CALIFORNIA
CalVCB
VICTIM COMPENSATION BOARD

STATE OF CALIFORNIA
GAVIN NEWSOM, Governor

Victim Compensation Board Meeting Agenda
July 21, 2022
10:00 a.m.
400 R Street
Third Floor, Room 330
Sacramento, CA 95812

BOARD MEETING MATERIALS

Item 1. Approval of Minutes — Action Item
Minutes of the May 19, 2022, 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
No materials for this item

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

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

Item 6. Proposal to Amend Trauma Recovery Center Grant Awards — Action Item
Copy of agenda item attached

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

Item 8. Lamont Tarkington (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
May 19, 2022, 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 Amy Tong, Secretary of the Government Operations Agency, at 400 R Street, Third Floor, Room 330, Sacramento, California, on Thursday, May 19, 2022, at 10:12 a.m.

Also present were Members Diana Becton, Contra Costa County District Attorney, Shawn Silva, Deputy State Controller and Chief Counsel, acting for and in the absence of, Betty T. Yee, Controller, Executive Officer Lynda Gledhill, Chief Counsel Kim Gauthier, and Board Liaison Andrea Burrell.

Item 1. Approval of the Minutes of the March 17, 2022, Board Meeting

Member Becton moved approval of the Minutes for the March 17, 2022, Board Meeting. The motion was seconded by Member Silva. By unanimous vote, the Board approved the minutes of the March 17, 2022, Board meeting.

Item 2. Public Comment

The Board opened the meeting for public comment and Ms. Burrell 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 was no public comment.

Item 3. Executive Officer Statement

Executive Officer Gledhill updated the Board on several items:

To start, Ms. Gledhill stated how nice it is to be back together in person and thanked CalVCB technical staff who worked hard to set up the meeting so it could be done in a hybrid manner. Finally, she thanked everyone for their patience as we continue to work in this new way of doing business.

Ms. Gledhill then updated the Board on CalVCB's budget and reported that the Governor recently released his May revision, which includes two new appropriations for CalVCB. First, the Governor proposed a three million dollar allocation from the state restitution fund to conduct a media and outreach campaign. CalVCB will use this appropriation for a strategic, three-year campaign to target underserved populations, help boost awareness of CalVCB, and connect victims with the compensation and services they need.

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Ms. Gledhill indicated that CalVCB's application numbers continue to grow and that data shows that the numbers of violent crimes are rising even faster. In the most current year, the number of applications received statewide is only 23.4 percent of the number of violent crimes reported. These numbers cause CalVCB concern that the current model of outreach, which is mainly focused on engagement with community-based organizations, law enforcement, and county services are not reaching all eligible crime victims. In addition, CalVCB knows that the COVID-19 pandemic has had an isolating effect on many people, including victims of crime, making it difficult to reach them. The proposed media campaign will help overcome traditional barriers that exist to accessing CalVCB; in addition to those created by the pandemic. CalVCB will also create a foundation for outreach that CalVCB can build off of once the campaign concludes. CalVCB expects to hire a vendor to create and execute this campaign.

The Governor also proposed spending 30 million dollars, one time from the general fund, to establish an innovative pilot grant program to provide victim services across California. For victims needing services, there are large inequities in what is available in different regions of the state. Rural areas in particular have limited access to victim services. This competitive grant program will fund local entities throughout California to fill that void; with the flexibility to do it in a way that is most practical and effective in their areas, and it would require a 20 percent match from participating entities.

These additions in the May revision are on top of what was proposed in the Governor's January budget. Those proposals will increase CalVCB's federal authority benefit limit to accommodate the increase in its federal Victims of Crime Act reimbursement rate. CalVCB would use this additional funding to support an increase in benefit limits for crime scene cleanup, funeral burial costs, and relocation claims. These are benefit limits that were set more than 20 years ago and have not been raised since then. It would also change the way CalVCB compensates those who have been found erroneously convicted and deserving of payment at these Board meetings. The budget proposal would allow CalVCB to pay those claims directly without going through the legislative process. It would also allocate 2.4 million dollars for CalVCB's IT infrastructure and information security needs and, finally, it would provide CalVCB with additional funds to assist in processing an increased number of erroneous conviction claims under SB 446, which took effect January 1, 2022.

Also, we learned in the May revision that the Prop. 47 savings is greater than what was projected in January. Ten percent of the Prop. 47 savings will go toward funding Trauma Recovery Center grants, so there's an additional 1.38 million that is being applied to the 2022 grant awards that the Board approved in March.

Ms. Gledhill also mentioned that Senate leadership has recommended enhancing CalVCB's budget in various ways, including appropriating 115 million ongoing backfill to the restitution fund and providing 15 million dollars, one time, to increase grants for trauma

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recovery centers. There are several items pending in the legislature that would impact CalVCB and we look forward to seeing how things work out. We hope and expect that the final budget will allow us to do much more to help victims.

Ms. Gledhill updated the Board on the rulemaking process to revise and amend regulations governing Penal Code section 4900 claims, which the Board officially started with its approval on March 17. On March 21, we submitted the proposed regulations along with the Notice of Proposed Rulemaking and Initial Statement of Reasons to the Office of Administrative Law. Those documents were published on April 1 in the California Regulatory Notice Register and on our website. The 40-day public comment period ensued, spanning from April 1 to May 16. No public hearing was scheduled; none was requested. CalVCB did receive some feedback to the proposed regulations, which is under consideration, and we anticipate proposing some modifications to the proposed regulations, which would trigger another 15-day public comment period. These changes include referencing an updated version of the claim form as well as substituting the technical term of jurisdiction with its specific definition in this administrative context. CalVCB hopes to have a final version of the regulations ready to present for the Board's approval at the July Board meeting.

Finally, Ms. Gledhill expressed her pride for CalVCB and its dedicated employees related to the recently conducted Denim Drive, which was sponsored in April to coincide with Sexual Assault Awareness Month, National Crime Victims' Rights Week, and international Denim Day. She noted this was exciting for many reasons, one of which was that it was the first time in two years that CalVCB has been able to have an in-person commemoration or event. CalVCB staff continue to come into the office one day a week and CalVCB collected denim from them as well as from the public. On Denim Day, which was April 27, Ms. Gledhill presented WEAVE with nearly a hundred pairs of jeans. WEAVE is the primary provider of crisis intervention services for survivors of domestic violence and sexual assault in Sacramento County. WEAVE came to the CalVCB offices and picked up the jeans and then placed them for sale in their store. WEAVE used the proceeds to fund their programs.

Chairperson Ravel thanked Ms. Gledhill for the updates.

Item 4. Legislative Update

The Legislative Update was provided by Deputy Executive Officer of the External Affairs Division, Andrew LaMar.

Mr. LaMar acknowledged that several of the bills that CalVCB is following were scheduled to be heard in the Appropriations Committees. He explained that bills will either pass off

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the file and move to the floor, or be held in the committee. Most notably, the Senate Appropriations Committee will hear:

- SB 993 by Senator Skinner, which would make many significant changes to CalVCB's statutes.
- SB 877, by Senator Edmund, which would authorize CalVCB to reimburse mental health providers who are licensed in states outside of California.
- SB 1468, by Senator Glazer, which is related to findings of factual innocence.
- AB 2126, by Assembly Member Flora, which would create a new program to be administered by CalVCB to compensate the family members of those who die from Fentanyl overdoses.

Additionally, SB 632 by Senator Portantino, which would appropriate funds to pay erroneous conviction claims approved by the Board was recently amended to include three claims that were approved at the March Board meeting. The bill would now appropriate 4.5 million from the general fund to pay the five claims. The bill was passed by the Appropriations Committee and is currently on the Assembly floor.

Chairperson Ravel thanked Mr. LaMar for the updates.

Item 5. Contract Update

The Contract Update was provided by Deputy Executive Officer of the Administration Division, Sarah Keck.

Ms. Keck reminded the Board that it has delegated to the Executive Officer the authority to execute contracts for the maintenance of the Board's information technology systems, as well as contracts in an amount not to exceed $200,000. 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.

Ms. Keck explained the Board would consider two items for approval at the meeting. First is a contract for Two Q, Inc. doing business as JP Marketing. This contract is in the amount of $276,055. The contractor is engaged to conduct a statewide outreach campaign in consultation with community-based organizations to locate survivors of state-sponsored sterilization. This contract is specifically for sterilizations conducted pursuant to Eugenics Laws that existed in the state between 1909 and 1979 and to identify survivors of coerced sterilizations conducted in California prisons after 1979. The goal of the outreach campaign is to notify victims of the process to apply for victim compensation and the accompanying free counseling services. This contract was procured through a competitive bid and the term is from May 2022 to December 2023.

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The second contract requiring action from the Board that Ms. Keck discussed is the Alliance for a Better Community contract. This contract is in the amount of $300,000 and the contractor shall conduct initial research of forced or involuntary sterilization that possibly took place until 2012 at the Los Angeles + USC Medical Center; formerly known as Los Angeles County Hospital, located in Los Angeles, California. This contract was authorized in Senate Bill 119. The contract term is from July 1, 2022, to June 31, 2024.

Chief Counsel Kim Gauthier offered clarification regarding the first contract with Two Q, Inc. and noted that that contract was not agendized for the meeting and that it was actually approved at the January Board Meeting. Ms. Gauthier further explained that, as a result, the only contract for review and consideration of the Board was the contract with the Alliance for a Better Community for $300,000 dollars.

Ms. Keck also informed the Board of contracts executed since the last Board meeting, including one contract with for Kovarus, in the amount of $96,071.65. Pursuant to this contact, the contractor shall provide support and maintenance to CalVCB's Dell EMC Avamar System, which enables fast and efficient backup of CalVCB's data on file share and servers; this includes Cares2 and OLA. This contract was procured through a DGS approved leveraged procurement agreement under statewide contracts and the term is March 2022, through March 2023.

Chairperson Ravel thanked Ms. Keck for her update and thanked Chief Counsel for clarifying the matters for approval.

Member Becton moved to approve the Executive Officer's execution of the Alliance for a Better Community contract in the amount of $300,000. The motion was seconded by Member Silva. By a unanimous vote of the Board, the motion passed.

Item 6. PC 4900 Claim No. 21-ECO-13, Monica Magana

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

On July 9, 2021, Ms. Magana submitted an application for compensation as an erroneously convicted person pursuant to Penal Code section 4900. The application was based on Ms. Magana's 2018 convictions for robbery and burglary in concert, which were reversed on appeal for insufficient evidence of accomplice testimony. The Proposed Decision recommended denying the application as the Hearing Officer found that Ms. Magana had not met her burden of proof by a preponderance of the evidence showing she was more likely innocent than guilty of her vacated convictions.

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Throughout the proceedings, Ms. Magana represented herself. The Attorney General's Office was represented by Deputy Attorney General Jessica Leal.

Chairperson Ravel asked that Ms. Magana address the Board first.

Ms. Magana, who appeared via conference call, stated she was falsely accused throughout her case. Based only on someone else's testimony, she was found guilty and sentenced to life in prison. She noted that during her time in prison, she paid restitution fines and fees. She expressed her belief that she should be compensated because she was released. Finally, she indicated she was trying to understand what more she needed to show to prove her innocence..

