Christina has admitted she repeatedly discussed the molestations with both A.Y. and H.Y. during the five years between trials, and has taken part in A.Y.'s therapy, she has had numerous opportunities to plant false memories in her children's minds. That A.Y. repeated Christina's newly stated "facts" suggests that she was, in fact, coached as to what she should say during the second trial. Nevertheless, Harding and M.W.'s statements, interviews, and testimony remains and, unlike Christina, both Harding and White testified that they specifically chose to not discuss the molestation with M.W. so as to not prolong the trauma. Although Ms. Kayfetz attempted to discredit Harding and M.W.'s accounts of the allegations at the second trial, based on the close friendship between the two families, it would be a leap to assume that Harding and M.W. fabricated the cut on M.W.'s vagina, which then led to A.Y.'s and H.Y.'s spontaneous and unexpected disclosures of the molestations the following day. In addition, Harding testified during the 2013 trial that, as of that time, she had not had any contact with Christina since Young's arraignment on the charges. Although Christina admitted she lied to Harding when she claimed she had reported Young to CPS and obtained a TRO while they lived in Texas, there is simply no evidence that the two women then conspired to fabricate the allegations against Young.

Further, DDA Prentiss did not play the recordings of A.Y's., H.Y.'s, and M.W.'s 2013 interviews. Thus, the jury had one less recounting of the molestations from each of the girls to observe and evaluate in judging credibility and determining whether Young was guilty of the charged offenses. In fact, Ms. Kayfetz specifically raised this omission during her closing arguments at the second trial and asked the jurors to consider what the prosecution was trying to hide from them.[100] Also lacking at the second trial was CPS SW Zufelt's testimony about M.W.'s forensic interview from 2013 and Harding's testimony of M.W.'s disclosure of the molestation. Without that and the recording of the interview, the

[100] AG Ex. 16-3, at p. 2531.

jury heard only M.W.'s brief testimony in which she stated that Young had tried to touch her vagina but could not remember whether he touched her on the inside or the outside. Without those two pieces of evidence, M.W.'s testimony was undoubtedly afforded less weight.

On balance, the evidence fails to prove that Young is more likely innocent, than guilty, of sexually assaulting A.Y, H.Y., and M.W. That his conviction was reversed on appeal and he was acquitted at the second trial - the crux of his 4900 claim - does not equate to a finding of factual innocence. While Young has raised numerous superfluous allegations, even when considered together as a whole, they do not satisfy his burden of demonstrating that he is actually innocent by a preponderance of evidence. More significantly, that he admittedly lied during his first trial and then tried to blame his attorney for his perjury, along with his numerous additional false assertions, shows his on-going pattern of lying to avoid any responsibility for his actions. This demonstrates a complete lack of credibility. Although Christina's, A.Y.'s, and H.Y.'s statements have significantly changed to the point where their 2018 accounts also lack credibility, CPS SW Zufelt's, Harding's, and M.W.'s consistent statements remain to support the charges and convictions. Moreover, the appellate court that reviewed the 2013 conviction specifically found that the evidence was "sufficiently substantial" to support Count 3 and that there was "plenty of corroboration with respect to defendant's other acts of sexual abuse committed against the child victims in this case."

Overall, the evidence demonstrates that M.W.'s disclosures were purely spontaneous, and that her initial disclosure then led to A.Y.'s and H.Y.'s equally spontaneous allegations against Young the following day, which lend credibility to their statements. A.Y.'s and H.Y.'s disclosures, which were untainted by the more violent details they provided in 2018, reflect much the same conduct as that described by M.W. Thus, there is every reason to accept them as credible. As such, it remains at least as likely, if not more, that Young is actually guilty of the sexual assaults against A.Y., H.Y., and M.W.

CONCLUSION

Based on a thorough review of the evidence, it is determined that Young has failed to prove, by a preponderance of evidence, that he did not commit the crimes with which he was charged,

convicted, and served time for in prison. Accordingly, he is not eligible for compensation as an erroneously convicted felon.

Date: September 16, 2021

Andrea L. Konstad
Hearing Officer
California Victim Compensation Board

ITEM 7

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: **Alice Waterman** Claim No. 20-ECO-06	**Proposed Decision** **(Penal Code §§ 4900, et seq.)**

I. Introduction

On April 15, 2020, Alice Waterman (Waterman) applied to the California Victim Compensation Board (CalVCB) as an erroneously convicted felon pursuant to Penal Code section 4900. The application was based upon Waterman's convictions for two counts of arson, both of which were vacated by the California Court of Appeal for insufficient evidence. Waterman does not seek compensation for four additional counts of arson and one count of conspiracy to commit arson that were upheld by the appellate court.[1] Waterman seeks compensation for that portion of her imprisonment, which totals $67,900 for 485 days. The Attorney General objected, arguing that Waterman's evidence fails to demonstrate her innocence by a preponderance. CalVCB Senior Attorney Sara Harbarger conducted a hearing on November 6, 2020, at which both parties appeared, and Waterman testified. Throughout these proceedings, Waterman represented herself, and the Attorney General was represented by Deputy Attorney General Barton Bowers.

After considering all the evidence in the record, the application is recommended for denial because Waterman has failed to show by a preponderance of the evidence that she is more likely innocent, than guilty of her vacated convictions.

[1] While Waterman maintains her innocence of these crimes, her application only seeks compensation for 485 days served in prison for the two vacated convictions.

II. Procedural Background

Waterman and her husband, Kenneth Allen Jackson (Jackson), were arrested on June 25, 2013, and subsequently prosecuted together in Madera County Superior Court for 31 separate felony counts of arson and one felony count of conspiracy to commit arson.[2] Waterman was released from custody on June 26, 2013, and re-arrested on June 29, 2013.[3] Following a jury trial, Waterman was convicted of six felony counts of arson and one felony count of conspiracy to commit arson.[4] The trial court sentenced Waterman on August 8, 2014, to an aggregate determinate term of 10 years and eight months in state prison.[5]

Waterman appealed to the Fifth Appellate District of the California Court of Appeal. She claimed that insufficient evidence supported her convictions. While her appeal was still pending, Waterman completed her prison sentence and was released on June 9, 2018.[6] By then, she had served a total of 1,809 actual days in custody.[7] On July 17, 2018, the appellate court affirmed four of the arson convictions and one conviction for conspiracy to commit arson.[8] The court reversed just two of the arson convictions, counts 14 and 18, for insufficient evidence.[9] The reversed convictions could not be retried.[10] On October 24, 2018, the California Supreme Court denied review.[11]

On March 18, 2019, the Madera County Superior Court re-sentenced Waterman to eight years in state prison.[12] Waterman was awarded a total of 1,809 actual days of pre- and post-conviction

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[2] Pen. Code §§ 451, subd. (c) (arson), 182, subd. (a)(1) (conspiracy); AG Ex. 4 at p. 18.

[3] AG Ex. 1 at p. 9.

[4] AG Ex. 4 at p. 18.

[5] AG Ex. 2 at p. 11.

[6] Waterman's Application.

[7] AG Ex. 6 at p. 89.

[8] AG Ex. 4. at p. 18.

[9] *Ibid.*

[10] AG Ex. 4 at p. 51.

[11] AG Ex. 5 at p. 87. Jackson's convictions and appeal are not addressed in this decision.

[12] AG Ex. 6 at p. 90.

custodial credits (i.e., June 25, 2013 to June 26, 2013 and June 29, 2013 to June 9, 2018.)[13] Thus, her imprisonment exceeded her lawful sentence by 349 custodial days.[14]

On April 15, 2020, Waterman submitted an application to CalVCB seeking compensation as an erroneously convicted offender pursuant to Penal Code section 4900. Attached to the application Waterman provided a seven-page brief comprised of her date calculations and arguments in support of her compensation claim.[15] Waterman requested compensation in the amount of $67,900, representing $140 per day for the 345 days she was imprisoned beyond her sentence and the 140 days of milestone credits for a total of 485 days.[16] Because Waterman lacked a finding of factual innocence as required for automatic compensation under Penal Code sections 1485.55 and 4903 subdivision (a), a response from the Attorney General was requested.[17] The Attorney General opposed the application due to insufficient proof of innocence and the inclusion of the 140 days of post-custodial time. The Attorney General timely submitted a response letter on June 18, 2020, along with six supporting exhibits. The exhibits are as follows: (1) Probation Report (2) Amended Abstract of Judgment (3) Supplemental Report and Recommendation (4) Court of Appeal Opinion (5) Order Denying Petition for Review and (6) Minute Order Abstract. Neither party filed a pre-hearing brief. A hearing ensued on November 6, 2020, where both parties appeared, and Waterman testified. Neither party submitted any other evidence at the hearing. At the conclusion of the hearing, the hearing record closed for the submission of additional evidence.

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[13] *Id.* at p. 89.

[14] The calculation is as follows: 8 years x 365 days /2 for Penal Code 4019 credits = 1,460 custodial days for the eight-year sentence. 1,809 of actual custodial days – 1,460 of the eight-year sentence = 349 days spent incarcerated for the erroneous convictions.

[15] Waterman did not submit any evidence or exhibits with her application and brief.

[16] Waterman asserts in her application that she would have been released 140 days earlier based on her milestone credits and so it should be included in her custodial calculation. Milestone credits are provided to offenders who participate in approved rehabilitative and educational programs.

[17] CalVCB email to parties, dated April 20, 2020.

III. Factual Summary

The following facts are as summarized by the Fifth Appellate District of the California Court of Appeal. Waterman and Jackson were prosecuted together as arsonists for 31 charged fires that occurred between May 11, 2013, and June 25, 2013.[18] Two groups of fires occurred, the Cluster Fires and the Roadside Fires. Only Jackson was charged and convicted of the Roadside Fires.[19] The Cluster Fires occurred around East Revis Circle in Yosemite Lakes next to and behind Waterman's residence.[20] Whoever started these fires did so on foot because of the terrain and location.[21] The Cluster Fires stopped after Waterman and Jackson were arrested.[22] Waterman was found guilty of six of the Cluster Fires and one count of conspiracy to commit arson, and two of the counts, 14 and 18, were later overturned.[23]

A. CAL FIRE Chief Matthew Gilbert's Testimony

CAL FIRE chief Matthew Gilbert (Gilbert) testified that the Cluster Fires generally occurred near Waterman's residence, away from the road, in a cluster pattern.[24] Gilbert stated the fires could not have been started inside or beside a vehicle.[25] He believed the fires were all started hot, without an incendiary device.[26] Gilbert opined that, based on the terrain elevation, these fires posed minimal danger to Waterman's residence.

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[18] AG Ex. 4 at p. 18. Jackson's convictions are not at issue in this application.

[19] AG Ex. 4 at p. 18. There will be no further mention of the Roadside Fires because only Jackson was charged and convicted of those crimes.

[20] AG Ex. 4 at p. 18.

[21] *Ibid.*

[22] *Id.* at p. 32.

[23] *Id.* at p. 18.

[24] AG Ex. 4 at p. 27.

[25] *Ibid.*

[26] *Ibid.*

B. Cluster Fire May 18, 2013 (Count 4)

The fire on May 18, 2013, occurred on Revis Road on private property belonging to Kevin Olsen.[27] Waterman's residence was about 100 feet away from the fire.[28] Fire personnel were dispatched at approximately 7:30 p.m.[29] Arrows and rocks with strike marks were found in this fire's origin area.[30] The rock strikes could have caused a spark, which could have started a fire.[31] CAL FIRE captain Tim McCann (McCann) investigated the fire and following a cause exclusion analysis determined he could not rule out arson or human activity.[32] The jury found Waterman and Jackson not guilty of this fire.

C. Cluster Fires on May 22, 2013 (Counts 5 and 6)

These two fires occurred on May 22, 2013, approximately 100 feet from Waterman's residence, and were started about 10 to 15 feet apart.[33] The fires were reported at about 8:30 p.m.[34] No ignition source was located but a weathered lighter was found approximately 600 to 700 yards away.[35] Responders saw Jackson holding a garden hose about 50 feet away from the flames.[36] Jackson stated he planned to extinguish the flames if they came closer to his residence.[37]

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[27] AG Ex. 4 at p. 27.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid*.
[33] AG Ex. 4 at p. 27.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*

CAL FIRE received reports that children were heard in the area shortly before the fires started.[38] Children were known to frequent this area.[39] Additionally, about 90 minutes prior to the start of these fires, a juvenile started a fire with a lighter in a backyard about half a mile away.[40]

At trial, CAL FIRE fire prevention specialist Darrin McCully (McCully) opined these fires had been intentionally set.[41] He determined the fires were arson after eliminating other potential causes. On cross examination, McCully acknowledged a juvenile started a fire with a lighter at around the same time, but stated there was no evidence the juvenile was responsible for these two fires.[42]

At trial, CAL FIRE battalion chief Bernie Quinn (Quinn) opined a juvenile did not set either of these fires because the arsonist would have raised suspicion because they had to walk between or within people's yards and there were two dogs that aggressively barked in this area.[43]

Waterman testified she was in Fresno playing soccer in an 8:15 p.m. match when the fires occurred.[44] She stated she left her house no later than 6:15 p.m. and several soccer teammates confirmed she attended the soccer game on the night of the fires.[45]

The jury found Jackson guilty for both counts but found Waterman not guilty in both counts.

D. Cluster Fire on June 9, 2013 (Count 14)

The fire on June 9, 2013, occurred in very close proximity to the Cluster Fires that occurred in counts five and six.[46] Fire personnel responded at about 6:50 p.m. and investigators did not find anything significant.[47]

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[38] AG Ex. 4 at p. 27.

[39] *Ibid.*

[40] *Ibid.*

[41] AG Ex. 4 at p. 27.

[42] *Ibid.*

[43] AG Ex. 4 at p. 27-28.

[44] AG Ex. 4 at p. 28.

[45] *Ibid.*

[46] AG Ex. 4 at p. 28.

[47] *Ibid.*

At trial, McCann opined that arson caused this fire after he ruled out all other possible causes.[48] He stated the other fires in this area played a role in determining arson.[49] The day after this fire, McCann spoke to Waterman at her residence.[50] He noticed shrubbery next to her front walkway, which appeared burnt.[51] Waterman told him she and Jackson had been gone that night, noticed the shrubbery when they returned home, and did not report it.[52] McCann did not examine the cause of this apparent shrubbery fire.[53]

At trial, Waterman disputed that the shrubbery had been burned and claimed it just had blank spots.[54] Waterman believed she had been home when the fire occurred either making or eating dinner.[55] The jury found both Jackson and Waterman guilty of this fire.[56]

E. Cluster Fires on June 10, 2013 (Counts 15 and 16)

On June 10, 2013, two fires occurred 50 feet apart on Revis Circle East near Waterman's residence.[57] The fire in Count 15 was reported at 8:38 p.m., responders arrived, and found the second fire, Count 16, also burning.[58]

Shortly after the fires were suppressed, Waterman told fire personnel that she heard either a bicycle and/or vehicle, went outside to investigate, observed smoke coming from grass about 25 feet from her neighbor's driveway, and the smoke turned into active flames.[59] Bystanders indicated both a teenager on a bicycle and a speeding white pickup had both been observed in the area but fire

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[48] AG Ex. 4 at p. 28.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] AG Ex. 4 at p. 28.
[55] *Ibid.*
[56] *Ibid.*
[57] AG Ex. 4 at p. 28.
[58] *Ibid.*
[59] AG Ex. 4 at p. 28.

personnel did not follow up on this information.[60] At first, the fire was the size of a roll of duct tape and Waterman noticed a chemical odor.[61] She tried to stomp out the fire but it quickly expanded.[62] She stated the vehicle left the area at a high rate of speed.[63]

On the evening of the fires, Waterman gave an interview with a television reporter.[64] She stated she happened to walk up, spotted the fire starting, and called 9-1-1.[65] At trial, the reporter stated Waterman initiated the interview.[66]

At trial, fire captain Joseph Felix (Felix) opined the larger fire, count 15, started first.[67]

At trial, CAL FIRE battalion chief Mark Pimentel (Pimentel) explained the fire in count 15 was much larger and occurred behind Waterman's residence.[68] The fire in count 16 occurred down the hill closer to the driveway that extended past Waterman's residence.[69] He opined the fires started separately.[70] A cause exclusion analysis was performed which ruled out everything but arson.[71]

At trial, Waterman stated she and Jackson were walking outside as they regularly did because of the past fires.[72] Near her neighbor's driveway, she smelled something funny and a fire suddenly started.[73] She ran to her house and called 9-1-1.[74] She saw the second fire start when she hung up

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[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] AG Ex. 4 at p. 28.
[65] *Ibid.*
[66] *Ibid.*
[67] AG Ex. 4 at p. 28.
[68] AG Ex. 4 at p. 28.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] AG Ex. 4 at p. 28.
[73] *Ibid.*
[74] *Ibid.*

with 9-1-1.[75] She agreed she saw one of the fires when it was the size of a baseball.[76] She denied seeking out the television interview and stated the reporter approached her.[77] She did not recall hearing a bicycle before the fires.[78]

At trial, McCann noted that when a person sees a fire beginning, as Waterman reported, that person is usually at the fire's ignition.[79] McCann told the jury he did not believe Waterman's explanation of events.[80]

The jury found both Jackson and Waterman guilty of both fires charged in counts 15 and 16.[81]

F. Cluster Fires on June 12, 2013 (Counts 18 and 19)

Both fires occurred on June 12, 2013.[82] The fire in count 18 occurred less than a two-minute walk to Waterman's residence and was reported at 4:38 p.m.[83] The fire charged in count 19 was reported at 9:30 p.m. and occurred approximately 200 yards away from the first fire.[84] Using cause exclusion analysis, Pimentel determined arson caused both fires.[85]

Waterman's vehicle was seen near her residence about 29 minutes prior to the report of the first fire.[86] Waterman told an investigator that a white SUV was in their area just before the first fire occurred.[87] A witness also told the same investigator that a white Chevy truck left the area at an

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[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] AG Ex. 4 at p. 29.
[80] *Ibid.*
[81] AG Ex. 4 at p. 29.
[82] AG Ex. 4 at p. 29.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] AG Ex. 4 at p. 29.
[87] *Ibid.*

accelerated speed.[88] A local camera showed a white Ford SUV enter the street at about 4:15 p.m. and leave a minute later.[89]

At trial, Waterman testified she left for a soccer game in Fresno between 5:30 and 5:45 p.m. while fire personnel battled the first fire.[90] She returned home at about 10:45 p.m. and Jackson was asleep in bed. Several soccer teammates confirmed she attended the 8:15 p.m. soccer game on the night of the fire.[91]

At trial, Jackson's father testified that he and Jackson were in Waterman's pool when the first fire started.[92] He saw Waterman several times before the fire started and she was never near its origin site.[93] Waterman was preparing to leave and worried the fire responders might block the driveway.[94]

The jury found Waterman guilty of Count 18 and Jackson not guilty.[95] The jury also found Jackson guilty of count 19 and Waterman not guilty.[96]

G. Cluster Fire on June 14, 2013 (Count 20)

The fire on June 14, 2013, occurred near Waterman's residence, fire personnel were dispatched at approximately 7:30 p.m., and CAL FIRE fire captain specialist William Cacho (Cacho) determined arson caused the fire.[97]

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[88] *Ibid.*

[89] *Ibid.*

[90] AG Ex. 4 at p. 29.

[91] *Ibid.*

[92] AG Ex. 4 at p. 29.

[93] *Ibid.*

[94] *Ibid.*

[95] AG Ex. 4 at p. 29.

[96] *Ibid.*

[97] AG Ex. 4 at p. 29.

An eyewitness, CAL FIRE fire captain specialist David LaClair (LaClair), identified Waterman near the origin of the fire.[98] Specifically, LaClair's initial descriptions of the suspect seen at the origin of the fire included the person was white, unknown gender, had black hair, walked with a waddle, weighed about 180 pounds, and wore blue shorts, a white shirt, and black sunglasses.[99] LaClair went down a slope to the fire. A second person, later identified as Waterman, came behind him, yelled about the fire, and asked who he was and what he was doing at the fire.[100] The second person, Waterman, wore brown clothing, and appeared smaller in size than the initial suspect he had seen.[101] LaClair did not initially believe that the suspect at the origin and Waterman were the same person.[102] Two days later, LaClair observed Waterman near her residence wearing sunglasses, a blue shirt, and blue shorts.[103] She was walking in the area beating tall grass with a stick.[104] Over time, LaClair determined the suspect at the origin of the fire was also Waterman because her clothing two days later, her posturing, her walk, and her hair color matched.[105] He estimated Waterman weighed between 110 and 120 pounds.[106] He testified that, even though he did not initially believe the suspect and Waterman were the same person, he was certain that Waterman was the suspect he observed.[107]

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[98] AG Ex. 4 at p. 29.

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*

At trial, Waterman denied starting the fire and being at the origin site.[108] Waterman did say she encountered LaClair and chased him away because she thought he may have set the fires.[109] Waterman stated she may have weighed 140 pounds at the time of the encounter.[110]

At trial, Cacho stated Waterman told him she asked LaClair if he was conducting surveillance in the area for fires.[111] Cacho stated Waterman's question was unusual.[112]

The jury found Jackson not guilty and Waterman guilty of this fire.[113]

The appellate court noted some credibility concerns with LaClair's testimony but found the testimony was not inherently improbable.[114] Further, the appellate court reasoned that the jury found LaClair's testimony credible and so based on his testimony and the other circumstances of this fire there was substantial evidence to support the jury's conviction.[115]

H. Cluster Fire on June 25, 2013 (Count 31)

On June 21, 2013, prior to this fire, CAL FIRE made a lot of noise about clearing out the area as a ruse to put Waterman at ease.[116]

On June 25, 2013, the final Cluster Fire occurred behind Waterman's residence and was seen at about 6:40 p.m.[117] Gilbert eliminated all other causes and determined the case was arson.[118] Officers observed a smoke column rise from behind Waterman's residence and Waterman walk slowly up the driveway away from her residence.[119] When the emergency vehicles approached the

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[108] AG Ex. 4 at p. 30.

[109] *Ibid.*

[110] *Ibid.*

[111] AG Ex. 4 at p. 30.

[112] *Ibid.*

[113] AG Ex. 4 at p. 30.

[114] AG Ex. 4 at 50.

[115] AG Ex. 4 at p. 29 and 50.

[116] AG Ex. 4 at p. 30.

[117] AG Ex. 4 at p. 30.

[118] *Ibid.*

[119] *Ibid.*

area, Waterman threw her hands in the air, ran towards her residence, yelled fire, and expressed surprise that an arsonist started another fire.[120]

Firefighters observed Jackson standing near his residence and near the fire holding a hose with no water.[121] The firefighter believed Jackson was faking efforts to suppress the fire.[122] At this point, officers placed Jackson under arrest.[123]

At trial, Waterman claimed she gave Jackson the hose after she turned it on full blast.[124] She then turned the water down.[125] She said the hose had a fireman's nozzle that allowed the operator to adjust the stream.[126] After she gave him the hose, she ran towards the fire and then towards their driveway.[127] She wanted to clear some tree limbs so firefighters could reach the fire.[128]

The jury convicted both Jackson and Waterman for this fire.[129]

I. Waterman's statements to LaClair

On June 25, 2013, officers detained Waterman and interviewed her.[130] Waterman repeatedly denied starting any fires.[131] She denied being the person LaClair saw before the fire on June 14, 2013 (i.e., count 20).[132] She stated she did not smoke.[133] She claimed she did not know how to start

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[120] *Ibid.*

[121] AG Ex. 4 at p. 31.

[122] *Ibid.*

[123] *Ibid.*

[124] AG Ex. 4 at p. 31.

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.*

[128] *Ibid.*

[129] AG Ex. 4 at p. 31.

[130] AG Ex. 4 at p. 31.