Chairperson Ravel thanked Ms. Magana for her comments.

Chairperson Ravel then asked Ms. Leal for her comments on the matter.

Ms. Jessica Leal, who appeared via conference call, responded to Ms. Magana's reference to the restitution she paid by noting that the Penal Code section 4900 statutes limit compensation based on the time served, so restitution is outside the scope of the application. The Attorney General agreed with the proposed decision of the Hearing Officer and recommended the Board adopt the decision.

Chairperson Ravel thanked Ms. Leal for appearing before the Board.

Member Silva moved to adopt the Hearing Officer's Proposed Decision in the Penal Code section 4900 matter of Monica Magana. The motion was seconded by Member Becton. The motion was approved by a unanimous vote of the Board and the Proposed Decision was adopted.

Item 7. PC 4900 Claim No. 22-ECO-14, Alexander Torres

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

On April 19, 2022, Alexander Torres filed an application for compensation as an erroneously convicted person pursuant to Penal Code section 4900. The application was based upon Mr. Torres' 2001 murder conviction for which he was found factually innocent in April 2022.

As the claim is based upon a finding of factual innocence, compensation is mandated by Penal Code section 1485.55. The proposed decision of the Hearing Officer recommends

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compensation in the amount of $1,061,200, which represents $140 per day for each of the 7,580 days Mr. Torres was wrongfully imprisoned.

Throughout the proceedings, Mr. Torres was represented by Justin Brooks, Alexander Simpson, and Audrey McGinn with the California Innocence Project and the California Western School of Law. The Attorney General's Office was represented by Deputy Attorney General Jessica Leal.

Chairperson Ravel asked that counsel for Mr. Torres address the Board first.

Ms. McGinn, who appeared via conference call, stated that they agreed with the proposed decision that Mr. Torres be automatically compensated.

Chairperson Ravel thanked Ms. McGinn for her comments.

Chairperson Ravel then asked if Mr. Torres would like to address the Board.

Mr. Torres, who appeared via conference call, declined to comment.

Chairperson Ravel thanked Mr. Torres for his appearance.

Chairperson Ravel then asked Ms. Leal for her comments on the matter.

Ms. Leal, who appeared via conference call, agreed that compensation should be granted.

Chairperson Ravel thanked Ms. Leal for appearing before the Board.

Member Becton moved to adopt the Hearing Officer's Proposed Decision in the Penal Code section 4900 matter of Alexander Torres. The motion was seconded by Member Silva. The motion was approved by a unanimous vote of the Board and the Proposed Decision was adopted.

Item 8. PC 4900 Claim No. 22-ECO-06, Juan Bautista

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

On February 3, 2022, Juan Jesse Bautista filed an application for compensation as an erroneously convicted person pursuant to Penal Code section 4900. The application was based on Mr. Bautista's 2011 convictions for attempted murder, assault with a firearm,

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and street terrorism. These convictions were vacated and dismissed during state habeas proceedings in June 2021.

As there was no objection filed by the Attorney General's Office, compensation is automatic under Penal Code section 4900, subdivision (b), and the proposed decision recommends compensation of $617,680, which represents $140 per day for each of the 4,412 days Mr. Bautista was wrongfully imprisoned.

Throughout the proceedings, Mr. Bautista was represented by Saurabh Prabhakar, from the Northern California Innocence Project. The Attorney General's Office was represented by Deputy Attorney General Ian Whitney.

Chairperson Ravel asked that counsel for Mr. Bautista address the Board first.

Mr. Prabhakar, who appeared in person, started by introducing his co-counsel from the Northern California Innocence Project, Ms. O'Connell and Mr. Roberts from the law firm of Covington & Burling. Mr. Bautista also appeared in person.

Mr. Prabhakar, continued by stating they respectfully request the Board adopt the Hearing Officer's recommendation to approve Mr. Bautista's request for compensation.

Chairperson Ravel thanked Mr. Prabhakar for his comments.

Chairperson Ravel then asked if Mr. Bautista would like to address the Board.

Mr. Bautista, who appeared in person, declined to comment.

Chairperson Ravel thanked Mr. Bautista for appearing before the Board.

Chairperson Ravel then asked Mr. Whitney for his comments on the matter.

Mr. Whitney, who appeared via conference call, stated the Attorney General's Office has no objection to the request for compensation.

Chairperson Ravel thanked Mr. Whitney for appearing before the Board.

Member Silva moved to adopt the Hearing Officer's Proposed Decision in the Penal Code section 4900 matter of Juan Bautista. The motion was seconded by Member Becton. The motion was approved by a unanimous vote of the Board and the Proposed Decision was adopted.

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Item 9. PC 4900 Claim No. 22-ECO-05, Zavion Johnson

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

On January 31, 2022, Zavion Johnson filed an application for compensation as an erroneously convicted person pursuant to Penal Code section 4900. The application was based upon Mr. Johnson's 2002 convictions for murder and assault of a child resulting in death. Those convictions were vacated and dismissed during a state habeas proceeding in December 2017.

As there was no objection filed by the Office of the Attorney General, compensation is automatic under Penal Code section 4900, subdivision (b). The proposed decision recommends compensation of $818,720, which represents $140 per day for each of the 5,848 days Mr. Johnson was wrongfully imprisoned.

Throughout the proceedings, Mr. Johnson was represented by Supervising Attorney Paige Kaneb, of the Northern California Innocence Project. The Attorney General's Office was represented by Deputy Attorney General Jack Merritt.

Chairperson Ravel asked that counsel for Mr. Johnson address the Board first.

Ms. Kaneb, who appeared in person, stated that there was never a crime committed in this case and at 18-years-old, Mr. Johnson was sentenced to life in prison and sent to a maximum-security facility. The state, including the District Attorney's Office, recognized that he had been wrongfully convicted and dismissed the charges. Ms. Kaneb expressed her appreciation for the proposed decision and the Attorney General's recognition that this was not a case that should be opposed. Finally, she respectfully requested that the Board adopt the proposed decision and thanked everyone for their part in this.

Chairperson Ravel thanked Ms. Kaneb for her comments.

Chairperson Ravel then asked if Mr. Johnson would like to address the Board himself.

Mr. Johnson, who appeared in person, declined to comment.

Chairperson Ravel thanked Mr. Johnson for his appearance before the Board.

Chairperson Ravel then asked Mr. Merritt for his comments on the matter.

Mr. Merritt, who appeared via conference call, had no objection to the proposed decision.

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Chairperson Ravel thanked Mr. Merritt for appearing before the Board.

Member Silva moved to adopt the Hearing Officer's Proposed Decision in the Penal Code section 4900 matter of Zavion Johnson. The motion was seconded by Member Becton. The motion was approved by a unanimous vote of the Board and the Proposed Decision was adopted..

Closed Session

Pursuant to Government Code section 11126 (a), the Board adjourned into Closed Session with the Chief Executive Officer and Chief Counsel at 10:32 a.m. pursuant to Government Code section 11126, subdivision (c)(3) to deliberate on proposed decision numbers 1A-105 of the Victim Compensation Program.

Open Session

The Board reconvened in Open Session pursuant to Government Code sections 11126(a) and 11126(c)(3) at 10:46 a.m.

Member Becton to approve items 1A through 105, and to adopt proposed decision numbers 1A-105, with the exception of item number 5 of the Victim Compensation Program, which was removed from the agenda. Member Silva seconded the motion. The motion was approved by a unanimous vote of the Board and the proposed decision were adopted.

Adjournment

Member Becton moved adjournment of the May Board meeting. Member Silva seconded the motion. The motion was adopted by a unanimous vote of the Board and the meeting was adjourned at 10:47 a.m.

Next Board Meeting

The next Board meeting is scheduled for Thursday, July 21, 2022.

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 expect to decide whether to place the matter on a subsequent agenda. (Gov. Code, § 11125.7.)

ITEM 3

Executive Officer’s Statement

ITEM 4

California Victim Compensation Board
Legislative Update
July 21, 2022

SB 877 (Eggman) – CalVCB: Mental Health Services: Reimbursement.
This bill would authorize CalVCB to reimburse mental health providers who are licensed outside of California.
Status: Placed on the Suspense File in the Assembly Appropriations Committee

SB 993 (Skinner) – Victims and Persons Erroneously Convicted
This bill would increase the total cap on reimbursement (from $70,000 to $100,000), increase the caps on relocation (from $2,000 to $7,500), funeral and burial (from $7,500 to $20,000) and crime scene cleanup expenses (from $1,000 to $1,700), and eliminate caps and session limits for mental health counseling services. It would add a fourth board member with experience in restorative justice. It would expand eligibility for compensation of income and support loss, including for a victim who was unemployed at the time of the crime. It would allow documentation other than a crime report to be used to verify a qualifying crime. It would shorten the time period for processing of applications and appeals and extend the time period for a victim to provide additional information, appeal a decision, request reconsideration or file a petition for a writ of mandate. It would add requirements for CalVCB's communication of information to claimants. It would remove reasons for denial, including felony convictions, lack of cooperation and involvement in the events leading to the crime. It would create a presumption in favor of granting an emergency award for relocation or funeral expenses. It would require governmental agencies to provide information to potential survivors of crime about CalVCB services and require courts to provide information to survivors about the offender's sentence. It would also increase compensation for erroneously convicted individuals to account for inflation, legal expenses, and time spent on parole or probation. Finally, it would establish a pilot program within OES to contract with community-based organizations to provide direct cash assistance to survivors of violence.
Status: Scheduled for the Assembly Appropriations Committee on August 3

SB 1468 (Glazer) – Factual Innocence
This bill would create a new program for "nonmonetary relief," to be administered by CalVCB and disbursed by the Department of Justice (DOJ), for erroneously convicted persons who have been deemed factually innocent by either a court or CalVCB. This bill simultaneously deems any recommendation by CalVCB to the Legislature to appropriate compensation for a person under Penal Code section 4900 to be equivalent to a finding of factual innocence, even though no affirmative proof of innocence is required for such a recommendation under subdivision (b) of that section. Applicants may include any person who prospectively satisfies these criteria, as well as any person who previously satisfied these criteria prior to January 1, 2023. If the application is approved, CalVCB must calculate the number of days the applicant was incarcerated, subject to post-release supervision, and required to register as a sex offender. Upon CalVCB's determination, DOJ must issue to the person a certificate of innocence. In addition, DOJ and local law enforcement agencies must annotate the person's state or local summary criminal history information, and request any local, state, or federal agency or entity to which the department or agency provided that criminal record information to also annotate their records.
Status: Scheduled for the Assembly Appropriations Committee on August 3

SB 154 (Skinner) – Budget Act of 2022
The Budget Act of 2022 contains a $23 million one-time General Fund appropriation for funding for trauma recovery centers. It also appropriates $7 million from the General Fund to create a fund for the payment of erroneous conviction claims approved by CalVCB.
Status: Signed by the Governor (Chapter 43, Statutes of 2022)