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid*.

a fire except in a fireplace using paper, kindling, and a "clicky."[134] Waterman stated she had a distinctive walk and is bow legged.[135] She admitted she followed LaClair.[136] At one point, she stated she was possibly at the fire site on June 14, 2013, but could not keep track because she was in the area many times.[137]

At trial, Waterman clarified these statements by stating she patrolled the area in general before this fire and never intended to suggest she was at this fire right before it started.[138] She admitted hitting the ground with a stick to flush people out.[139]

J. Search of Waterman's Vehicle

Officers searched Waterman's vehicle after her arrest and located a new magnesium strike block and a box of matches missing 65 out of the 250 matches.[140]

K. Expert Testimony

Steven Carman (Carman), an owner of a fire and explosion investigation company, testified on behalf of Waterman and Jackson.[141] Carman reviewed all the CAL FIRE reports, an analysis of vehicle traffic, and transcripts from the preliminary hearing.[142] At trial, Carman raised concerns regarding using the exclusion method to determine a fire's cause.[143] He stated this was not a reliable indicator of arson and asserted the hypothesis cannot be tested if no evidence supported it.[144] Further, Carman stated CAL FIRE failed to pursue multiple leads and the investigations were

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[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] AG Ex. 4 at p. 31.
[139] *Ibid.*
[140] AG Ex. 4 at p. 32.
[141] AG Ex. 4 at p. 32.
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*

inadequate.[145] Carman believed the geospatial and temporal patterns were not sufficient grounds for CAL FIRE to determine arson.[146] Carman stated an investigator could infer arson from the existence of prior fires with undetermined causes or suspected arsons if these fires were very close together in space and time, i.e. a few feet and a few minutes.[147] Carman stated the destruction of a fire's origin area by firefighting activities would weaken the investigator's ability to find or exclude possible causes because small items of evidence could be lost.[148] Carman alleged the deficiencies in the investigation showed investigators were subject to confirmation or expectation bias.[149] Carman said overall, some of the investigations were inadequate.[150]

L. Carl Jackson's Trial Testimony

At trial, Carl Jackson, Jackson's father, testified he often spent time at Waterman's residence and people were always walking through that area.[151] On numerous occasions over the years, he had seen as many as four or five kids at a time in the nature area behind Waterman's residence.[152]

M. Waterman's Trial Testimony

At trial, Waterman testified she did not know why the fires occurred so close to her residence and denied starting them.[153] Additionally, she denied having an agreement with Jackson to start the fires.[154] She denied ever seeing Jackson build incendiary devices and had no indication he was possibly starting fires.[155]

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[145] *Ibid.*

[146] *Id.* at p. 32-33.

[147] *Id.* at p. 33.

[148] *Ibid.*

[149] *Ibid.*

[150] *Ibid.*

[151] AG Ex. 4 at p. 33.

[152] *Ibid.*

[153] AG Ex. 4 at p. 33.

[154] *Ibid.*

[155] *Ibid.*

N. Appellate Court Findings

The appellate court found the totality of the circumstantial evidence overwhelmingly suggests that Jackson and/or Waterman were responsible for the Cluster fires.[156] Specifically, the court stated the fires around Waterman and Jackson's residence were suspicious and stopped when both were arrested.[157] Waterman, Jackson, and very few other people could access the area where the fires occurred without alerting nearby dogs or neighbors.[158] Waterman and Jackson had numerous incendiary tools.[159] Despite not being a smoker and claiming she could only start a fire in a fireplace, Waterman possessed numerous matches and a magnesium strike block in her vehicle.[160] The court further recognized the doctrine of chances, which "tells us it is extremely unlikely that, through either bad luck or coincidence, an innocent person would be associated with so many arson fires occurring so often in so many different areas."[161]

Ultimately, as the court observed, "The totality of the circumstantial evidence overwhelmingly suggests that Jackson and/or Waterman were responsible for the Cluster Fires."[162] But as the court recognized, "This logical inference, however, is not substantial evidence that either Jackson and/or Waterman started a particular Cluster Fire."[163] The court stated other people lived in the area and other people had access to the area.[164] Consequently, "more evidence is necessary to link appellants to these suspicious fires beyond the general overwhelming inference of guilt."[165] Applying this standard, the court found constitutionally sufficient evidence to support Waterman's convictions

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[156] AG Ex. 4 at p. 48.
[157] *Ibid.*
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] AG Ex. 4 at p. 47.
[162] AG Ex. 4 at p. 48.
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.*

for the Cluster Fires' four acts of arson in counts 15, 16, 20, and 31, as well as Waterman's conviction for conspiracy to commit arson in count 32. As the court explained, the supporting evidence for all five of these convictions "was reasonable, credible, and of solid value."[166] By comparison, the court reversed Waterman's convictions in counts 14 and 18 due to insufficient evidence to permit the jury to find guilt beyond a reasonable doubt.[167]

Regarding count 14, the appellate court stated nothing in the record established Waterman had any involvement with this fire.[168] Other than the strong inference that Waterman must have been involved in the Cluster Fires, nothing substantially links her as an arsonist to this conviction.[169] Insufficient evidence supported the conviction for count 14.[170] Notably, the court did not find Waterman was innocent, only that the evidence was constitutionally insufficient to prove her guilt beyond a reasonable doubt.[171]

Concerning count 18, the appellate court stated although Waterman was home at the time of the fire, nothing else suggested she had any involvement in starting the fire.[172] Other than the strong inference that Waterman must have been involved in the Cluster Fires, nothing substantially links her as an arsonist to this conviction.[173] Accordingly, insufficient evidence likewise supported the conviction for count 18.[174]

O. Waterman's Testimony at CalVCB Hearing

On November 6, 2020, Waterman testified at the CalVCB hearing in support of her application under Penal Code section 4900. Waterman asserted the appellate court found sufficient evidence to

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[166] *Id.* at pp. 49 (counts 15, 16), 50 (count 20), 51 (count 31), 52 (count 32).

[167] *Id.* at pp. 43, 48.

[168] AG Ex. 4 at p. 48.

[169] *Ibid.*

[170] *Ibid.*

[171] *Ibid.*

[172] AG Ex. 4 at p. 49.

[173] *Ibid.*

[174] *Ibid.*

overturn two of her convictions because there was no evidence (i.e., DNA, fingerprints, video, photos, or any other type of evidence). Waterman emphasized that at trial, the prosecution only provided circumstantial evidence and did not provide actual evidence. Waterman stated there was no evidence to uphold any of the convictions and she is innocent of all the charges, even though she only seeks compensation for her two reversed convictions.[175] Waterman admitted she could not provide any witnesses to testify that she was innocent of starting these fires. Waterman stressed that in 2013, investigators took her DNA and fingerprints, and investigators did not locate a match for either during their investigation. Waterman stated she had no additional physical evidence to present since the 2013 jury trial. During her jury trial she denied setting any of the fires. Her denial of the arson during the CalVCB hearing was consistent with her denial at the time of the jury trial.

In 2013, Waterman witnessed fires that began near her property, and she felt concerned and mad. Waterman patrolled her property and she and her neighbors took turns patrolling the common areas near her property looking for people. They looked for arsonists and other people because the area had green space for hiking. During Waterman's patrols, she sometimes picked up a stick or small twig, and carried it like a walking stick. Sometimes she would beat the ground with the stick. She never located any arsonists. At one point, she located someone and later learned it was an undercover fire investigator. Waterman stated investigators found a 17-year-old boy who started approximately four or five fires in the area during this time, but she did not know this person's name or if he was prosecuted. She stated this was in the transcripts and this person lived in Yosemite Lakes Park.[176]

At the time of the fires, Waterman stated she played soccer, usually midfield or a back defender. Waterman stated she could run at the time and was in her late 40's. Waterman confirmed she previously told investigators that she called herself, "a fast little white girl." Waterman agreed that she could run fast at times.

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[175] Waterman Application.

[176] Neither party provided this transcript as evidence.

After her arrest, investigators searched Waterman's vehicle and located a new magnesium block and a box of matches with approximately 65 missing matches. Waterman stated these items were left over from camping. Waterman stated she has never been a habitual smoker. Waterman confirmed Jackson was a smoker.

Regarding the discrepancy in Waterman's prior testimony in relation to Count 14, Waterman stated she does not remember whether she was home or not at the time of the fire because it was seven years ago. She remembered one of the investigators showing her where they thought the shrubbery was burned.

Waterman described her property as at the end of a cul-de-sac, with properties on either side of her, and there were no fences between the properties. Additionally, there was a lot of open land without any development. She had a pool to the right of her home in the backyard, on the side of the home. From the pool a person could see directly into the home if the shades were open, but the shades were usually closed. From the pool you could see the back part of the property.

Regarding the custodial dates, both parties agreed Waterman was initially arrested on June 25, 2013, released on June 26, 2013, re-arrested June 29, 2013, and released from the California Department of Corrections and Rehabilitation (CDCR) on June 9, 2018. Both parties agreed Waterman spent 1,809 actual days in custody.

Determination of Issues

Penal Code section 4900 allows a person, who has been erroneously convicted and imprisoned for a felony offense, to apply for compensation from CalVCB.[177] Once an application has been properly filed, CalVCB typically requests a written response from the Attorney General pursuant to Penal Code section 4902, and then an informal administrative hearing ensues in accordance with Penal Code section 4903.[178] Throughout these proceedings, the claimant bears the burden to prove, by a preponderance of the evidence, that (1) the crime with which she was charged was either not committed at all, or, if committed, was not committed by her, and (2) she sustained injury through her

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[177] Pen. Code, § 4900.

[178] Pen. Code, §§ 4902, subds. (a)-(b), 4903, subd. (a); Cal. Code Regs., tit. 2, § 615.1, subd. (a).

erroneous conviction and imprisonment.[179] If the claimant satisfies her burden of persuasion for both elements, then pursuant to Penal Code section 4904, CalVCB shall recommend to the Legislature an award of compensation equal to $140 per day of incarceration, including pre-trial confinement in county jail.[180]

When determining whether the applicant has satisfied her burden of proof, the Board may consider the "claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or the decision of the prosecuting authority not to retry claimant of the crime…." However, none of these circumstances may be deemed sufficient evidence to warrant a recommendation for compensation "in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged." The Board may also "consider as substantive evidence the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence admitted in prior proceedings for which claimant had an opportunity to object." Ultimately, the Board may consider "any other information that it deems relevant to the issue before it," even if inadmissible under the traditional rules of evidence, so long as "it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."[181]

CalVCB's broad authority to consider all relevant evidence when deciding a claimant's application for compensation is expressly limited by Penal Code section 4903. Specifically, subdivision (b) of section 4903 provides:

> "In a hearing before the board, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus… shall be binding on the Attorney General, the factfinder, and the board."

Plainly understood, section 4903 binds CalVCB to any factual finding rendered by a court when granting habeas relief but omits any findings rendered by an appellate court on direct appeal.

Nonetheless, CalVCB may be bound by an appellate court's determinations on direct appeal under the doctrine of res judicata. Res judicata bars relitigation of claims that were, or could have

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[179] Pen. Code, §§ 4903 subd. (a), 4904; Cal. Code Regs., tit. 2, § 644, subd. (c).

[180] Pen. Code, § 4904.

[181] Cal. Code Regs., tit. 2, § 641, subds. (a)-(c).

been, raised in a prior proceeding.[182] The related doctrine of collateral estoppel similarly precludes relitigation of the same issues and arguments that were already decided in the prior proceeding.[183] Thus, an appellate court's determination of an issue or claim between a claimant and the Attorney General is binding in a subsequent CalVCB proceeding and may not be reconsidered on the same or different grounds that were, or could have been, previously presented on appeal. Despite these binding determinations, the claimant continues to bear the burden of proof to demonstrate innocence by a preponderance of the evidence.