AB 178 (Ting) – Budget Act of 2022
This bill amends SB 154, the Budget Act of 2022. It amends provisional language specifying the distribution of the $23 million one-time General Fund appropriation for funding for trauma recovery centers. It also increases CalVCB's budget authority by $3 million to conduct an outreach campaign to raise awareness of statewide victim support services.
Status: Signed by the Governor (Chapter 45, Statutes of 2022)

SB 189 (Committee on Budget) – State Government
This Budget Trailer Bill increases CalVCB benefit limits on funeral and burial expenses (from $7,500 to $12,818), relocation expenses (from $2,000 to $3,418), and crime scene cleanup expenses (from $1,000 to $1,709). It also states the intent of the Legislature to provide General Fund augmentation for the Restitution Fund as of the 2024-25 Budget for the purpose of eliminating restitution fines and making changes to victim compensation program eligibility, benefit levels, and administration. The bill also adds temporary exceptions to the Bagley-Keene Act allowing public meetings to be held by teleconference until July 1, 2023.
Status: Signed by the Governor (Chapter 48, Statutes of 2022)

AB 200 (Committee on Budget) – Public Safety
This Budget Trailer Bill repeals provisions that require CalVCB to submit a report and recommendation to the Legislature for the appropriation of funds to pay erroneous conviction claims. The bill instead authorizes CalVCB to approve payment of an erroneous conviction claim if sufficient funds have been appropriated by the Legislature. The bill also provides immunity to CalVCB from liability for damages for any decision on an erroneous conviction claim. The bill also requires CalVCB to report annually to the Joint Legislative Budget Committee on approved erroneous conviction claims paid in the previous year.
Status: Signed by the Governor (Chapter 58, Statutes of 2022)

SB 632 (Portantino) – Erroneous Conviction Claims Bill
This bill would appropriate $4,518,620 from the General Fund to pay five erroneous conviction claims approved by CalVCB for George Souliotes, Guy Miles, Edward Dumbrique, Jonathan Hampton, and John Klene.
Status: On the Governor's Desk

SB 299 (Leyva) – Victim Compensation: Use of Force by Law Enforcement
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: On the Assembly Inactive File

SB 981 (Glazer) – Criminal Procedure: Factual Innocence
This bill would expand the grounds for which an automatic recommendation for compensation of an erroneous conviction claim by CalVCB is required under subdivision (a) of Penal Code section 1485.55. It would also reduce the standard to obtain a court-issued finding of factual innocence under subdivision (b) of section 1485.55. It would also provide that the Attorney General's opportunity to object to the compensation of a claim where the underlying conviction was vacated may be extended beyond a 45-day extension for good cause, if agreed upon by stipulation between both parties.
Status: On the Assembly Floor

SB 1106 (Wiener) – Criminal Resentencing: Restitution
This bill would prohibit a petition for relief, whether statutorily authorized or in the court's discretion, from being denied due to an unfulfilled order of restitution or restitution fine. The bill would also remove the prohibition against a parolee or inmate from being released on parole to reside in another receiving state if the parolee or inmate is subject to an unsatisfied order for restitution to a victim or a restitution fine with the sending state.
Status: On the Assembly Floor

AB 1733 (Quirk) – State Bodies: Open Meetings
This bill would specify that a "meeting" under the Bagley-Keene Open Meeting Act, includes a meeting held entirely by teleconference.
Status: In the Assembly Governmental Organization Committee

SB 119 (Skinner) – Budget Act of 2021
This bill amends the Budget Act of 2021, which appropriated $300,000 to CalVCB for a contract with the Alliance for a Better Community. The amendment specifies that the contract is for study of and outreach to survivors of forced or involuntary sterilization at previously named Los Angeles County Hospital, currently named Los Angeles County + USC Medical Center in Los Angeles, California.
Status: Signed by the Governor (Chapter 9, Statutes of 2022)

AB 2126 (Flora) – Controlled Substances
This bill would create the Fentanyl Victim Compensation Fund and deposit into that fund 10 percent of the collections from a $20,000 fine imposed on drug charges in cases involving fentanyl. It would also authorize CalVCB to accept applications for reimbursement for up to $7,500 for funeral and burial expenses arising from, and up to $5,500 for mental health counseling related to, a fatal fentanyl overdose, if those applications are submitted by a surviving parent, grandparent, sibling, child, grandchild, spouse, or fiancé of the deceased. CalVCB would be authorized to reimburse those expenses upon an appropriation of funds from the Fentanyl Victim Compensation Fund by the Legislature for this purpose.
Status: Held on the Suspense File in the Assembly Appropriations Committee

AB 2850 (Berman) – California Sexual Assault Response Team (SART) Advisory Council
This bill would create the California Sexual Assault Response Team (SART) Advisory Council to promote swift, coordinated, competent, and efficient sexual assault intervention in every county, whose work shall be directed by a lead agency or department to be specified by the Governor. The bill would require the council to consist of representatives from specified entities, including the California Victim Compensation Board, sexual assault forensic examination teams, law enforcement agencies, county district attorneys' offices, crime laboratories, rape crisis centers, and hospitals. The bill would establish procedures for the council and require the council to, among other things, review statewide sexual assault intervention, advise county sexual assault response team programs, and submit, beginning on November 30, 2024, a biennial report to the Governor, Legislature, relevant legislative committees, and specified state agencies.
Status: Held on the Suspense File in the Assembly Appropriations Committee

AB 1599 (Kiley) – Proposition 47: Repeal
This bill would repeal the changes and additions made by Proposition 47, except those related to reducing the penalty for possession of concentrated cannabis. The bill would become effective only upon approval of the voters at the next statewide general election. The Safe Neighborhoods and Schools Act, as enacted by Proposition 47, reduced the penalty for certain crimes and requires the Director of Finance to calculate the savings to the state as a result of the act. The amount of the savings is transferred from the General Fund to the Safe Neighborhoods and Schools Fund, to be used for specified purposes. Ten percent of those funds are administered by CalVCB to provide grants to Trauma Recovery Centers.
Status: Failed the policy committee deadline

AB 1795 (Fong) – Open Meetings: Remote Participation
This bill would require state bodies to provide all persons the ability to participate both in-person and remotely in any meeting subject to the Bagley-Keene Open Meeting Act and to address the body remotely.
Status: Failed the policy committee deadline

AB 2600 (Dahle) – State Agencies: Letters and Notices: Requirements
This bill would require that every state agency, when sending any communication to any recipient, state, in bolded font at the beginning of the communication, whether it requires action on the part of the recipient or serves as notice requiring no action.
Status: Failed the policy committee deadline

Bills Impacting Victim Services

AB 2553 (Grayson) – Human Trafficking Act: California Multidisciplinary Alliance to Stop Trafficking (MAST)
This bill would establish the California Multidisciplinary Alliance to Stop Trafficking Act (MAST) to examine collaborative models between governmental and nongovernmental organizations for protecting victims and survivors of trafficking, among other related duties. The task force would be comprised of specified state officials or their designees and specified individuals who have expertise in human trafficking or providing services to victims of human trafficking.
Status: Scheduled for the Senate Appropriations Committee on August 1

AB 2534 (Bryan) – Survivor Support and Harm Prevention Pilot Program Act
This bill would, contingent upon an appropriation, establish the Survivor Support and Harm Prevention Pilot Program, to be administered by the California Health and Human Services Agency, with the purpose of funding noncarceral, nonpunitive, prevention-oriented, and therapeutic programs that support survivors of crime and otherwise support individuals who have experienced violence or trauma of any nature. The bill would require the agency to solicit applications from counties interested in hosting the pilot program and would require the agency to work with no more than 5 counties. It would also require the program to inform survivors of available victims' compensation programs.
Status: Held on the Suspense File in the Assembly Appropriations Committee

ITEM 5

California Victim Compensation Board
Contract Report
July 21, 2022

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: Department of State Hospitals **PO/Contract Number:** S22-005	**Contract Amount**: $450,000.00 **Term:** 7/22/2022 – 6/30/2024	The Contractor shall work with the Department of Developmental Services and the Department of Corrections and Rehabilitation, in consultation with stakeholders to establish markers or plaques at designated sites that acknowledge the wrongful sterilization of thousands of vulnerable people. Assembly Bill 137, Section 21 (Chapter 77, Statutes of 2021) mandates CalVCB contract with the Department of State Hospitals..
Contractor Name: Department of Corrections and Rehabilitation **PO/Contract Number:** S22-007	**Contract Amount**: $500,000.00 **Term:** 7/22/2022 – 6/30/2024	The Contractor shall work with the Department of State Hospitals and the Department of Developmental Services, in consultation with stakeholders to establish markers or plaques at designated sites that acknowledge the wrongful sterilization of thousands of vulnerable people. Assembly Bill 137, Section 21 (Chapter 77, Statutes of 2021) mandates CalVCB contract with the Department of Corrections and Rehabilitation.

Informational		
Contractor Name: Department of Developmental Services **PO/Contract Number:** S22-006	**Contract Amount:** $50,000.00 **Term:** 7/22/2022 – 6/30/2024	The Contractor shall work with the Department of State Hospitals and the Department of Corrections and Rehabilitation, in consultation with stakeholders to establish markers or plaques at designated sites that acknowledge the wrongful sterilization of thousands of vulnerable people Assembly Bill 137, Section 21 (Chapter 77, Statutes of 2021) mandates CalVCB contract with the Department of Developmental Services.
Contractor Name: U.S. Postal Service **PO/Contract Number:** PO 2684	**Contract Amount**: $50,000.00 **Term:** N/A	Funds to replenish CalVCB's postage account. Postage needed to continue daily mailings from CalVCB to claimants and stakeholders. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 5.80 (A)(5) (contract with a Federal agency).
Contractor Name: System Solutions DVBE Inc **PO/Contract Number:** PO 2676	**Contract Amount**: $68,087.50 **Term:** 7/27/2022-7/26/2023	Renewal of Blackboard Learning Management System software support and maintenance for one year. The Blackboard solution provides CalVCB with a centralized learning platform to manage training registration, attendance, completion of training, reporting, and access to e-learning training courses and materials. This was procured through a competitive, informal method.
Contractor Name: County of Alameda **PO/Contract Number:** VC-9065 A1	**Contract Amount**: $1,085,480.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $271,370.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local

		government entity).
Contractor Name: County of Contra Costa **PO/Contract Number:** VC-9066 A1	**Contract Amount**: $596,736.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $149,184.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Fresno **PO/Contract Number:** VC-9067 A1	**Contract Amount**: $254,384.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $63,596.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Los Angeles **PO/Contract Number:** VC-9068 A1	**Contract Amount**: $1,324,620.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $331,155.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Merced **PO/Contract Number:**	**Contract Amount**: $306,344.00 **Term:**	Amendment to add one additional year and funds in the amount of $76,586.00. Contractor shall ensure restitution fines and orders are properly administered in

VC-9068 A1	7/1/2019 – 6/30/2023	accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Monterey **PO/Contract Number:** VC-9070 A1	**Contract Amount**: $218,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $54,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Napa **PO/Contract Number:** VC-9071 A1	**Contract Amount**: $270,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $67,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Orange **PO/Contract Number:** VC-9072 A1	**Contract Amount**: $365,264.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $91,316.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).