A. Binding Court Determinations

CalVCB recognizes the appellate court's determination concerning the sufficiency of evidence of Waterman's guilt is binding. Thus, CalVCB presumes that the evidence presented at trial did not permit any rational trier of fact to conclude, beyond a reasonable doubt, that Waterman was guilty of starting the June 9, 2013, fire as alleged in count 14 or the June 12, 2013, fire as alleged in count 18. But, contrary to Waterman's assertion,[184] this binding determination does not amount to an affirmative finding of innocence. As the appellate court recognized, there was a "strong inference" that Waterman was involved, even though that inference was constitutionally insufficient to prove guilt beyond a reasonable doubt. Thus, CalVCB remains free to determine whether, in its view, the weight of evidence presented in this administrative proceeding satisfies Waterman's burden to prove her innocence of counts 14 and 18 by a preponderance of evidence. To that end, CalVCB may consider the appellate court's binding determination that substantial evidence supports Waterman's convictions for four acts of arson and one count of conspiracy to commit arson.

B. Weight of Evidence Fails to Prove Innocence

After considering all the evidence detailed above and taking into consideration the binding determinations by the appellate court, Waterman has failed to prove that she is more likely innocent than guilty of her vacated convictions for the two counts of arson. Waterman stands convicted of four

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[182] *Noble v. Draper* (2008) 160 Cal.App.4th 1, 10-12.

[183] *Ibid.*; see also 7 Witkin, Cal. Proc. 5th, Judgement: Res Judicata, § 413 (Supp. 2008).

[184] Waterman Application at pp. 6-7.

counts of arson and one count of conspiracy to commit arson, all of which occurred around the same time and location as the two counts for which she claims to be innocent. As conclusively found by the appellate court, substantial evidence of Waterman's guilt supports all five of these criminal convictions. As the appellate court asserted, the doctrine of chances makes it appear "extremely unlikely that, through either bad luck or coincidence, an innocent person would be associated with so many arson fires…"[185] Overall, while this is not enough to prove guilt beyond a reasonable doubt, this does amount to significant inculpating evidence.

By comparison, Waterman has not provided any independent, exculpating evidence. While she alluded to the possibility of a third-party culprit, Waterman offered no witnesses or documentary proof to support her assertion. Instead, Waterman stresses there is no physical evidence to connect her to the crimes. While the appellate court found "nothing substantially links" Waterman to counts 14 and 18, the court nevertheless recognized a "strong inference" that she committed the fires in counts 14 and 18. Specifically, the fires were started by a person on foot, near Waterman's property, in the areas she normally traversed, and access by unknown people was limited due to the close proximity of neighbors and their dogs. Further, Waterman admitted at trial that she was home at the time of both fires, she had the ability to move quickly from the ignition sites, and she knew the area intimately. Also, the circumstances surrounding the fires in counts 14 and 18 were similar to the fires that the appellate court upheld for Waterman's other Cluster Fire convictions, and the Cluster Fires stopped after she was arrested. Moreover, Waterman provided no evidence to refute the circumstantial evidence that linked her to both counts 14 and 18. In this context, the absence of any physical evidence implicating Waterman in counts 14 and 18, without more, fails to prove her innocence.

Besides the appellate court decision, Waterman's only evidence of innocence consists of her testimony at the CalVCB hearing. Waterman insisted she was innocent of starting any of the fires, including the upheld convictions, but this testimony is not credible. Waterman's blanket assertion of innocence of all the Cluster Fires diminishes her credibility when she also claims she is innocent of

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[185] AG Ex. 4 at p. 47

counts 14 and 18, because the appellate court found substantial evidence of guilt beyond a reasonable doubt to uphold four of these counts of arson and one count of conspiracy to commit arson. Additionally, Waterman's inconsistent statements to law enforcement and at trial as to whether she was at home at the time of the fires creates credibility concerns. Moreover, the inconsistencies in Waterman's statements to law enforcement and at the hearing regarding the matches and magnesium strike block further weaken her credibility. Specifically, at the hearing, Waterman mentioned for the first time that the matches and magnesium strike block were for camping, which greatly differed from her prior statement that she did not know how to start a fire unless it was in a fireplace. Waterman's testimony largely duplicated her trial testimony, which was rejected by the jury when finding her guilty of six counts of arson and one count of conspiracy to commit arson. Further, Waterman's overall credibility is impeached by her valid felony convictions for four acts of arson and conspiring to commit arson.[186] Ultimately, Waterman's account is not believable.

Regardless, Waterman's testimony that she is innocent of the crimes alone is insufficient to prove she did not commit the crimes in counts 14 and 18. Pursuant to Cal. Code Regs., tit. 2, § 641, "substantial independent corroborating evidence" is required beyond the "claimant's denial of the commission of the crime" or "reversal of the judgment of conviction…" Thus, Waterman's assertion of innocence, without more, is patently insufficient to meet her burden of proof.

On balance, the evidence fails to prove that Waterman is more likely innocent, than guilty, of arson. Waterman's uncorroborated testimony fails to meet this burden. This conclusion is consistent with the binding appellate court decision, which only found insufficient evidence to prove Waterman's guilt of counts 14 and 18, while nevertheless finding substantial evidence to affirm her remaining four convictions for arson and one conviction for conspiracy to commit arson. Given all the evidence detailed above, it is just as likely, if not more, that Waterman committed arson as alleged in counts 14 and 18.

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[186] See Evid. Code, § 788 (permitting impeachment of witness based upon prior felony conviction); *People v. Wheeler* (1992) 4 Cal.4th 284, 300 (permitting impeachment by conduct involving moral turpitude); *People v. Castro* (1985) 38 Cal.3d 301, 315 (defining moral turpitude).

Accordingly, Waterman's application under Penal Code section 4900 must be denied.

V. CONCLUSION

Waterman's claim for compensation is denied. She failed to demonstrate by a preponderance of evidence that she is innocent of the felony offenses with which she was charged. Waterman is, therefore, ineligible for compensation under Penal Code section 4900.

Date: October 13, 2021

Sara Harbarger
Senior Attorney
California Victim Compensation Board

ITEM 8

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: **Guy Miles** PC 4900 Claim No. 19-ECO-16	**Proposed Decision** **(Penal Code §§ 4900 et seq.)**

I. Introduction

On June 20, 2019, Guy Miles (Miles) submitted an application for compensation as an erroneously convicted person to the California Victim Compensation Board (CalVCB) pursuant to Penal Code section 4900. The application is based upon Miles' imprisonment for two counts of robbery and one count of possessing a firearm. All three counts were vacated pursuant to Penal Code section 1473, subdivision (b)(3)(A), due to new exculpatory evidence that likely would have altered the verdict, but without an affirmative finding of factual innocence. On remand, Miles accepted a plea to a stipulated term of 18 years for all three counts, resulting in his unconditional release after having served almost 19 years imprisonment. Miles is represented by Brook T. Barnes of Procopio Cory Hargreaves & Savitch LLP. The Office of the Attorney General is represented by Deputy Attorney General Barton Bowers, who concedes that Miles has proven his innocence by a preponderance of the evidence. The record closed on August 9, 2021, after Miles waived further proceedings before a hearing officer. The matter was assigned to CalVCB Senior Attorney Laura Simpton.

After considering all of the evidence in the record, along with the binding factual findings from the Court of Appeal and the Attorney General's concession, the hearing officer finds that Miles has demonstrated that he is more likely innocent than guilty. Pursuant to Penal Code 4904, it is therefore recommended that the Legislature appropriate $965,300 as payment to Miles for the injury he sustained by having been wrongfully imprisoned for 6,895 days as a result of his erroneous convictions.

II. Procedural History

Following his arrest on August 5, 1998,[1] Miles and codefendant Bernard Teamer (Teamer) were jointly charged with two counts of robbery and a third count of possessing a firearm in Orange County Superior Court case number 98NF2299.[2] Miles was additionally charged with enhancements for inflicting great bodily injury, use of a firearm, and promoting a criminal street gang.[3] Miles was further alleged to have sustained three prior convictions and served two prior prison terms.[4] On June 15, 1999, after five days of deliberation and a request for clarification as to when a jury is "hung," the jury convicted both defendants of all charges.[5] Miles was subsequently sentenced on May 19, 2000, to an aggregate, indeterminate term of 75 years to life, while Teamer received a determinate term of 17 years.[6]

Miles and Teamer both appealed to the Fourth Appellate District of the Court of Appeal. In an opinion issued on April 30, 2003, the appellate court struck both defendants' gang enhancements for insufficient evidence but otherwise affirmed the judgment.[7] Between 2004 and 2008, Miles pursued multiple pro se habeas petitions before the state and federal courts, which were all denied.[8] In 2010, with the assistance of the California Innocence Project, Miles filed another habeas petition in the Orange County Superior Court. After an evidentiary hearing before the original trial judge, the superior court denied the petition in 2011. The court found that Miles' exculpatory witnesses were not credible, and the new evidence failed to point unerringly to innocence as required by statute for relief.[9]

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[1] AG Response Letter (RL) at 30; AG Ex. 1 at pp. 133, 136. All pinpoint citations to the Attorney General's exhibits refer to the "AGO" pagination only

[2] Pen. Code, §§ 211, 12021.

[3] Pen. Code, §§ 12022.7, subd. (a), 12022.5, subd. (a), 186.22, subd. (b)(1).

[4] Pen. Code, §§ 667, 667.5.

[5] Miles Claim Memorandum (Memo) at pp. 8-9; AG Ex.5-2 at pp. 1474-1476.

[6] AG Exs. 5 at p. 1720; 8 at p. 4256.

[7] AG Ex. 8 at pp. 4255-4294.

[8] Miles Memo at pp. 9-10; AG Ex. 8 at pp. 4297-4334.

[9] AG Exs. 9-2 at pp. 4654-4707 (petition), 13 at pp. 5582-5586 (2011 decision).

Miles next petitioned the Court of Appeal for habeas relief.[10] Two additional evidentiary hearings ensued before a referee, one in 2013 and another in 2016.[11] On January 19, 2017, the appellate court granted Miles' habeas petition pursuant to Penal Code section 1473, subdivision (b)(3)(A), which had been recently amended to lower the standard for relief from evidence that "pointed unerringly to innocence" to, instead, evidence that "would have more likely than not changed the outcome at trial."[12] The appellate court concluded that the new evidence offered by Miles, which simultaneously implicated a third-party culprit and raised an alibi defense, likely would have altered the jury's verdict. The appellate court expressly found that Miles' exonerating witnesses, who confessed to committing the robbery without any involvement by Miles, were "sufficiently credible to warrant habeas relief."[13] On this basis, without any finding of factual innocence, the appellate court vacated all three of Miles' convictions.[14]

Upon remand to the superior court, Miles accepted an offer to plead guilty to two counts of robbery and one count of possessing a firearm pursuant to *People v. West* (1970) 3 Cal.3d 595, in exchange for a stipulated term of 18 years imprisonment that guaranteed his immediate release from prison.[15] Despite his plea, Miles maintained his innocence.[16] Miles was released from custody on June 20, 2017, after having served a total of 6,895 days solely as a result of these three convictions.[17]

Two years later on June 20, 2019, Miles timely submitted his application to CalVCB seeking compensation as an erroneously convicted person pursuant to Penal Code section 4900. The

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[10] Miles App. Ex. B.

[11] AG Exs. 16 at pp. 6564-6570 (2013 findings), 21 at pp. 6940-6941 (2016 findings).

[12] Pen. Code, § 1473, as amended Stats.2016, c. 785 (S.B.1134), § 1, eff. Jan. 1, 2017; AG Ex. 22 at p. 6967.

[13] AG Ex. 22 at p. 6971.

[14] AG Ex. 22 at pp. 6976-6977; see also *In re Guy Donell Miles*, Fourth Appellate District, Division Three, of the Court of Appeal, case number G046534, docket available at https://appellatecases.courtinfo.ca.gov. (Cal. Code Regs., tit. 2, § 617.8 (permitting judicial notice).)

[15] Miles App. Ex. D at p. 4; AG RL at 30; AG Ex. 23 at pp. 7002-7004; see also *People v. West, supra*, 3 Cal.3d at pp. 604-608 (allowing guilty plea for tactical reasons).

[16] AG Ex. 23 at p. 7003.