Contractor Name: County of Riverside **PO/Contract Number:** VC-9073 A1	**Contract Amount**: $642,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $160,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Bernardino **PO/Contract Number:** VC-9073 A1	**Contract Amount**: $582,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $145,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Diego **PO/Contract Number:** VC-9076 A1	**Contract Amount**: $922,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $230,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Francisco **PO/Contract Number:** VC-9078 A1	**Contract Amount**: $356,496.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $89,124.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines.

		This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Joaquin **PO/Contract Number:** VC-9079 A1	**Contract Amount**: $767,852.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $191,963.00 Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Luis Obispo **PO/Contract Number:** VC-9080 A1	**Contract Amount**: $347,508.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $86,877.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of San Mateo **PO/Contract Number:** VC-9081 A1	**Contract Amount**: $314,388.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $78,597.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Santa Barbara **PO/Contract Number:**	**Contract Amount**: $385,492.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $96,373.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and

VC-9082 A1		promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Santa Clara **PO/Contract Number:** VC-9083 A1	**Contract Amount**: $1,154,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $288,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Shasta **PO/Contract Number:** VC-9084 A1	**Contract Amount**: $270,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $67,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Solano **PO/Contract Number:** VC-9085 A1	**Contract Amount**: $302,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $75,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).

Contractor Name: County of Sonoma **PO/Contract Number:** VC-9086 A1	**Contract Amount**: $302,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $75,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Tulare **PO/Contract Number:** VC-9088 A1	**Contract Amount**: $322,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $80,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).
Contractor Name: County of Ventura **PO/Contract Number:** VC-9089 A1	**Contract Amount**: $322,344.00 **Term:** 7/1/2019 – 6/30/2023	Amendment to add one additional year and funds in the amount of $80,586.00. Contractor shall ensure restitution fines and orders are properly administered in accordance with applicable statues and promote the appropriate assessment and collection of restitution fines. This procurement is exempt from competitive bidding pursuant to State Contracting Manual (SCM) Vol 1, Section 3.06 (A)(3) (contract with a local government entity).

ITEM 6

California Victim Compensation Board
Proposal to Amend Trauma Recovery Center Grant Awards

July 21, 2022

Background

A Trauma Recovery Center (TRC) is an organization that helps victims of violent crime by providing trauma-informed services that include assertive outreach to underserved populations, comprehensive evidence-based mental health services, and coordinated care tailored to each victim's needs. TRCs serve victims of all types of violent crime, including those with complex needs, with a multidisciplinary team to promote resiliency and recovery. TRCs also provide training to local law enforcement and other community partners on the identification and effects of violent crime.

Government Code section 13963.1 was enacted on July 1, 2013, and directed the California Victim Compensation Board to administer a program to evaluate applications for and award grants to Trauma Recovery Centers (TRCs) in California to provide services to victims of crime.

Government Code sections 13963.1 and 13963.2 contain requirements for how TRCs must operate and who they must serve, and they direct that CalVCB award the grants through a competitive grant application process. The grants are paid for each year with $2 million from the state Restitution Fund and a portion of the Safe Neighborhoods and Schools Fund, which is the savings the state realizes annually due to the passage and implementation of Proposition 47.

Since its inception, the program has steadily grown over the years. Presently, CalVCB has grant agreements with 18 TRCs across the state. In recent years, the program has received more qualified applications for TRC grants than it has funding to award each year, and that has prompted calls from victim advocates and legislators to increase support for the program.

2022-23 State Budget

The 2022-23 state budget package was signed into law by Governor Gavin Newsom on June 30, 2022, and took effect on July 1, 2022. One bill in the package, AB 178, contained $23 million in additional funding for TRCs. The bill states:

1. *Of the amount appropriated in Schedule (1), $13,300,000 shall be allocated to Trauma Recovery Centers in existence as of July 1, 2022, for the purposes of serving additional victims of violent crime. All Trauma Recovery Centers with annual budgets of less than $1,100,000 shall be given additional funding to increase their annual budgets to $1,100,000 for the remainder of their current grant agreements. The remaining funds shall be divided equally and one-third of the amount shall be used to increase Trauma Recovery Center grant awards in each of the next three years.*
2. *Of the amount appropriated in Schedule (1), $5,000,000 shall be allocated to establish a Regional Trauma Recovery Center Pilot Program operating Trauma Recovery Center satellite offices in rural or underserved areas that would be run by a local organization in each community and affiliated with a Trauma Recovery Center in another location that provides the services either via telehealth or by visiting the location on a regular basis, such as once a week.*
    1. *Of the total amount, $2,500,000 shall be to contract for one Trauma Recovery Center to run satellite offices in two Northern California locations for three years.*

2. *Of the total amount, $2,500,000 shall be to contract for one Trauma Recovery Center to run satellite offices in two Central California locations for three years.*
3. *Of the amount appropriated in Schedule (1), $120,000 shall be provided to each TRC in existence on July 1, 2022, for a flexible emergency cash assistance program to support victims of crime. These funds may be used for, but are not limited to, the following: transportation, childcare, food, emergency shelter, and any other reasonable urgent expenses to support victims of crime. Each TRC shall have three years to encumber the funds.*
4. *Of the amount appropriated in Schedule (1), $1,390,000 shall be used for the purposes of training and technical assistance, provided by the University of California Trauma Recovery Center Technical Assistance Program, for the California Victims (sic) Compensation Board and the California Trauma Recovery Centers. In accordance with Sections 13963.1 and Section 13963.2 of the Government Code, indirect costs shall be limited to 5 percent of that amount.*
5. *Of the amount appropriated in Schedule (1), $1,150,000 shall be allocated to the California Victims (sic) Compensation Board to cover administrative costs.*
6. *Funding within Provisions 2 through 6 shall be available for encumbrance or expenditure until July 1, 2025.*

With this agenda item, staff is seeking approval for items 1 and 4 above. CalVCB staff will return to the Board for item 2 later this year, after the pilot program has been developed and applications from TRCs interested in running it have been received and evaluated. The other budget items do not require Board approval to execute as they are within the authority delegated by the Board to the Executive Officer.

Of the 18 TRCs funded by CalVCB grants in existence as of July 1, 2022, 11 qualify for increased grant amounts under budget item 1. The funding is for the remainder of their current grant agreements. Nine qualifying TRCs (first table) have one year remaining on their agreements, while two qualifying TRCs (second table) have two years remaining on their agreements. Board approval is needed to amend the existing agreements to increase the grant amounts, consistent with the state budget appropriations.

Increased Funding for TRCs

Note: All TRCs with annual budgets of less than $1.1 million a year are to be funded to that amount for the remainder of their grant agreements. The following tables show the additional funding TRCs will receive.

Grant Agreements for 7/1/21- 6/30/23	Original 2 yr. Award Amount	Annual Budget	Additional Funding	Final Award Amount
A Quarter Blue	$387,653.73	$193,826.86	$906,174.00	$1,293,827.73
Amanacer Community Counseling Service	$2,411,016.71	$1,205,508.35	$0.00	$2,411,016.71
Contra Costa Family Justice Alliance	$865,819.75	$432,909.87	$667,091.00	$1,532,910.75
Rady's Children's Hospital - San Diego	$573,133.13	$286,566.56	$813,434.00	$1,386,567.13
Solano Trauma Recover Center	$825,217.28	$412,608.64	$687,392.00	$1,512,609.28
Olive View	$1,926,490.24	$963,245.12	$136,755.00	$2,063,245.24
Palomar Health Foundation / One Safe Place	$1,515,727.16	$757,863.58	$342,137.00	$1,857,864.16
Partnership for Trauma Recovery	$556,869.79	$278,434.89	$821,566.00	$1,378,435.79
Safe Harbor	$2,301,173.47	$1,150,586.73	$0.00	$2,301,173.47
Special Service for Groups / HOPICS	$803,945.99	$401,972.99	$698,028.00	$1,501,973.99
Strength United / The University Corporation	$775,353.25	$387,676.62	$712,324.00	$1,487,677.25
Total Amounts	$12,942,400.50		$5,784,901.00	$18,727,301.50

Grant Agreements for 7/1/22 - 6/30/24	Original 2 yr. Award Amount	Annual Budget	Additional Funding	Final Award Amount
Alameda County Family Justice Ctr	$2,600,000.00	$1,300,000.00	$0.00	$2,600,000.00
Citrus Counseling Services	$1,990,000.00	$995,000.00	$210,000.00	$2,200,000.00
CSU Long Beach TRC	$3,430,658.00	$1,715,329.00	$0.00	$3,430,658.00
Miracles Counseling Center	$2,445,214.00	$1,222,607.00	$0.00	$2,445,214.00
The Regents on the UCSF	$2,787,913.00	$1,393,956.50	$0.00	$2,787,913.00
USC Suzanne Dworak-Peck School of SW	$1,566,379.00	$783,189.50	$633,622.00	$2,200,001.00
Downtown Women's Center	$2,452,036.00	$1,226,018.00	$0.00	$2,452,036.00
Total Amounts	$17,272,200.00		$843,622.00	$18,115,822.00
Total Additional Funding			$6,628,523.00	

Contract for Technical Assistance

Item 4 of the TRC budget language in AB 178 provides $1.39 million in funding for technical assistance and training provided by the University of California Trauma Recovery Center Technical Assistance Program for CalVCB and TRCs.

Staff is currently developing the statement of work for the contract, which will include providing training to staff in all TRCs, assisting new TRCs and identifying the need for TRC services throughout the state and how best to meet it. Board approval of the agreement is requested now to ensure that when the contract is approved and signed by both the Technical Assistance Program and CalVCB Executive Officer Lynda Gledhill, it will go into effect.

ITEM 7

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: **Edward Easley** Claim No. 22-ECO-08	**Proposed Decision** **(Penal Code § 4900, subd. (b))**

I. Introduction

On March 2, 2022, Edward Easley (Easley) submitted a claim for compensation as an erroneously convicted person to the California Victim Compensation Board (CalVCB) pursuant to Penal Code section 4900. The claim is based upon Easley's two, 1993 convictions for lewdly touching a child, which were vacated and dismissed by the Shasta County Superior Court on August 31, 2017. Easley seeks compensation in the amount of $263,620 for having served 1,883 days imprisonment for these convictions.[1] Easley is represented by Supervising Attorney Paige Kaneb of the Northern California Innocence Project.

The Office of the Attorney General is represented by Deputy Attorney General Jessica Leal. By letter dated May 23, 2022, the Attorney General declined to object to Easley's claim. The administrative record closed that same day, and the matter was assigned to CalVCB Senior Attorney Sara Harbarger. As required by subdivision (b) of Penal Code section 4900,[2] CalVCB is mandated to grant Easley's unopposed claim and recommend that the Legislature appropriate $263,620 to Easley for the injury sustained by his vacated convictions.

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[1] Letter from Deputy Attorney General Jessica Leal, dated May 23, 2022, submitted via email; E-mail from Easley's attorney Paige Kaneb confirming calculation dated May 23, 2022.