[17] AG RL at p. 3.

application requested $958,300 for having been wrongfully incarcerated for 6,845 days.[18] This calculation was based upon Miles' arrest, supposedly on September 23, 1998, until his release on June 20, 2017, at a rate of $140 per day.[19]

Pursuant to Penal Code section 4902, subdivision (a), CalVCB requested a response from the Attorney General on June 24, 2019. Two years later, after multiple extensions of time for demonstrated good cause, the Attorney General timely submitted a response on August 8, 2021, along with 26 exhibits that span over 7,000 pages. Notably, the Attorney General concedes that Miles' claim should be granted in the amount of $965,300 for 6,895 days of imprisonment.[20] This calculation is based upon Miles' documented arrest on August 5, 2017, to and including his release on June 20, 2017, at a rate of $140 per day.[21]

On August 9, 2021, Miles waived further briefing or hearing before a hearing officer. The administrative record closed the same day.

III. Factual Summary[22]

A. The Robbery

Around 6:00 p.m. on Monday, June 29, 1998, three men committed an armed robbery at Fidelity Financial Services (Fidelity), a small loan office located in a strip mall in the Orange County city of Fullerton. Max P. and Trina G. were both working inside Fidelity with no one else present.[23] Andrew

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[18] Miles Memo at p. 42.

[19] There are 6,845 days from September 23, 1998, to but not including June 20, 2017, according to the website TimeandDate.com at https://www.timeanddate.com/date/duration.html. This purported date of Miles' arrest is based upon his supporting declaration only. (Miles App. at p. 1; Miles Ex. A at p.1 ¶ 2.)

[20] AG RL at pp. 1, 23-30.

[21] There are 6,895 days from August 5, 1998, to and including June 20, 2017, according to TimeandDate.com. This date of Miles' arrest is confirmed by an arrest form, other police reports, and the probation report. (AG Exs. 1 at pp. 133-139, 151-152; 5-3 at p. 1695.)

[22] This factual summary is based upon all evidence submitted in this administrative proceeding, including the Court of Appeal decision granting habeas relief and all consistent inferences from previous decisions.

[23] The victims and witnesses are referred to by their first name only in an effort to preserve their privacy.

H. was working next door at Trio Auto Parts.[24] Max was white, and Trina and Andrew were both Hispanic.[25]

All three robbers were Black and appeared to be in their 20's. They arrived together in a single car. Two of the robbers (i.e., Accomplices One and Two) entered Fidelity together, ostensibly to make a payment and use the bathroom. Accomplice One was wearing a suit, and Accomplice Two was wearing a white polo shirt and jeans. Accomplice One pulled out a firearm, demanded money, and ordered Trina to the ground. Meanwhile, Accomplice Two struck Max on the side of his head, causing bleeding from his ear and mouth. Accomplice Two grabbed $1,400 in cash and $4,000 in checks from a desk drawer and filing cabinet. Accomplice Two then escorted Max and Trina to the bathroom, where he ordered them to remain for 15 minutes. During these events, the remaining robber (i.e., Accomplice Three) entered the auto parts store and asked Andrew about a rare engine for a 1975 Caprice. The two were still talking when Andrew observed Accomplices One and Two return to the car and sound the horn.[26]

As described to responding officers by Trina and Max, Accomplice One was clean shaven, tall and thin, standing about six feet and two inches tall and weighing 150 pounds, with a dark complexion. Accomplice Two appeared to be shorter and stockier, standing about five feet and nine inches tall and weighing 200 pounds. Trina noted that Accomplice Two had a roll on the back of his neck. Max opined that he would be able to identify Accomplice One because he resembled a particular celebrity rapper, but he did not think he could identify Accomplice Two.[27] Neither Trina nor Max mentioned any scar or indentation on Accomplice One's head.

B. Pre-Trial Identifications

The day after the robbery, Accomplice Three was identified as Teamer. Significantly, Teamer had an account with Fidelity that listed a 1975 Caprice as a financial asset. When a Fidelity employee

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[24] AG Ex. 22 at pp. 6943-6945.

[25] AG Exs. 1 at pp. 1, 7, 13; 12-2 at 5394-5395.

[26] AG Ex. 22 at pp. 6946-6947.

[27] Miles Memo at p. 12; AG Ex. 1 at p. 35.

overheard Andrew speaking with the detective about his conversation with Accomplice Three, she retrieved Teamer's customer records with a copy of Teamer's driver's license and showed it to Andrew. Andrew immediately recognized Teamer as Accomplice Three.[28]

Teamer was 26 years old and affiliated with the 190th Street East Coast Crips (190th Street) from the city of Carson, located in Los Angeles County.[29] A few weeks after the robbery, police surveillance observed Teamer with Harold Bailey (Bailey). Bailey was 21 years old, six feet tall, and weighed approximately 200 pounds.[30] Bailey was also a member of the 190th Street gang. Bailey knew Jason Steward (Steward), who turned 19 years old on the day of the Fidelity robbery. Steward was six feet and two inches tall and weighed approximately 155 pounds.[31] Steward grew up in Compton and was affiliated with the Farm Dog Compton Crips (Farm Dog). Thus, at the time of the robbery, Teamer, Bailey, and Steward were either in or close to their 20s, and Bailey was heavier than Steward, even though both were similar heights.[32]

By comparison, Miles was 33 years old when the robbery occurred.[33] He stood five feet nine inches tall and weighed about 190 pounds.[34] He also had a mark on his forehead from a gunshot wound in 1987 that was still visible in 2020.[35] Miles grew up in Carson and had associated with the 190th Street gang. Miles was on parole for a prior robbery conviction, for which he had served a five-year sentence. During two months of his incarceration, Miles was housed in the same prison with

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[28] AG Exs 1 at pp. 15-16; 22 at pp. 6944.

[29] AG Exs. 1 at p. 30, 75; 22 at p. 6947.

[30] AG Ex. 22 at p. 6947 n.2.

[31] *Ibid*.

[32] AG RL at p. 27; AG Ex. 22 at pp. 6954-55, 6975-76; see also AG Ex. 1 at p. 75 (police surveillance report describing Bailey's appearance as "early 20's, approximately 6-2, 170 pounds").

[33] AG RL at p. 27.

[34] AG Ex. 22 at p. 6947 n.2.

[35] AG Exs. 22 at p. 6948; 24 at pp. 7014, 7019.

Teamer. After his release, Miles moved to Las Vegas, but he falsely told his parole officer that he continued to reside with his parents in Carson. Miles returned to Carson every one or two months.[36]

The investigating detective assembled eight separate photographic lineups, with six photographs in each, that included various 190th Street gang members. The seventh lineup (i.e., Lineup G) included Bailey, and the eighth (i.e., Lineup H) included Miles. None of the lineups included Steward. Trina identified Miles as Accomplice Two with "100 percent" certainty, but she previously noted that Bailey also "stands out" and believed he resembled Accomplice One.[37] Andrew tentatively identified Miles and another subject from the same lineup as Accomplice Two, and he added that Bailey and another subject from a different lineup both resembled Accomplice One.[38] Max also identified Miles as Accomplice Two, but only after learning from the detective that an arrest had been made.[39] Max eliminated Bailey as Accomplice One.[40]

C. Miles' Post-Arrest Interview

On August 5, 1998, Miles was arrested for the Fidelity robbery.[41] He was interviewed that same day by the investigating detective. After the detective informed Miles that he and Teamer had been identified as committing a robbery in Fullerton on June 29, 1998, Miles repeatedly insisted that he was innocent and had not been to Fullerton for over a decade since 1987. Miles acknowledged knowing Teamer, adding that they met for the first time while in prison together. Miles saw Teamer about a week earlier on July 31, 1998, while Miles was in town for a visit with his parole officer. Before then, Miles last saw Teamer at least four months earlier (i.e., April 1998). Miles insisted that he did not associate with Teamer or any of the "youngster" members of 190th Street gang. Miles revealed that he had been living in Las Vegas, unbeknownst to his parole officer. Miles claimed he had an alibi

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[36] Ex. 22 at pp. 6957, 6976.

[37] Ex. 1 at pp. 75, 77.

[38] Ex. 1 at pp. 76, 174.

[39] *Ibid.*; AG Ex. 22 at pp. 6947-6948, 6986.

[40] AG Exs. 1 at pp. 176-181; 22 at pp. 6947-6948; Miles Memo at pp. 13-21.

[41] AG RL at p. 30; AG Ex. 1 at pp. 135-141.

because, on July 29, 1998, he got his car out of the shop. When the detective responded that the robbery had actually occurred one month earlier on June 29, 1998, Miles replied that he would "have to ask my girl cause … I can't think that far," but he reiterated that he "was not in no Fullerton. That's for sure." Miles repeatedly offered to take a lie detector to prove his innocence. As for the supposed eyewitness identification of him, Miles remarked, "So far as my picture being coming up in an ID, that's no way possible. No way possible. And if they did, maybe [they're] just all [B]lack guys look alike, cause [there] ain't no way in the world they seen me at no robbery." Throughout the interview, Miles appeared cooperative and forthright.[42]

D. Trial Proceedings

At trial, Max, Trina, and Andrew testified as percipient witnesses. Max identified Miles as Accomplice Two. Max acknowledged that Miles had noticeable marks or indentations on his head, but Max opined they would not have been visible with a full head of hair.[43] Outside of the jury's presence, Trina was unable to identify Miles, even after viewing him up close, while he stood up and turned around.[44] After the prosecutor showed her a copy of his booking photograph, Trina identified Miles as Accomplice Two in front of the jury. Andrew was not asked to identify Miles.[45] No other evidence linked Miles to the robbery or placed Miles in Fullerton on the day of the robbery.

By comparison, Miles presented an alibi defense that included testimony from his father, mother, 12-year-old son, a Las Vegas neighbor, and the Las Vegas manager for his apartment.[46] All consistently maintained that Miles returned to Las Vegas from Carson on the early morning of June 29, 1998 (i.e., the day of the robbery), after picking up his son from his parents' home the night before, and they remained in Las Vegas all day. Miles' relatively inexperienced attorney failed to admit into

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[42] AG Exs. 1 at pp. 224-245 (interview transcript), 4 at 48:00-1:12:00 (audio recording).

[43] AG Exs. 6-2 at p. 1987; 6-3 at p. 2472; 22 at 6948.

[44] AG Exs. 6-2 at pp. 2215-2216; 22 at p. 6948-6949.

[45] AG Ex. 22 at pp. 6948-6949.

[46] AG Ex. 22 at pp. 6949-6951.

evidence telephone records, an airline ticket, and a towing receipt to bolster this alibi defense.[47] Defense counsel also presented expert testimony from a psychologist to describe factors that undermine the accuracy of an eyewitness identification, such as weapon focus, cross-racial effect, and photo exposure bias.[48] Neither Teamer nor Miles testified. The jury convicted both Teamer and Miles of all charges on June 15, 1999.

A few months earlier on February 23, 1999, Miles wrote a letter to the presiding judge that maintained his innocence and offered to undergo any available test to prove his innocence.[49] Shortly after the verdict in July 1999, Miles categorically denied the charges when interviewed by the Orange County Probation Department for sentencing. Miles insisted he had been in Las Vegas when the robbery occurred.[50] After denying Miles' motion for new trial and request to dismiss his prior convictions, Miles was sentenced to 75 years to life on May 19, 2000.[51]

E. State Habeas Proceedings

In 2010, with the assistance of the California Innocent Project, Miles filed a habeas petition in the superior court on the basis of third-party culpability, false eyewitness testimony, and actual innocence.[52] The petition included declarations from Teamer, Bailey, and Steward, each confessing to the robbery without any involvement by Miles.[53] At the evidentiary hearing, Teamer, Steward, and Miles all testified that Miles was not involved in the Fidelity robbery. Bailey did not testify, as he declined to participate while incarcerated in Texas for robbery and assault. The superior court did not find Teamer, Steward, or Miles to be credible and denied the petition for failing to present new evidence that pointed unerringly to innocence.[54]

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[47] AG RL at p. 27; AG Exs. 10 at pp. 4901-4917; 22 at pp. 6949-6950 at n.4-6.