[2] Pen. Code, § 4900, subd. (b), added by Stats.2021, c. 490 (S.B. 446), § 3, eff. Jan. 1, 2022.

II. Procedural History

On November 19, 1993, Easley pled no contest to two felony violations of Penal Code section 288, for lewdly touching a child under the age of 14 years, in Shasta County Superior Court case number 93-362.[3] On April 28, 1994, he filed a motion to withdraw his plea.[4] On April 29, 1994, the court denied Easley's motion to withdraw his plea and sentenced him to 10 years in state prison.[5] On January 24, 1999, Easley completed his prison term and was released.[6] Easley was incarcerated for 1,883 days.[7] Following his release, Easley remained subject to registration as a sex offender pursuant to Penal Code section 290.

On June 4, 2007, Easley applied to the Shasta County Superior Court for a writ of habeas corpus, writ of error coram nobis, and motion to vacate.[8] Easily asserted he was factually innocent and attached an exonerating declaration from the victim, N.V.,[9] that identified two other persons as her abusers. On September 20, 2007, the Shasta County Superior Court denied Easley's petitions on both procedural and substantive grounds.[10] On April 11, 2008, the Shasta County Superior Court denied Easley's petition for reconsideration of the September 20, 2007, ruling.[11]

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[3] Easley Application (App.) at pp. 1, 49, 98. For convenience, the pagination for Easley's application refers to the continuous page numbers for the entire 669-page PDF file, starting with the Erroneously Convicted Person Claim Form (App. at p. 1-2), the supporting memorandum (*id*. at pp. 3-14), followed by supporting exhibits including Motion to Vacate and accompanying 16 exhibits filed May 3, 2017 (*id*. at pp. 16-663), the court order dismissing the case (*id*. at p. 665-667), and AOJ filed April 29, 1994 (*id.* at p. 669.).

[4] Easley App. at pp. 562-565.

[5] Easley App. at pp. 1, 567-568; see also Easley Abstract of Judgment (AOJ), submitted via email attachment on March 2, 2022.

[6] AG Exhibit 1.

[7] Letter from Deputy Attorney General Jessica Leal, dated May 23, 2022, submitted via email; E-mail from Easley's attorney Paige Kaneb confirming calculation dated May 23, 2022.

[8] Easley App. at pp. 49-51.

[9] To preserve her privacy, the victim is referred to solely by her initials.

[10] Easley App. at pp. 10, 49, 573-578.

[11] Easley App. at p. 579.

On June 3, 2008, Easley filed a petition for writ of habeas corpus in the Court of Appeal, raising the same claim of actual innocence, as well as other issues.[12] The Court of Appeal issued an order to show cause on July 18, 2008, which ordered the superior court to hold an evidentiary hearing.[13] The Shasta County Superior Court held an evidentiary hearing from March 17, 2009 to March 19, 2009, during which the victim, N.V., Easley, and other witnesses testified.[14] The Shasta County District Attorney's Office opposed Easley's petition.[15] After the evidentiary hearing, on April 1, 2009, the Shasta County Superior Court affirmed the judgment.[16] The court specifically found that, even though it was unlikely the jury would have convicted Easley had it heard the new evidence, relief was barred under the prevailing legal standard because a reasonable jury could have convicted Easley after considering all of the evidence presented.[17]

Easley filed a petition for writ of habeas corpus raising the same claim in the California Supreme Court.[18] On July 28, 2010, the Supreme Court denied Easley's petition for lack of standing, as he was no longer confined in state custody.[19]

On May 4, 2017, with the assistance of the Northern California Innocence Project, Easley filed a motion to vacate both convictions in the Shasta County Superior Court based on the newly enacted law, Penal Code section 1473.7, subdivision (a)(2).[20] Under this provision, a person no longer imprisoned may move to vacate a conviction based upon newly discovered evidence of actual innocence that requires vacation of the conviction as matter of law or in the interests of justice.[21] The

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[12] Easley App. at p. 10.

[13] Easley App. at pp. 10, 49.

[14] Easley App. at pp. 10, 106, 259.

[15] Easley App. at p. 105.

[16] Easley App. at p. 10.

[17] Pen. Code, § 1473.7, subd. (a)(2).

[18] Easley App. at p. 11.

[19] *Ibid.*

[20] Easley App. at pp. 11, 17.

[21] *Ibid.*

People did not file an opposition, nor did they object to the motion to vacate.[22] On August 31, 2017, the Shasta County Superior Court granted Easley's motion to vacate, dismissed the charges in the interest of justice, and determined collateral estoppel applied.[23] Easley did not move for a finding of factual innocence pursuant to Penal Code section 1485.55, which requires a preponderance of evidence that the person did not commit the charged offense.[24]

On March 2, 2022, Easley submitted his claim via email to CalVCB seeking compensation as an erroneously convicted person under the recently enacted provision of Penal Code section 4900, subdivision (b). Easley initially requested compensation in the amount of $264,180 for 1,887 days of incarceration from the date of his sentencing on April 29, 1994, up to but excluding the date of his release "on or about January 31, 1999," with the addition of 151 days spent in county jail prior to sentencing.[25] After confirming compliance with Penal Code sections 4900 and 4901, CalVCB deemed the claim filed on March 3, 2022, and requested a response from the Attorney General within 45 days pursuant to Penal Code section 4902, subdivision (d). In addition, CalVCB requested Easley clarify the custodial dates. Easley's counsel responded the same day, seeking compensation in the amount of $266,00 for a total of 1,900 days incarceration, which was calculated based upon Easley's best recollection after being unable to obtain any records with his exact release date.[26]

Following the Attorney General's single request for an extension of time, the Attorney General timely submitted a declination letter on May 23, 2022. The Attorney General declined to object to compensation, but disagreed with Easley's custodial calculation by 17 days, and provided a printout from the California Department of Corrections and Rehabilitation showing the dates Easley entered and exited prison.[27] The Attorney General stated claimant was incarcerated for 1,732 days from the

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[22] Easley App. at p. 665.

[23] *Ibid.*

[24] Pen. Code, § 1485.55, subd. (b). In accordance with Penal Code section 1485.55, subdivision (d), no presumption exists in this proceeding from the absence of such a determination.

[25] Easley App. at pp. 1, 12.

[26] E-mail from Easley's attorney Paige Kaneb dated March 3, 2022.

[27] Letter from Deputy Attorney General Jessica Leal, dated May 23, 2022, submitted via email.

date of his sentencing on April 29, 1994, through his release from prison on January 24, 1999.[28] Additionally, per the sentencing minutes and abstract of judgment, claimant served an additional 151 days in jail prior to sentencing. Based on this calculation, the Attorney General stated claimant served a total of 1,883 days in custody and is entitled to $263,620.

The Hearing Officer requested Easley respond to the Attorney General's custodial day calculation. Easley agreed with the Attorney General's calculation of custodial days.[29] The administrative record closed on May 23, 2022.

III. Factual Background[30]

A. Preliminary Hearing held April 8, 1993

N.V. testified at the preliminary hearing on April 8, 1993, one month before her tenth birthday.[31] The following facts are summarized from the preliminary hearing transcript.

N.V. identified Easley as her Uncle Ed who lived with her Aunt Sharon (Sharon) across the bridge from her home.[32] N.V. stated on an undetermined date, Easley pushed her into the trailer, took her into his bedroom, took off her clothes, and took off his clothes.[33] N.V. stated she saw his front private and it was long and hard.[34] He shoved her on the bed, she lay on her stomach, he got on top of her, and stuck his front private in her back private.[35] At some point he got off, gave N.V. her clothes, and told her to get out.[36] N.V. left the trailer, ran home, and locked the door.[37] On a different date, around N.V.'s ninth birthday in 1992, the same exact sequence of events occurred.[38] After each

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[28] Letter from Deputy Attorney General Jessica Leal, dated May 23, 2022, submitted via email.

[29] E-mail from Easley's attorney Paige Kaneb dated May 23, 2022.

[30] This factual summary is based upon Easley's application and supporting documents.

[31] Easley App. at pp. 58-59.

[32] Easley App. at p. 60.

[33] Easley App. at pp. 66-67.

[34] Easley App. at p. 68.

[35] Easley App. at pp. 68-69.

[36] Easley App. at p. 69.

[37] *Ibid.*

[38] Easley App. at pp. 75-76, 82.

unlawful touching, Easley cut the crotch out of her underwear, gave the underwear back to her, and told her to hide them.[39] Easley threatened to kill N.V.'s mother if N.V. disclosed the unlawful touching.[40] N.V. hid the underwear in her closet, her mother found them, asked why it was cut out, and she replied "[Easley's] been doing this to me."[41] N.V. told her mom what happened because she was having digestive problems.[42] N.V. subsequently told Detective Madeline Wade about these incidents and underwent a medical examination.[43]

Detective Madeline Wade also testified at the preliminary hearing. She confirmed N.V.'s prior disclosure to her.[44] She acknowledged that N.V.'s mother had failed to turn over N.V.'s cut or soiled underwear, despite a request to do so.[45]

Following the preliminary hearing, Easley pled no contest to lewdly touching N.V., while under the age of 14, on two separate occasions.[46] Easley stipulated to the preliminary hearing as the factual basis for his plea. In exchange, two separate counts for sodomy of a child under age 14, a violation of Penal Code section 286, subdivision (c), were dismissed.[47] He was sentenced on April 29, 1994, to ten years imprisonment.

B. Habeas Corpus Evidentiary Hearing held March 17-19, 2009

Fifteen years later, multiple witnesses testified at the Habeas Corpus Evidentiary Hearing held March 17 through 19, 2009.[48] The following facts are summarized from the hearing transcript.

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[39] Easley App. at p. 83.

[40] Easley App. at p. 77.

[41] Easley App. at p. 83.

[42] Easley App. at p. 108.

[43] Easley App. at pp. 78, 90.

[44] Easley App. at pp. 86-90 (testimony), 610-619 (report).

[45] Easley App. at pp. 88-89.

[46] Easley App. at pp. 87, 98-103.

[47] Easley App. at pp. 94, 98.

[48] Easley App. at pp. 58-59.

1. N.V.'s Testimony

N.V., then age 25, testified that Easley was her uncle, a good male role model, and treated her like one of his own children.[49] When she was a child, her Aunt Samara (Samara), Samara's husband, and their two sons C.M. and S.M. moved close to N.V.[50] She spent a lot of time at Samara's home.[51] C.M. was approximately five to seven years older than N.V.[52] C.M. spent a lot of time with his friend S.H.[53] N.V. stated C.M. and S.H. touched her inappropriately on different occasions.[54] On one occasion, C.M. and S.H. told her to go in the bathroom, S.H. joined her in the bathroom, she asked him not touch her in the front because it hurt, she ended up on the floor, and S.H. penetrated her behind with his penis.[55] When she told her mother that C.M. and S.H. touched her on her private parts, her mother told her to run away next time.[56] On an undisclosed date after this disclosure, C.M. and S.H. tried to touch her again, she ran away, and escaped the attack.[57] Immediately afterwards, she told her mother that C.M. and S.H. asked to touch her, her mother became upset, confronted C.M., and yelled at him.[58] C.M. and S.H. did not touch her again after this incident.[59]

After the last touching, N.V., then age eight or nine, soiled her underwear a few times, her mother became upset about the soiled underwear, and so N.V. began to hide them in a closet to avoid getting into trouble.[60] Her mother found a few pairs of soiled underwear, confronted her, became

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[49] Easley App. at p. 116.