[48] AG Exs. 6-6 at pp. 3493-3647; 22 at pp. 6951-6952.

[49] AG Ex. 5 at p. 1112.

[50] AG Ex. 5-3 at pp. 1702-1703.

[51] AG Ex. 5 at pp. 1713-1715.

[52] Miles Ex. B; AG Ex. 22 at p. 6953.

[53] AG Ex. 11 at pp. 4918-4936 (Declarations).

[54] Miles Ex. B at pp. 46-47; AG Exs. 12 at pp. 5016-5297 (transcript); 13 at pp. 5582-5586.

Miles next petitioned the appellate court for habeas relief, which resulted in an evidentiary hearing before a referee in 2013 and another in 2016. Teamer, Steward, and Miles testified again, as well as several alibi witnesses and an investigator for the district attorney who had interviewed Bailey in Texas. The confessions and related evidence are summarized below.

1. Teamer Confession

Teamer testified that he had robbed Fidelity with Bailey and Steward only. Teamer knew Bailey from their neighborhood, and Bailey was his "little homie" who looked up to him. Bailey introduced Teamer to Steward. Teamer decided to rob Fidelity "to get some money." He proposed the plan to Baily and Steward while at Steward's house on the morning of the robbery. Teamer described Baily as six feet tall, stocky, with a dark complexion and rolls on the back of his neck, whereas Steward was also six feet tall but slim. Teamer knew Miles from prison, but he insisted Miles did not have any involvement with the Fidelity robbery. After their arrest, Teamer claimed to be innocent because he believed that he and Miles would not be convicted.[55]

At the time of his testimony in 2013, Teamer was married with eight children and operated a trucking business in Lancaster. He acknowledged being a longtime member of the 190th Street gang until 2003, when he turned his life around. Teamer also had four prior felony convictions that resulted in a state prison sentence, including the Fidelity robbery.[56]

2. Steward Confession

Steward likewise testified that he had robbed Fidelity with Bailey and Teamer only. Steward recalled that Teamer and Bailey suggested the robbery while at Steward's home on the day of the robbery, which was Steward's nineteenth birthday. Steward, who was about six feet tall and weighed between 160 and 165 pounds, changed into a suit to gain entrance into Fidelity. He also hid a shotgun in the sleeve. Steward and Bailey, who was about the same height but heavier, entered Fidelity together, while Teamer remained in the car. When Steward and Bailey returned, the car was locked, and Teamer was inside the auto parts store. Steward was 100 percent sure that the doors were locked,

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[55] AG Ex. 22 at p. 6954.

[56] AG Exs. 15 at 5915-5984; 16 at p. 6565.

although Steward was committing a lot of robberies around that time. He had already committed some crimes with Bailey, but this was his first crime with Teamer.[57]

In 2007, Steward met Miles while in prison together. Their meeting was set up by another inmate, Jahed Prince (Prince).[58] Miles showed Steward a document with the date of the robbery on it. Steward immediately recognized the date as his nineteenth birthday and was surprised that Miles had been convicted of the robbery that he had committed with Bailey and Teamer. In 2008, Steward agreed to assist Miles' habeas litigation by signing a declaration that exonerated Miles. Steward also drew a diagram showing the location of Fidelity, the auto parts store, and their parked car, as well as the interior layout of the Fidelity office and placement of the victims. By then, the statute of limitations for robbery had expired, but Steward claimed to be unaware.[59]

Steward subsequently spoke to Bailey to see if he would "come forward and say his part in it, I say my part." Steward insisted he was not lying. He explained, "I ain't got nothing to gain from lying for him… Why would I go down with that? Actually makes no sense to lie."[60]

Steward was released on parole in 2011, but he was subsequently arrested for an unrelated crime. At the time of his habeas testimony in 2016, Steward was serving an indeterminate sentence of 171 years to life as the result of three, second-degree murder convictions. Steward also had unrelated prior convictions for robbery and attempted robbery.[61] Steward was a longtime Farm Dog from Compton. Unlike Teamer, Bailey, and Miles, Steward had never been a member of the 190th Street gang from Carson.[62]

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[57] AG Exs. 20 at pp. 6605-6745; 22 at pp. 6954-6955.

[58] Prince's testimony at the habeas hearing corroborated Steward's testimony. (AG Ex. 22 at p. 6955 n.10.)

[59] AG Ex. 22 at pp. 6955-6956.

[60] AG Ex. 22 at p. 6956.

[61] AG Exs. 21 at p. 6940; 22 at p. 6956.

[62] AG Exs. 16 at p. 6565; 20 at pp. 6606-6607; 21 at p. 6940; 22 at p. 6956.

3. Bailey Confession

Bailey did not testify at any of the habeas hearings. Instead, he provided a declaration in 2010 that largely corroborated the testimony of Teamer and Steward. In it, Bailey described planning the robbery while at Steward's home on Steward's birthday, after which Steward changed into a suit.[63] The threesome drove to Fidelity, and then Steward and Bailey went inside. Afterwards, they returned to the car to find Teamer was not there. Steward initially remained outside of the car waiting. But Bailey opened his door, and they both entered the car and reclined on the floor.[64] After a couple minutes, Steward raised his head and made eye contact with Teamer, who was inside the auto parts store.[65] Teamer finally returned to the car, and they drove away.[66]

In 2013, an investigator from the Orange County District Attorney's Office, who had also been the detective originally assigned to this case, interviewed Baily in a Texas prison. Bailey repeated that he and Steward had committed the robbery that was planned by Teamer. Baily wore a white shirt with jeans, and Steward wore a suit. Steward was armed with a shotgun, and Bailey had a revolver. After the robbery, Steward and Bailey returned to the car, but Teamer was not there. Bailey spotted Teamer inside the auto parts store. Steward sounded the horn to get Teamer's attention. At the time of the robbery, Bailey knew Teamer well and viewed him as a brother, but they had since fallen out. Bailey also knew Steward from school. Bailey insisted that he did not know Miles, despite both having lived in Carson and being associated with the 190th Street gang, which Bailey attributed to their 12-year difference in age and their residences on opposing sides of town.[67]

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[63] Miles Ex. B; AG Ex. 22 at p. 6953.

[64] AG Exs. 11 at p. 4930; 14 at pp. 5633-5634.

[65] *Ibid*.

[66] AG Exs. 11 at pp. 4923-4930; 14 at pp. 5632-5643; 15-2 at pp. 6223-6239;15-3 at pp. 6466-6479, 22 at pp. 6956-6957.

[67] AG Exs. 9 at pp. 4367-4371 (report), 4479-4540 (transcript); 9-2 at pp. 4541-4587; 11 at p. 5015; 22 at pp. 6964-6965.

4. Miles Testimony

Miles testified at the hearing in 2013. He acknowledged knowing Teamer from prison, during which they served two months at the same facility. He further acknowledged having a 1991 conviction for robbery, shooting in a car, and assault with a deadly weapon, as well as a 1985 conviction for possession of marijuana for sale. Miles was paroled in May 1997, almost one year before the Fidelity robbery occurred. During that time, Miles was living in Las Vegas while falsely telling his parole officer that he resided with his parents in Carson. Miles insisted that he drove to Carson on the evening of June 28, 1998, prompted by a call from his son, who had just flown in for a visit with Miles' parents. Miles arrived in Carson around 2:00 a.m. and, after staying only a few minutes, he and his son drove together back to Las Vegas. Miles wanted to leave Carson early to avoid the heat once the sun came up. They arrived in Las Vegas around 7:00 a.m. on June 29, 1998, and they remained together throughout the rest of the day. Miles denied any involvement in the robbery, which occurred on the evening of June 29, 1998.[68]

Miles testified that, throughout the trial proceedings, Teamer repeatedly denied any involvement in the Fidelity robbery. Miles last saw Teamer on the day of the jury's guilty verdict. Several months later, Miles heard through friends that Teamer and Bailey committed the robbery, but he did not learn of Steward's involvement until 2007. Miles mentioned to another inmate Rory Dungey (Dungey) that he had been wrongfully convicted of a robbery committed by Teamer, Bailey, and a third, unidentified person. Dungey had been in prison with Steward in 2003, when Steward admitted that he had committed a robbery with Teamer and Bailey. Dungey suggested Miles speak with Steward, who was confined at the same prison but assigned to a different yard. The meeting was arranged by Prince. Afterwards, Miles told his parents to call the Innocence Project.[69]

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[68] AG Exs. 15-2 at pp. 6357-6411; 15-3 at pp. 6439-6456; 22 at pp. 6957-6958.

[69] *Ibid*.; see also AG Ex. 15-2 at pp. 6058-6109 (Dungey testimony), pp. 6119-6158 (Prince testimony).

5. Alibi Witnesses

Multiple witnesses also testified in support of Miles' alibi defense, including his mother, father, son, and girlfriend. They all corroborated Miles' account of driving to Carson on the night of June 28, 1998, and immediately driving back to Las Vegas on the early morning of June 29, 1998.[70]

In addition, Tasharon Foy (Foy), who was the property manager of Miles' Las Vegas apartment, recalled speaking to him on June 29, 1998, in an effort to convince him to renew his lease before it expired at the end of the month. Foy further recalled that Miles' car, which was parked in its assigned spot, on June 29, 1998, appeared to have been damaged and was towed the following afternoon on June 30, 1998. The referee found Foy to be sincere but her "ability to recall events is at best problematic."[71]

Patria Joseph (Joseph), who was Miles' upstairs neighbor in Las Vegas, recalled seeing Miles drive away from the apartment complex on the night of June 28, 1998, and then spotted him returning the following morning around 7:00 a.m. Her apartment window faced the carport, and she happened to see Miles after hearing the sound of music from his car. Joseph spoke to Miles and his son as they entered their apartment because her 11-year-old nephew wanted to visit with them. The referee found her testimony to be sincere but not inherently credible.[72]

6. Eyewitness Identifications

In 2011, the district attorney's investigator spoke separately to Trina and Max. Both affirmed their prior identification of Miles as Accomplice Two and denied feeling pressured to select his photograph from the lineup or identify him in court. However, Trina no longer recalled being hesitant to identify Miles in court. She also did not recall any significant height difference between the two robbers.[73] Max noted the "wrinkles" on the side of Miles' head as support for his identification, even

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[70] AG Exs. 16 at pp. 6567-6568; 22 at pp. 6949-6951.

[71] AG Exs. 15-2 at pp. 6412-6437; 16 at pp. 6566-6569; 22 at p. 6951.

[72] AG Exs.15-2 at pp. 6191-6220; 16 at p. 6568; 22 at p. 6951.

[73] AG Exs. 9-2 at pp. 4743-4758 (transcript of 2011 interview with Trina), 4777-4780 (report); 22 at p. 6946.

though Max's trial testimony indicated that he did not notice any marks on the side of Accomplice Two's head.[74]

Two years later in 2013, the investigator showed Steward's photograph to Max and Trina, and both tentatively identified him as Accomplice One (i.e., the thin robber).[75] In particular, Max "pointed directly at [Steward's] photograph" said Steward "looked like the person that he recalled" as the "thin robber."[76]

7. Polygraph

A polygraph of Teamer, which was conducted at the request of the California Innocence Project, indicated that he was truthful.[77] A polygraph of Steward, which was conducted at the request of the Orange County District Attorney, indicated that he was not truthful.[78]

8. Appellate Court Decision

Ultimately, the appellate court found the confessions of Teamer, Steward, and Bailey, "on the whole, are credible." The court observed that Steward's testimony "simply has the 'ring of truth' about it." Moreover, Steward's account was corroborated by two other inmates with no connection to the case (i.e., Dungey and Prince). While recognizing some inconsistencies, the court found "the confessions of Teamer, Steward, and Bailey sufficiently credible to warrant habeas relief."[79] In a concurring opinion, one justice further concluded that the circumstances surrounding the photographic lineups and in-court identification were so unduly suggestive as to render them false evidence.[80]

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[74] AG Ex. 9 at pp. 4357-4359 (declaration regarding 2011 interview with Max), pp. 4360-4362 (report); cf. AG Exs. 6-2 at p. 1987; 6-3 at p. 2472; 22 at p. 6948.

[75] AG Ex. 22 at p. 6970; see also AG Exs. 15-2 at pp. 6225-6227 (investigator testimony at 2013 hearing), 15-3 at pp. 6528-6529 (closing).

[76] AG Ex. 15-2 at p. 6227.

[77] AG Ex. 9 at pp. 4472-4473.

[78] AG Ex.9 at pp. 4475-4477.

[79] AG Ex. 22 at pp. 6967-6972.

[80] AG Ex. 22 at pp. 6978-6991.

Accordingly, on January 19, 2017, the appellate court vacated all three of Miles' convictions and remanded the matter to the superior court for a new trial.[81]

F. Guilty Plea

Six months later on June 20, 2017, Miles accepted a plea to both counts of robbery and one count of possessing a firearm, in exchange for an 18-year sentence that resulted in his immediate release from custody.[82] During the proceeding, Miles maintained his innocence.[83] The Orange County District Attorney insisted he was guilty.[84]

G. Attorney General Investigation

On June 20, 2019, Miles timely submitted an application for compensation to CalVCB. After screening for jurisdiction, CalVCB requested a response from the Attorney General on June 25, 2019. Over the next two years, the Attorney General conducted interviews with Miles, Bailey, and Steward, as well as Miles' alibi witnesses Joseph and Foy, as summarized below.

1. Miles Interview

Miles met with the Attorney General in January 2020. At that time, Miles lived in Texas and was employed full-time with a warehouse distribution company. Before his arrest for the Fidelity robbery, Miles worked at a Motel Six in Las Vegas, which was his first legitimate job.[85] Miles insisted that he was innocent and had been misidentified by the victims. Miles was initially angry following his erroneous conviction, but he decided to focus on improving himself by attending self-help groups. He eventually completed his GED and then volunteered to help other inmates obtain their GED. He also worked in the prison library and read as many legal materials as he could to help his case. Miles explained that he was working with Dungy on the GED program when Dungy told him about Steward. Miles asked Prince to arrange a meeting with Steward, since they were on separate yards. During that

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[81] AG Ex. 22 at p. 6977.

[82] Miles Memo at p. 11; AG Ex. 23 at pp. 6996-7007.

[83] AG Ex. 23 at p. 7003.

[84] Miles Memo at p. 41; Miles Ex. F.

[85] See AG Ex. 5-3 at p. 929 (probation report noting Miles' employment at Motel Six from April to June 1998).

meeting, Steward admitted his involvement in the robbery. Thereafter, Miles contacted the California Innocence Project. As for his plea following remand, Miles explained that he decided to accept the prosecution's offer, despite his insistence of innocence, to ensure that he would return home to his family. Miles did not want to risk going forward with another trial, although he also did not want to let down his attorneys, who had worked so hard and for so long on his behalf.[86]

2. Bailey Interview

Bailey spoke by telephone with the Attorney General in May 2021. At that time, Bailey had been released from prison, still lived in Texas, and owned a janitorial business. Bailey admitted that he, Steward, and Teamer committed the Fidelity robbery together in 1998. Bailey denied ever meeting Miles and insisted Miles was entirely innocent. Bailey was unaware that Teamer and Miles both lived in Texas. Bailey has not spoken to Teamer, whom he had previously looked up to as a big brother, for over ten years.[87]

3. Steward Interview

Steward was interviewed by the Attorney General in May 2021 at Kern Valley State Prison. Steward admitted that he, Bailey, and Teamer had committed the Fidelity robbery together on Steward's nineteenth birthday on June 29, 1998. In particular, Steward and Bailey entered Fidelity together while armed, and Teamer drove their get-away car. Steward, who had previously worked at a clothing department store (i.e., JCPenney), wore a suit, which he often did when committing robberies. Steward acknowledged he belonged to a different gang than Bailey and Teamer, but he noted that he and Bailey had known each other since junior high school and Bailey's sister was the mother of his son. Steward did not meet Miles until Prince introduced him in 2007 or 2008, at which time Steward admitted his involvement in the robbery for which Miles had been convicted. Steward now considers Miles to be a friend. Steward maintained that Miles was entirely innocent of the Fidelity robbery. Steward insisted he had nothing to gain from incriminating himself in the robbery.[88]

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[86] AG Exs. 24 at pp. 7010-7036 (transcript); 26 (Miles audio).

[87] AG Ex. 24 at p. 7080.

[88] AG Exs. 24 at pp. 7050-7080 (transcript); 26 (Steward audio).

4. Joseph Interview

Joseph was interviewed at her home by the Attorney General in 2020. She insisted that she had observed Miles driving away from their Las Vegas apartment parking lot on a Sunday evening and then returning early the next morning with his son in the car. She no longer recalled the specific date but insisted that Miles could not have done what he was accused of doing.[89]

5. Foy Interview

Foy, who had since changed her last name, met with the Attorney General in 2020. Foy confirmed her prior testimony for Miles was the truth, adding she had "no dog in the fight." Around the time of the robbery, she recalled speaking to Miles about whether he planned to renew his lease and then later noticing his car was parked in its assigned spot. She also recalled the tow truck driver subsequently removing Miles' car. Even though Foy still resided in Las Vegas, she had been willing to testify on Miles' behalf during the trial and habeas proceeding because he was innocent. But Foy was not sure if she would be willing to testify a third time because "it seems like this is just a never-ending story…."[90]

6. Attorney General's Concession

After completing the investigation, the Attorney General conceded that, in his view, Miles "has met his burden under the compensation statute, and his claim should be granted."[91] The Attorney General reiterated that Miles "has proved that he is innocent and that he has suffered injury."[92] The Attorney General found Miles to be credible.[93] After comparing the inculpating and exculpating evidence in the administrative record, the Attorney General "agrees that claimant has proved that he is probably innocent of the robbery of Fidelity Financial Services on June 29, 1998."[94] Accordingly, "the

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[89] AG Ex. 24 at p. 7038. The Board may take official notice of the indisputable fact that June 29, 1998 (i.e., the date of the robbery) was a Monday. (Evid. Code, § 452, subd. (h); Cal. Code Regs., § 617.8.)

[90] AG Ex. 24 at pp. 7040-7048.

[91] AG RL at p. 1.

[92] AG RL at p. 23.

[93] AG RL at pp. 25, 28.

[94] AG RL at p. 28.

Attorney General recommends that the claim be granted, and the amount of compensation be fixed at $965,300.[95]

IV. Determination of Issues

Penal Code section 4900 allows a person, who has been erroneously convicted and imprisoned for a felony offense, to apply for compensation from CalVCB.[96] Once an application has been properly filed, CalVCB typically requests a written response from the Attorney General pursuant to Penal Code section 4902, and then an informal administrative hearing ensues in accordance with Penal Code section 4903.[97] Throughout these proceedings, the claimant bears the burden to prove, by a preponderance of the evidence, that (1) the crime with which he was charged was either not committed at all, or, if committed, was not committed by him, and (2) he sustained injury through his erroneous conviction and imprisonment.[98] If the claimant satisfies his burden of persuasion for both elements, then pursuant to Penal Code section 4904, CalVCB shall recommend to the Legislature an award of compensation equal to $140 per day of incarceration, including pre-trial confinement in county jail.[99]

When determining whether the applicant has satisfied his burden of proof, the Board may consider the "claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant of the crime…." However, none of these circumstances may be deemed sufficient evidence to warrant a recommendation for compensation "in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged." The Board may also "consider as substantive evidence the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence admitted in prior proceedings for which claimant had an opportunity to object." Ultimately, the Board may consider "any other information that it deems relevant to the issue before it," even if inadmissible

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[95] AG RL at p. 30.

[96] Pen. Code, § 4900.

[97] Pen. Code, §§ 4902, subds. (a)-(b), 4903, subd. (a); Cal. Code Regs., tit. 2, § 615.1, subd. (a).

[98] Pen. Code, §§ 4903, subd. (a), 4904; Cal. Code Regs., tit. 2, § 644, subd. (c).

[99] Pen. Code, § 4904.

under the traditional rules of evidence, so long as "it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."[100]

CalVCB's broad authority to consider all relevant evidence when deciding a claimant's application for compensation is expressly limited by Penal Code section 4903. Specifically, subdivision (b) of section 4903 provides:

> "In a hearing before the board, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus … shall be binding on the Attorney General, the factfinder, and the board."

Plainly understood, section 4903 binds CalVCB to any factual finding rendered by a court when granting habeas relief, even if the evidence before CalVCB overwhelmingly supports a contrary determination.[101]

In addition, Penal Code section 1485.5, subdivision (c), similarly renders binding upon CalVCB all "express factual findings made by the court" when "considering … an application for a certificate of factual innocence," regardless of whether the application is granted or denied. Nonetheless, under subdivision (d) of Penal Code section 1485.55, "A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling" for a finding of factual innocence.

A. Binding Court Determinations

As both parties agree,[102] the appellate court's decision granting habeas relief is binding upon CalVCB pursuant to Penal Code sections 1485.5 and 4903. These findings include the appellate court's determination that the confessions of Teamer, Bailey, and Steward, "on the whole, are credible" and Steward's testimony, in particular, has the "ring of truth" about it.[103] Because these findings were most recently issued by a higher court while applying the current legal standard for habeas relief, they

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[100] Cal. Code Regs., tit. 2, § 641, subds. (a)-(c).

[101] See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1045 (explaining process of statutory interpretation "begin[s] with the statutory language, which is usually the most reliable indicator of legislative intent").

[102] Miles Memo at pp. 32-36; AG RL at pp. 16-23.

[103] AG Ex. 22 at pp. 6967, 6969-6970.

negate any prior inconsistent findings by either the referee or superior court.[104] While the appellate justice's concurring decision is not binding, it still warrants consideration.[105] The referee's assessment that alibi witnesses Foy and Joseph were both sincere, even if inaccurate, is accepted as binding solely as to the sincerity - but not accuracy - of their testimony.[106] No significance is attached to the superior court's findings that Teamer, Steward, and Miles were not credible, as those findings are inconsistent with the appellate court's binding determinations.[107] And finally, in accordance with Penal Code section 1485.55, subdivision (d), no significance is attached to the lack of an affirmative finding of innocence by any court.

B. Persuasive Proof of Innocence

After considering the entire administrative record and all binding court determinations, Miles has demonstrated his innocence by a preponderance of evidence. As explained below, the overall weight of evidence proves that Miles is more likely innocent, than guilty, of his convictions for robbery and possession of a firearm in Orange County Superior Court case number 98NF2299.

1. Inculpating Evidence

CalVCB recognizes that Miles' guilty plea to all three counts in case number 98NF2299 for the Fidelity robbery is a significant inculpating factor. But this plea does not necessarily preclude compensation, as it was not entered into with the specific intent of protecting another from prosecution.[108] To the contrary, Miles entered the plea pursuant to *People v. West, supra*, 3 Cal.3d 595, while maintaining his innocence, after identifying the likely culprits and securing their sworn confessions.[109] Moreover, Miles' plea did not result in any additional imprisonment and ensured his

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[104] See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (explaining that "all tribunals exercising inferior jurisdiction … must accept the law declared by courts of superior jurisdiction").

[105] See *Turney v. Collins* (1941) 48 Cal.App.2d 381, 388 (explaining "concurring opinion is not the decision of the court" and, therefore, "the view there expressed is not binding upon us").

[106] AG Ex. 16 at pp. 6568-6569.

[107] AG Ex. 13 at pp. 5582-5583.

[108] Pen. Code, § 4903, subd. (c) (barring compensation for any claim if the "claimant pled guilty with the specific intent to protect another from prosecution").

[109] AG Ex. 23 at p. 7003.

immediate release from custody. All of these circumstances tend to diminish the weight of this inculpating factor.