[50] Easley App. at p. 117.

[51] Easley App. at p. 118.

[52] Easley App. at pp. 118, 142. In an effort to preserve their privacy, N.V.'s family members and friends are referred to solely by their first name or initials.

[53] Easley App. at p. 118.

[54] Easley App. at pp. 119-120.

[55] Easley App. at p. 126.

[56] Easley App. at p. 124.

[57] Easley App. at pp. 127-128.

[58] Easley App. at p. 128.

[59] Easley App. at pp. 128, 179.

[60] Easley App. at pp. 128-129.

angry, and asked if someone touched her.[61] N.V. told her mother no one touched her.[62] Her mother asked if it was Easley and said she knew it was Easley.[63] N.V. felt scared and said yes it was Easley.[64] N.V.'s mother already knew that N.V. had accused S.H. and C.M. of unlawfully touching her when she suggested Easley was the perpetrator.[65]

Child Protective Services spoke with N.V. after she told her mother Easley touched her.[66] Prior to the interview, Samara told her to tell them the truth.[67] During the interview, Samara was present, and N.V. again named Easley as the perpetrator.[68] When she testified at the preliminary hearing, Samara was also present, and N.V. either made stuff up or answered mostly yes or no questions.[69] At the preliminary hearing, N.V. cried and could not look at Easley because she knew what she said was not true.[70] She felt very upset, scared, and sad because her testimony against Easley was not true.[71]

During N.V.'s teenage years, she told Sharon that Easley did not touch her, but C.M. and S.H. did.[72] She and Sharon went to the District Attorney's Office and told unspecified employees of that office that Easley did not touch her.[73] She refused to disclose to law enforcement that the actual perpetrators' names were S.H. and C.M.[74]

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[61] Easley App. at p. 129.

[62] *Ibid.*

[63] Easley App. at p. 130.

[64] *Ibid.*

[65] Easley App. at pp. 179-180.

[66] Easley App. at p. 130.

[67] Easley App. at p. 132.

[68] Easley App. at pp. 132-133.

[69] Easley App. at p. 134.

[70] *Ibid.*

[71] Easley App. at pp. 192-193.

[72] Easley App. at p. 136.

[73] Easley App. at p. 136. The Prosecutor provided a declaration disputing this disclosure. The dispute of whether this disclosure took place is not discussed because it is not relevant to this proceeding.

[74] Easley App. at p. 136.

N.V. testified that Easley never touched her in an inappropriate way; Easley did not rape or sodomize her; and Easley did not threaten her or her mother.[75] She feared her aunt Samara and mother, and they led her to accuse Easley.[76] When she got into trouble, her mother screamed, spanked, hit, or pulled her hair.[77] She stated Easley should never have been convicted because he was innocent.[78] She stated Sharon did not pressure her to testify on Easley's behalf.[79]

2. C.M.'s Testimony

C.M., then age 33, testified that when he was approximately seven years old, N.V.'s mother and Samara approached him and told him to keep his hands off N.V. but he did not know what they meant.[80] C.M. testified that he never had any sexual contact with N.V.[81]

3. S.H.'s Testimony

S.H. testified that he never raped, sodomized, or touched N.V. in a sexual way.[82] He was a close childhood friend of C.M. and visited C.M.'s home starting at age five until high school.[83] He knew who N.V. was but never played with her.[84]

4. C.W.'s Testimony

C.W. testified that Samara is his wife's aunt.[85] In 1995, Samara threatened C.W., "If you keep doing that and pissing me off, I'm going to do the same thing I did to Ed."[86] At that time, Easley was

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[75] Easley App. at pp. 122, 182.
[76] Easley App. at pp. 122-123.
[77] Easley App. at p. 123.
[78] Easley App. at p. 181.
[79] Easley App. at p. 185.
[80] Easley App. at p. 223.
[81] Easley App. at p. 240.
[82] Easley App. at p. 551.
[83] Easley App. at p. 554.
[84] Easley App. at pp. 555-556.
[85] Easley App. at p. 359.
[86] Easley App. at p. 361.

in jail for the child molestation convictions.[87]

5. Easley's Testimony

Easley testified that he never raped, sodomized, or touched N.V. in a sexual way.[88] He stated N.V.'s mother left her with him and Sharon for extended periods of time.[89] He witnessed N.V.'s mother slap and hit her on the head.[90] In 1993, he told law enforcement he was innocent and never touched N.V.[91] Months after talking to law enforcement, he was arrested.[92] He stated it was difficult to watch N.V. testify at the preliminary hearing because she was crying and he felt bad for her.[93] His attorney told him he was facing 32 years in prison but the attorney could get him a deal for ten years.[94] Even though he knew he was innocent, he pled no contest because he did not want to risk being sentenced to 32 years in prison.[95] A psychiatrist interviewed him, and he told the psychiatrist "something happened" in order to preserve the plea.[96] Additionally, he falsely told the probation officer and the psychiatrist that he fondled N.V. to preserve the plea.[97] After meeting with the psychiatrist, he asked his attorney to withdraw the plea because he did not want to lie, but the court denied his request.[98] The court sentenced him to ten years in prison, and he served five years and

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[87] AG Ex. 1.

[88] Easley App. at p. 417.

[89] Easley App. at p. 421.

[90] Easley App. at p. 422.

[91] Easley App. at p. 427.

[92] Easley App. at p. 428.

[93] Easley App. at p. 432.

[94] Easley App. at p. 434.

[95] Easley App. at p. 435.

[96] Easley App. at pp. 438, 465.

[97] Easley App. at pp. 464-465.

[98] Easley App. at p. 438.

two months.[99] He stated he never tried to influence N.V., to change her testimony, nor did he ever threaten to harm her or her mother.[100]

C. Habeas Corpus Statement of Decision dated April 1, 2009

In the Statement of Decision dated April 1, 2009, the Shasta County Superior Court rendered multiple factual findings at the conclusion of the evidentiary hearing when denying relief.[101] The first relevant finding was in response to the issue of whether N.V. made false statements at the preliminary hearing.[102] The court found,

> "During the hearing beginning on March 18, 2009, both parties argued that [N.V.] was either lying at the preliminary hearing or in her recantation. This court disagrees with both parties. Her testimony at the preliminary hearing could be inaccurate but not false. False statements mean statements that the maker knows are false. At the time of the preliminary hearing [N.V.] could have believed she was accurately testifying to what happened based on her recollection embellished by hearsay from her family. This court finds Easley has not established by a preponderance of the evidence that [N.V.] made false statements at the preliminary hearing."[103]

The second relevant finding was in response to the issue of whether the newly discovered recantation evidence undermined the entire prosecution case such that no reasonable juror would have returned a guilty verdict.[104] The court found,

> "This court finds that Easley has not established by a preponderance of the evidence that [N.V.'s] recantation was accurate. This is a close question, but the court after observing the witness [N.V.] testify and after comparing her testimony with previous statements she has made and after weighing the corroborative evidence, both supporting her recantation and discrediting her recantation, has concluded her recantation testimony is not accurate. This does not mean she is lying. As this court observed… above, [N.V.] could have believed she was accurately testifying to what originally happened based on her present recollection embellished by hearsay from members of her family other than the family member referenced…above."[105]

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[99] Easley App. at pp. 439-440.

[100] Easley App. at p. 451.

[101] Easley App. at pp. 49-53.

[102] Easley App. at p. 51.

[103] *Ibid.*

[104] Easley App. at p. 52.

[105] Easley App. at p. 52.

IV. Determination of Issues

Penal Code section 4900 allows a person, who has been erroneously convicted and imprisoned for a felony offense, to submit a claim for compensation to CalVCB.[106] Typically, claimants bear the burden to prove by a preponderance that (1) the crime with which they were convicted either did not occur or was not committed by them and (2) they suffered injury as a result of their erroneous conviction.[107] If the claim is ultimately approved, it results in a recommendation by CalVCB to the Legislature to make an appropriation for compensation for the person's sustained injury, which is calculated at the rate of $140 per day of imprisonment that resulted from the erroneous conviction.[108]

In limited circumstances, both of the elements for innocence and injury may be presumed, if a court has found the claimant factually innocent under any standard applicable in a proceeding to grant habeas relief or vacate a conviction pursuant to Penal Code section 1473.6.[109] To obtain such a finding, the claimant may move for a finding of factual innocence by a preponderance of the evidence that the crime which with they were charged was either not committed at all or, if committed, was not committed by the claimant.[110] If the claimant received a finding of factual innocence for each and every conviction underlying the period of their incarceration, CalVCB must automatically recommend compensation, within 30 days and without a hearing.[111]

Alternatively, under recently enacted subdivision (b) of Penal Code section 4900, a recommendation for compensation is mandated for certain claimants, even without a preponderance of evidence that the claimant did not commit the crime for which they were convicted.[112] Specifically, subdivision (b) compels a recommendation for compensation, without a hearing and within 60 days, when the following three elements are met. First, the claimant's conviction must have been vacated

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[106] Pen. Code, § 4900.

[107] Pen. Code, §§ 4900, subd. (a); 4903, subd. (a).

[108] Pen. Code, § 4904.

[109] Pen. Code, §§ 1485.55, subd. (a), 4902, subd. (a).

[110] Pen. Code, §§ 1485.55, subd. (b).

[111] Pen. Code, §§ 861.865; 1485.55, subd. (a), 4902, subd. (a).

[112] Pen. Code, § 4900, subd. (b), added by Stats.2021, c. 490 (S.B. 446), § 3, eff. Jan. 1, 2022.

either by a writ of habeas corpus or pursuant to Penal Code section 1473.6 or 1473.7, subdivision (a)(2). Second, the charges underlying the vacated conviction must have been dismissed on remand, or the claimant must have been acquitted upon retrial. Third, the Attorney General must decline to object to the application in this administrative proceeding.[113] If all three of these elements are satisfied, and CalVCB finds that the claimant sustained injury through their erroneous conviction, then CalVCB shall recommend that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury.[114] The recommendation is required, regardless of whether or not the evidence proves the claimant is more likely innocent than guilty.

If the Attorney General objects, he must do so in writing, within 45 days from when the claimant files the claim, and with clear and convincing evidence that the claimant is not entitled to compensation. Only a single extension of time for 45 days is allowed for good cause. The Attorney General bears the burden to prove, by clear and convincing evidence, that the claimant committed the acts constituting the offense.[115] To meet that burden, the Attorney General may not rely solely on the trial record for the vacated conviction to establish that the claimant is not entitled to compensation.[116]

When deciding a claim under Penal Code section 4900, the Board is bound by any factual findings and credibility determinations rendered by a court during proceedings on a petition for writ of habeas corpus, motion to vacate pursuant to Penal Code sections 1473.6 or 1473.7, subdivision (a)(2), or an application for a certificate of factual innocence.[117] The Board is likewise bound by any court finding that the claimant is factually innocent, "under any standard for factual innocence applicable in those proceedings," when either granting a writ of habeas corpus or vacating the judgment pursuant to Penal Code section 1473.6.[118]

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[113] Pen. Code, §§ 4900, subd. (b), 4902, subd. (d).