CalVCB further recognizes that Miles' identification as Accomplice Two, by three separate witnesses, is another significant incriminating factor. However, none of these identifications were unequivocal. For instance, Trina briefly disavowed her identification of Miles upon seeing him in person at trial. Trina also noted that Bailey, who later confessed to being Accomplice Two, looked familiar. Andrew tentatively identified both Miles and another subject as Accomplice Two and never identified Miles in court. Max first identified Miles from a photographic lineup, despite previously insisting he would not be able to identify Accomplice Two, after being informed that an arrest had been made. Over a decade later, Max confirmed his identification of Miles by noting the marks on the side of his head, even though Max acknowledged at trial that no such marks were visible on Accomplice Two. These circumstances raise concerns of photo bias and undue suggestion, as persuasively noted in the appellate justice's concurring opinion.[110] Also, these identifications were based upon a single, brief interaction with Accomplice Two, during the stress of an armed robbery, by witnesses of a difference race. As such, these identifications raise further concerns of weapon focus and cross-racial effect, as explained by the defense expert at trial.[111] Viewed together, these concerns reduce the weight of this incriminating evidence.

2. Exculpating Evidence

In contrast, significant evidence exonerates Miles. Notably, three separate individuals have repeatedly confessed over the past decade, at times under oath, that they committed the robbery with only each other and not Miles. As found by the appellate court, these confessions by Teamer, Bailey, and Steward were, "on the whole, credible" and Steward's testimony in particular had "the ring of truth." According to these confessions, Steward was the tall and thin Accomplice One wearing a suit, Bailey was the heavier Accomplice Two wearing jeans, and Teamer was Accomplice Three driving their getaway car. All three men's confessions were largely consistent with one another, although they did

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[110] AG Ex. 22 at pp. 6978-6991.

[111] AG Exs. 6-6 at pp. 3493-3647; 22 at pp. 6951-6952.

vary on some relatively minor details, such as whether or not the car was locked while Accomplice Three was in the auto parts store. But, as the appellate court observed, these "minor discrepancies" may have resulted from an honest mistake in their recollection that does not warrant automatic rejection of their entire testimony.[112] Since the statute of limitations had expired, none of the men risked any adverse penal consequence as a result of their confessions. Nevertheless, these men risked prosecution for perjury if their confessions were false. Overall, these confessions weigh heavily in favor of Miles' innocence.

Also, as noted by both the appellate court and Attorney General,[113] the convoluted manner in which Steward's confession was obtained further corroborates Miles' claim of innocence. Miles explained that Dungey first informed him of Steward's involvement and then Prince arranged for Miles to meet with Steward. Miles' account was separately confirmed by Dungey and Prince, who both testified under oath. If Steward was simply "lying on Miles' behalf, it would make absolutely no sense to involve two other people (i.e., Dungey and Prince) in the fabricated story."[114]

The reliability of the confessions by Teamer, Bailey, and Steward is further bolstered by aspects of the eyewitnesses' identifications. Trina and Andrew both tentatively identified Bailey's photograph, albeit as Accomplice One, when viewing the photographic lineup in 1998. Although Max excluded Bailey, he unequivocally identified Steward as Accomplice One when shown his photograph in 2013. Consistent with all three witnesses' description of the robbers' physical appearance, Steward was tall and thin like Accomplice One, and Bailey was heavier like Accomplice Two. Steward and Bailey were similar heights, and Trina later recalled no significant height difference between the accomplices. Moreover, the ages of Teamer, Bailey, and Steward (i.e., 26, 21, and 19 years old, respectively) are generally consistent with the original description of the robbers in their 20's, particularly when compared to Miles' age of 33 years.

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[112] AG Ex. 22 at p. 6971 (referring to CALCRIM No. 226 regarding credibility evaluation).

[113] AG RL at p. 28; AG Ex. 22 at p. 6970.

[114] AG Ex. 22 at p. 6970.

Other objective factors support the veracity of these confessions. At the time of the robbery, Miles was living in Las Vegas, rendering it less likely that he would be inclined to commit a robbery in Fullerton with two other men who lived in Los Angeles County. While Miles knew Teamer, there is no evidence of any prior connection between Miles and Bailey or Steward. By comparison, police surveillance captured Teamer and Baily together within a month of the robbery, and it is undisputed that Steward knew Baily from junior high school and fathered a child with Bailey's sister. Thus, it appears more likely that the three robbers were Teamer, Bailey, and Steward, rather than Teamer, Miles, and either Bailey or Steward. This probability is not altered by the shared affiliation with the 190th Street gang by Teamer, Baily, and Miles, whereas Steward was a member of the Farm Dog gang, given Steward's other ties with Bailey. As for the inconsistent polygraph results indicating that Teamer was truthful, but Steward was not, no significance is attached to this often-unreliable evidence.[115]

In addition to the confessions, Miles' extensive alibi evidence weighs in favor of innocence. Miles, along with numerous family members and friends, as well as his apartment manager Foy and neighbor Joseph, have consistently and repeatedly maintained that he was in Las Vegas, with his son, when the Fidelity robbery occurred approximately 250 miles away in Fullerton.[116] Aspects of Miles' alibi defense are supported by telephone records, an airline ticket, and a towing receipt. While the referee cautiously viewed much of the testimony from Miles' loved ones, the referee acknowledged that several witnesses, including Foy and Joseph, appeared sincere. The sheer number of alibi witnesses, who testified under penalty of perjury, sometimes more than once, is an important exculpating factor, regardless of any understandable bias in favor of Miles. This is particularly true for both Foy and Joseph, given their lack of any close relationship to Miles. As the Attorney General admits, the "probability that these witnesses are all lying for claimant is low."[117]

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[115] See *People v. Wilkinson* (2004) 33 Cal. 4th 821, 849 (quoting *United States v. Scheffer* (1998) 523 U.S. 303, 309) ("there is simply no consensus that polygraph evidence is reliable").

[116] This distance was calculated using Google Maps. (Evid. Code, § 452, subd. (h); Cal. Code Regs., § 617.8.)

[117] AG RL at p. 28.

Last but not least, Miles has repeatedly and consistently maintained his innocence. On the day of his arrest in August 1998, Miles spoke at length with the investigating detective, during which he adamantly denied any involvement, whatsoever, with the Fidelity robbery. There is a ring of truth to Miles' statement, which displayed initial confusion over when the robbery occurred and his candid admission that he could not recall his whereabouts on that particular date but knew for certain he was not in Fullerton. Throughout his statement, Miles appeared cooperative and forthright. Over the next 22 years, Miles consistently proclaimed his innocence, including his letter to the presiding trial judge in February 1999, his statement to the probation department for sentencing July 1999, his sworn declarations and testimony in support of his habeas petitions between 2010 and 2016, his sworn declaration in support of this administrative claim, and his 2020 interview with the Attorney General. Even inmate Prince testified that, while in prison, Miles "was like a weirdo because he was always telling people he was innocent."[118] Ultimately, the Attorney General found Miles "to be credible," as does this Hearing Officer.

3. Overall Evidence Demonstrates Innocence

After evaluating all of the inculpating and exculpating evidence detailed above, it appears that Miles is more likely innocent, than guilty, of his vacated convictions for robbery and possessing a firearm in Orange County Superior Court case number 98NF2299. Due consideration is given to Miles' guilty plea, as well as his identification by three separate eyewitnesses. But on balance, this incriminating evidence is outweighed by the exculpating evidence of three separate confessions, numerous alibi witnesses, and Miles' credible and consistent avowal of innocence. This assessment of the evidence is consistent with the appellate court's binding determination that the confessions of Teamer, Bailey, and Steward, were, "on the whole, credible" and with a "ring of truth."[119] It is also consistent with the Attorney General's concession, which is an important, though not binding, consideration.

It is possible, as the Orange County District Attorney maintains, that Miles may actually be guilty, and all of his supporting witnesses are either mistaken or lying. But as the Attorney General concedes,

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[118] AG Ex. 22 at p. 6970.

[119] AG Ex. 22 at pp. 6967, 6970.

that possibility does not appear to be the most likely version of events. As recognized by the Attorney General, "Compensation requires a showing of probability, not certainty."[120] Based upon the evidence in this administrative proceeding, it appears more likely than not that Miles is actually innocent. Accordingly, Miles has satisfied his burden under Penal Code section 4900 to demonstrate his innocence by a preponderance of evidence.

C. Persuasive Proof of Injury

Miles has similarly satisfied his burden to demonstrate injury by a preponderance of evidence. Penal Code section 4904 twice references "injury" as a requisite condition for compensation, which is calculated at a rate of $140 per day.[121] The injury need not be pecuniary, as this particular requirement was expressly removed by the Legislature.[122] Instead, given the manner by which compensation is calculated, the injury contemplated by section 4904 is "each day … spent illegally behind bars, away from society, employment, and [ ] loved ones."[123] Thus, injury occurs within the meaning of Penal Code section 4904 upon a persuasive showing that, but-for the erroneous conviction and imprisonment, the claimant would have been free.[124]

Miles was incarcerated for over 18 years as a result of his convictions for the Fidelity robbery in Orange County Superior Court case number 98NF2299. Miles' confinement commenced on August 5, 1998, when he was arrested on these charges at the age of 33.[125] His confinement finally terminated

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[120] AG RL at p. 29.

[121] Pen. Code, § 4904.

[122] Pen. Code, § 4904, amended by Stats.2015, c. 422 (S.B. 635), §1, eff. Jan. 1, 2016; Senate Floor Analysis of Sen. Bill No. 635 (2015-2016), as amended Sept. 3, 2015, at p. 4 (striking "pecuniary injury" as "an unfortunate and unsound description of the unique harm suffered when factually innocent persons are imprisoned").

[123] *Holmes v. Calif. Victim Comp. & Gov't Claims Board* (2015) 239 Cal.App.4th 1400, 1405.

[124] See Assembly Floor Analysis of Sen. Bill No. 636 (2015-2016), as amended April 29, 2015, at p. 4 (noting author's intent to provide compensation "when our own justice system erroneously takes those precious rights from an individual," which are "enshrined in the Declaration of Independence" as "life, liberty, and the pursuit of happiness").

[125] AG RL at pp. 27, 30; AG Exs. 1 at pp. 133-139, 151-152; 5-3 at p. 1695 (confirming arrest on August 5, 1998). Given this compelling evidence, Miles' declaration listing the date of his arrest as September 23, 1998, is deemed to be mistaken. (See Miles App. Ex. A (Miles' declaration).)

6,895 days later on June 20, 2017, when Miles was almost 52 years old.[126] Miles did not sustain any new convictions during this period of incarceration.

CalVCB recognizes that, but for these erroneous convictions, Miles would not have spent 6,895 days "illegally behind bars, away from society, employment, and [his] loved ones."[127] As Miles observed, "Because of my incarceration, I missed all three children's high school graduations. I missed my daughter's wedding … [and] the births of all six of my grandchildren."[128] In addition, Miles also "was not able to be there for my parents when my mother was diagnosed with Stage 4 cancer, or when my father suffered a stroke," or when several family members and close friends passed away.[129] Even years after his release, Miles still felt "like a stranger in my own family" because he had "missed so much of their lives."[130] This evidence amply satisfies Miles' burden to prove, by a preponderance, that he sustained injury as a result of his erroneous convictions arising from the Fidelity robbery.

Overall, Miles has satisfied his burden to prove, by a preponderance, that he did not commit the crimes of robbery and possession of a firearm and that he sustained injury in the amount of 6,895 days imprisonment as a result of these erroneous convictions. Miles is, therefore, entitled to a recommendation for compensation under Penal Code section 4904 in the amount of $965,300, representing $140 for each day of his erroneous imprisonment.

V. Conclusion

CalVCB hereby grants Miles' claim for compensation under Penal Code section 4900 based upon persuasive proof of his innocence and injury and, therefore, recommends that the Legislature appropriate $965,300 as payment to Miles for his 6,895 days of erroneous incarceration.

Date: September 30, 2021

Laura Simpton
CalVCB Hearing Officer

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[126] AG RL at p. 30; see also Pen. Code, § 2900.5 (calculating jail credits by including partial days).

[127] *Holmes, supra,* 239 Cal.App.4th at p. 1405.

[128] Miles Ex. A at p. 2.

[129] Miles Ex. A at p. 3.

[130] *Ibid*.