[114] Pen. Code, §§ 4900, subd. (b), 4902, subd. (d).

[115] Pen. Code, § 4902, subd. (d).

[116] Pen. Code, § 4903, subd. (d).

[117] Pen. Code, §§ 1485.5, subd. (c), 4903, subd. (c).

[118] Pen. Code, § 1485.55, subd. (a).

If the claim is ultimately approved, it results in a recommendation by CalVCB to the Legislature to make an appropriation for compensation for the claimant's sustained injury. Injury is calculated at the rate of $140 per day for the pre- and post-conviction confinement that resulted from the erroneous conviction.[119] Compensation is disbursed to the claimant if the Legislature passes a bill to appropriate the funds that is then signed by the Governor.[120]

Here, Easley's claim falls within the mandatory recommendation provision of subdivision (b) of Penal Code section 4900, as all three of the required elements are met. First, Easley's convictions in case number 93-362 for lewdly touching a child were both vacated by a motion to vacate pursuant to Penal Code section 1473.7, subdivision (a)(2). Second, the underlying charges were dismissed by the court after determining the People could not refile charges against Easley in case number 93-362 pursuant to collateral estoppel. Third, the Attorney General declined to object. Regardless of any binding factual determination rendered by the trial court when denying habeas relief in 2009, CalVCB is required by subdivision (b) to recommend compensation for the injury sustained by Easley's claim in this administrative proceeding. [121]

As calculated by the Attorney General and agreed upon by Easley, the injury sustained amounts to 1,883 days imprisonment for his vacated conviction in case number 93-362. Given the manner by which compensation is calculated, the requisite injury contemplated by Penal Code section 4904 is "each day … spent illegally behind bars, away from society, employment, and [ ] loved ones."[122] But-for his vacated convictions for lewdly touching a child, Easley would have been free for all 1,883 days from the date of his sentencing on April 29, 1994, up to the date of his release on

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[119] Pen. Code, § 4904.

[120] Pen. Code, § 4904; see also Assembly Bill 1593 (2020-2021) (appropriating compensation for multiple PC 4900 claimants); (Senate Bill 417 (2019-2020) (appropriating compensation over minority dissent for PC 4900 claimant); *cf*. Assembly Bill 1273 (2007-2008) (declining to appropriate compensation for PC 4900 claimant); Capitol Weekly, *GOP Senators Targeting Mods on Criminal Justice*, posted July 12, 2007, accessible at https://capitolweekly.net/gop-senators-targeting-mods-on-criminal-justice/ (explaining AB 1273).

[121] Pen. Code, §§ 4900, subd. (b), 4904.

[122] *Holmes v. Calif. Victim Comp. & Gov't Claims Board* (2015) 239 Cal.App.4th 1400, 1405.

January 24, 1999, plus the 151 days spent in county jail pre-sentencing.[123] Easley is therefore entitled to a recommendation for compensation in the amount of $263,620.

V. Conclusion

The undersigned Hearing Officer recommends that CalVCB grant Easley's unopposed claim for compensation, as mandated by subdivision (b) of Penal Code section 4900, with a recommendation that the Legislature appropriate $263,620 as payment for his 1,883 days of incarceration that were solely attributable to his vacated convictions for child molestation.

Date: June 14, 2022

Sara Harbarger
Hearing Officer
California Victim Compensation Board

[123] Letter from Deputy Attorney General Jessica Leal, dated May 23, 2022, submitted via email; E-mail from Easley's attorney Paige Kaneb confirming calculation dated May 23, 2022.

ITEM 8

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: **Lamont Tarkington** Claim No. 18-ECO-25	**Proposed Decision** **(Penal Code §§ 4900 et seq.)**

INTRODUCTION

On September 17, 2018, Lamont Tarkington (Tarkington) applied to the California Victim Compensation Board (CalVCB) as an erroneously convicted felon pursuant to Penal Code section 4900. Tarkington seeks compensation for 4,556 days of imprisonment in the amount of $637,840, based upon his vacated convictions for robbery. The Attorney General opposes Tarkington's application. CalVCB Senior Attorney Jenny Wong conducted a hearing on October 27, 2020, at which both parties' counsel appeared. Throughout these proceedings, Tarkington was represented by Leo Terrell, from the Law Offices of Leo Terrell, and the Attorney General was represented by Deputy Attorney General Dina Petrushenko.

After considering all of the evidence in the record, the application is recommended for denial pursuant to subdivision (b) of Penal Code section 4900 because the Attorney General's Office has proven by clear and convincing evidence that Tarkington committed the acts constituting the offense of robbery.

PROCEDURAL BACKGROUND

Tarkington and Darris Allen (Allen) were arrested together on the evening of December 14, 2005, for a bank robbery that occurred earlier that morning in Palmdale, California. Tarkington and Allen were charged in Los Angeles County Superior Court with five counts of second degree robbery

and one count of second degree commercial burglary.[1] The second amended information alleged Tarkington and Allen committed the offenses for the benefit of a criminal street gang and a principal was armed with a firearm.[2] On the counts for robbery, the second amended information alleged a principal personally used a firearm.[3] Additionally, the second amended information alleged Tarkington had one prior serious felony conviction within the meaning of the Three Strikes Law.[4] Following a jury trial with co-defendant Allen, Tarkington and Allen were convicted of five counts of second degree robbery and one count of second-degree commercial burglary. The jury found Tarkington and Allen robbed the bank for the benefit of a criminal street gang, and that a principal was armed and used a firearm in the commission of the crime.[5] Tarkington waived his right to a jury trial on his prior conviction allegations and the trial court found them to be true.[6] On May 15, 2007, the trial court sentenced Tarkington to 39 years and 4 months in state prison.[7]

Tarkington and Allen appealed to the Second District of the California Court of Appeal. On March 3, 2009, the appellate court affirmed the convictions but struck the gang enhancement, struck the 10-year firearm use enhancement, imposed a consecutive one-year armed principal enhancement, and stayed their sentences on the burglary conviction.[8]

On remand, the trial court resentenced Tarkington to an aggregate term of 24 years in state prison and imposed a restitution fine in the amount of $4,800 and parole revocation fine in the amount of $4,800.[9] Tarkington appealed arguing the trial court improperly imposed restitution fines

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[1] Pen. Code, §§ 211 (robbery), 459 (burglary); AG Ex. 2 at pp. 416-424.

[2] Pen. Code, §§ 186.22, subd. (b)(1)(A) (gang enhancement), 12022, subd. (a)(1) (firearm enhancement); AG Ex. 2 at pp. 416-424.

[3] Pen. Code, § 12022.53, subds. (b) and (e)(1); AG Ex. 2 at pp. 416-424.

[4] 28 U.S.C. 2113(A)(D) (bank robbery), Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i); AG Ex. 2 at pp. 416-424.

[5] AG Ex. 3, pp. 575-590.

[6] AG Ex. 3, p. 581.

[7] AG Ex. 2 at pp. 270-273.

[8] AG Ex. 13, p. 2828.

[9] AG Ex. 14, pp. 2850-2856.

that exceeded the fines imposed at his original sentencing and challenged the trial court's calculation of his presentence credit. The Court of Appeal reduced the restitution fine and parole revocation fine to $2,000 each and determined Tarkington should have received an additional two days of custody credit.[10]

On October 14, 2011, Tarkington filed a petition for habeas corpus in the Court of Appeal arguing he was deprived of adequate assistance of trial counsel for failing to obtain his cell phone records and the prosecutor withheld exculpatory evidence.[11] On November 18, 2011, the appellate court issued an order to show cause returnable before the superior court. The trial court conducted evidentiary hearings on October 1, 2012, October 18, 2012, October 19, 2012, March 7, 2013, March 28, 2014, and May 28, 2015.[12] On June 12, 2015, the trial court denied Tarkington's petition.[13]

In 2016, Tarkington filed a supplemental habeas petition in the Court of Appeal claiming, inter alia, he was denied effective assistance of counsel.[14] On October 20, 2017, the appellate court granted the writ based on ineffective assistance of counsel due to his counsel's failure to test a shirt and towel for the presence of a chemical used in bank red dye packs, methylamino anthraquinone (MAAQ). As a result, Tarkington's convictions were reversed. The court stated the prosecution may elect to retry Tarkington within the statutory timeframe, otherwise, Tarkington was to be released from custody.[15]

On January 31, 2018, the California Supreme Court denied the prosecution's Petition for Review seeking to challenge the habeas decision.[16]

The Los Angeles County District Attorney's Office elected to retry Tarkington, charging him with five counts of second degree robbery and one count of second degree commercial burglary with

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[10] AG Ex. 17, p. 3 (citing to *People v. Tarkington* (Oct. 22, 2010, B219128) [nonpub. opn.].).

[11] AG Ex. 18, p.2961-2966.

[12] AG Ex. 21.

[13] AG Ex. 21, pp. 3027-3029.

[14] AG Ex. 17, p. 2943.

[15] AG Ex. 17, p. 2957.

[16] Tarkington's Ex. J.

a firearm enhancement for each count.[17] On June 1, 2018, Tarkington's second jury trial commenced, but on June 4, 2018, the case was dismissed pursuant to Penal Code section 1382 after the prosecution announced it was unable to proceed.[18]

On September 17, 2018, Tarkington submitted an application to CalVCB seeking compensation as an erroneously convicted offender pursuant to Penal Code section 4900. On September 18, 2018, CalVCB requested a response letter from the Attorney General pursuant to Penal Code section 4902. Meanwhile, on March 11, 2019, Tarkington's counsel submitted a letter to CalVCB contending Penal Code section 1485.5, subdivision (c), mandated compensation because the appellate court essentially found Tarkington to be factually innocent when it applied the "fundamental miscarriage of justice" exception to the procedural bar against successive petitions. Counsel further asserted that this implicit finding by the appellate court barred the Attorney General from disputing Tarkington's innocence. Shortly thereafter, on March 29, 2019, the Attorney General submitted a response letter, which urged CalVCB to deny Tarkington's application. In it, the Attorney General maintained that the appellate court's decision did not amount to a finding of factual innocence, and the evidence ultimately failed to satisfy Tarkington's burden to prove he was more likely innocent than not. CalVCB Senior Attorney Laura Simpton issued a decision on April 24, 2019, denying both of Tarkington's contentions because "the Court of Appeal excepted Mr. Tarkington's successive petition from the procedural bar based upon its determination that an 'error of constitutional magnitude' occurred, rather than any determination of actual innocence."[19]

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[17] AG Ex. 20.

[18] AG Ex. 19.

[19] Letter dated April 24, 2019, from CalVCB Senior Attorney Laura Simpton to Leo Terrell and Dina Petrushenko titled "Penal Code section 1485.5 Determination." At that time, subdivision (c) of Penal Code section 1485.5 provided that "the express factual findings made by the court, including credibility determinations, in considering a petition for habeas corpus … shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board." (Former Pen. Code, § 1485.5, Stats.2016, c. 785 (S.B.1134), § 2, eff. Jan. 1, 2017.) Effective January 1, 2022, this provision was amended to replace "in considering" with "during proceedings on…." (Pen. Code, § 1485.5, subd. (c), added by Stats.2021, c. 490 (S.B.446), § 1, eff. Jan. 1, 2022.) As applied to Tarkington's claim, the result under either version of subdivision (c) is the same.

A hearing was held on October 27, 2020, by videoconference. Both parties' counsel appeared, and Tarkington's expert witness, Peter Barnett (Barnett), testified. Tarkington, however, was not present and failed to testify on his own behalf in this administrative proceeding. The record closed on October 27, 2020. While Tarkington's claim remained under consideration, the Legislature passed Senate Bill (SB) 446 in September 2021, which was approved by the Governor in October 2021. Effective January 1, 2022, SB 446 amended several statutory provisions for processing claims under Penal Code section 4900. These changes included the addition of subdivision (b) to Penal Code section 4900, which shifted the burden of persuasion for claimants like Tarkington whose underlying convictions were vacated during a habeas proceeding and dismissed on remand. When applicable, the claimant is no longer required to prove by a preponderance that they did not commit the crime; instead, the Attorney General must prove the claimant's guilt by clear and convincing evidence.[20]

On January 18, 2022, both parties submitted letters addressing the issue whether Penal Code section 4900, subdivision (b), and other corresponding amendments applied to Tarkington's claim since the claim was filed prior to enactment of these statutory provisions. Both parties agreed newly amended section 4900, subdivision (b) and corresponding amendments applied to Tarkington's claim. In her letter, the Deputy Attorney General also objected to compensation claiming there is clear and convincing evidence, through evidence in the trial record and outside the trial record, that Tarkington committed the robbery. Subsequently, both parties waived further hearing, submission of additional evidence, and briefing, and submitted the matter on the record.

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[20] Pen. Code, §§ 4900, subd. (b), 4902, subd. (d), added by Stats.2021, c. 490 (S.B.446), §§ 3-4, eff. Jan. 1, 2022.

FACTUAL SUMMARY[21]

I. Robbery at Bank of America in Palmdale, California

On December 14, 2005, at approximately 10:14 a.m., police were notified of a robbery at the Bank of America located inside an Albertson's supermarket in Palmdale, California.[22] Witnesses reported three black males entered the bank and ordered everyone to get down on the floor.[23] Personal Banker, Archna Rekhi (Rekhi), was pushed onto the ground by one of the robbers.[24] One robber stood in the lobby of the bank keeping time while the other two robbers jumped over the bank teller counter.[25] The robbers kept a hand inside their jackets appearing as if they had guns.[26] The two robbers behind the counter removed money from the bank tellers' drawers and put the money into bags, including trays of coins.[27] Each drawer contained bait money and dye packs designed to explode and spray dye.[28] One robber removed money from Bank Teller Coordinator Claudia Rissling (Rissling) and Bank Teller Manager Yolanda Moore's (Moore) teller drawers, while the other removed money from Bank Teller Yesenia Bahena's (Bahena) drawer.[29] After removing money from Bahena's drawer, the robber opened the door to the back area of the bank and demanded Bahena open the vault. When Bahena advised she did not have keys for the vault, the robber located keys, and tried to open the vault. After he was unable to open the vault with the keys, he took Bahena's keys and again attempted

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[21] This factual summary is based upon all evidence submitted in this administrative proceeding.

[22] AG Ex. 24, p. 3217.

[23] AG Ex. 7, p. 1334, Ex. 24, pp. 3220-3222, Ex. 26, pp. 3224-3225, Ex 26, pp. 3238-3239, Ex. 35, pp. 3267-3270.

[24] AG Ex. 7, p. 1331, Ex. 24, p. 3223, Ex. 25, pp. 3229, 3231, Ex. 35, pp. 3266, 3268.

[25] AG Ex. 1, p. 102, Ex. 7, pp. 1331, 1336, 1364, 1383, Ex. 8, pp. 1447, 1450, Ex. 24, pp. 3221-3222, 3224-3225, Ex. 25, pp. 3229, 3231, 3232, Ex. 35, pp. 3264, 3266, 3268-3269.

[26] AG Ex. 7, pp. 1338-1339, Ex. 8, pp. 1460, 1489, Ex. 24, pp. 3221, 3225, Ex. 35, pp. 3264, 3266, 3269.

[27] AG Ex. 8, pp. 1495, 1560; Ex. 24, p. 3221, Ex. 25, pp. 3230-3231, Ex. 35, pp. 3264, 3266, 3269.

[28] AG Ex. 1, p. 105; Ex. 7, pp. 1345-1347, Ex. 8, pp. 1479-1482, Ex. 35, p. 3271.

[29] AG Ex. 7, p. 1381, Ex. 8, pp. 1458, 1465, Ex. 24, p. 3221, Ex. 25, pp. 3230-3231, Ex. 35, pp. 3264, 3266, 3269.

to open the vault.[30] The robber who remained in the lobby provided updates on time and referred to the other men as "Bloods."[31] When he called out it was time to go, all three robbers immediately left the bank.[32] They took approximately $12,223 from the bank.[33]

II. Law Enforcement Investigation

Witness Brandi Bateman (Bateman) was outside the bank and saw the robbers flee in a white SUV. She memorized the SUV's license plate number, 5NNW366, and provided the license plate number to the bank's assistant manager and a deputy from the Los Angeles County Sheriff's Department.[34] A Department of Motor Vehicles (DMV) records check revealed the vehicle was a stolen 2005 white Ford Explorer from Budget Rent-A-Car on Airport Boulevard in Los Angeles on December 11, 2005.[35]

That same day, at approximately 6:44 p.m., the Los Angeles County Sheriff's Department was dispatched to a suspicious vehicle less than half a mile away from the bank.[36] There was an unoccupied white Ford Explorer, license plate number 5NNW366, idling on a residential street. Approximately $124 was found in the back seat and rear floor area.[37] There was red dye in a line across the back seats and inside the rear passenger door between the window and the arm rest.[38] On the outside of the exterior rear driver's side door was a fingerprint matching Allen's left middle finger.[39]

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[30] AG Ex. 7, p. 1339, Ex. 8, pp. 1487-1488, Ex. 24, p. 3222, Ex. 25, pp. 3230, 3233, Ex. 35, pp. 3264, 3269.

[31] AG Ex. 1, p. 102, Ex. 7, p. 1336, Ex. 8, p. 1488, Ex. 24, pp. 3222, 3225; Ex. 25, pp. 3231-3232, Ex. 35, pp. 3264, 3266, 3268, 3269.

[32] AG Ex. 7, p. 1336, Ex. 24, p. 3222, Ex. 25, pp. 3230, 3233, Ex. 35, pp. 3264, 3266, 3269.

[33] AG Ex. 8, pp. 1557-1559; Ex. 22, p. 3059; Ex. 35, p. 3271.

[34] AG Ex. 26, p. 3237

[35] AG Ex. 9, p. 1861; Ex. 26, p. 3239 (The County of Los Angeles Sheriff's Department Supplemental Report (AG Ex. 9) states the vehicle was stolen on December 12, 2005; however, at trial the parties stipulated the vehicle was stolen on December 11, 2005 (AG Ex. 26).)

[36] AG Ex. 8, pp. 1576, 1580-1581, Ex. 27.

[37] AG Ex. 8, pp. 1577-1579, Ex. 27, p. 3240.

[38] AG Ex. 8, pp. 1685-1686.

[39] AG Ex. 8, pp. 1500-1501, 1512-1518, Ex. 28.

Later that day, at approximately 9:00 p.m., Los Angeles County Sheriff's Deputies James Wheeler (Wheeler), Dianne Moreno (Moreno) and Ronald Giovanni (Giovanni) conducted a traffic stop on a 2005 Dodge Magnum for no license plates and tinted front passenger and driver side windows. The traffic stop occurred east of Normandie and Century Boulevard in Los Angeles, about 60 to 70 miles from the bank. [40] The Dodge Magnum was registered to Tarkington and a female.[41] Allen was in the driver's seat and Tarkington was in the front passenger seat.[42] Allen indicated he did not have a driver's license and his license was suspended. Deputy Giovanni asked Allen to exit the vehicle and detained him for driving on a suspended license.[43] A check for Allen revealed he had an arrest warrant for driving with a suspended license.[44] Tarkington provided Deputy Wheeler with a driver's license with the name Michael Skaggs.[45] Tarkington indicated Allen was driving because Tarkington had smoked too much marijuana and was tired. When asked if there was marijuana in the vehicle, Tarkington stated there was a some in a bottle in the driver's door pocket. Deputy Wheeler had Tarkington exit the vehicle and detained him for a narcotics investigation.[46] Both Tarkington and Allen were detained in the backseat of the deputies' car.[47] Deputy Wheeler ran a check for the name Michael Skaggs, which revealed he had an outstanding arrest warrant for driving without a license. [48]

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[40] AG Ex. 8, pp. 1628, 1635-1636, Ex. 11, p. 2297, Ex. 30 at p. 3249. (AG Ex. 30 states the name Deputy DiGiovanni; however, he testified his last name was Giovanni during trial. All references to Deputy DiGiovanni in the record will be stated as Deputy Giovanni in this decision. Additionally, AG Ex. 30 refers to Deputy Garcia; however, she testified her last name was Moreno during trial and therefore all references to Deputy Garcia in the record will be stated as Deputy Moreno in this decision.)

[41] AG Ex. 8, pp. 1648-1649

[42] AG Ex. 8, pp. 1642, 1648, Ex. 11, pp. 2297-2298, Ex. 30 at p. 3249.

[43] AG Ex. 8, p. 1642, Ex. 11, pp. 2297-2298, Ex. 30 at p. 3249.

[44] AG Ex. 30, p. 3249.

[45] AG Ex. 11, p. 2299, Ex. 30, p. 3249.

[46] AG Ex. 11, pp. 2298-2299, Ex. 30, p. 3249.

[47] AG Ex. 8, pp. 1637-1639.

[48] AG Ex. 30, p. 3249.

Deputies Giovanni and Moreno conducted a search of the vehicle for approximately 20 to 25 minutes in the dark lit by street lights and flashlights.[49] Deputy Giovanni retrieved a small pill bottle containing a substance resembling marijuana from the driver's door pocket and a black plastic bag between the driver's seat and center console with approximately $3,138 in cash stained with red dye.[50] The money was moist and smelled like bleach.[51] In the back seat, Deputy Moreno found a jacket with bills stained with red dye in one of the front pockets.[52] The money was bleached and had a scent of bleach.[53]

When asked where Allen obtained the money, Allen said he received the money from a man named Marcus Frye (Frye) who he sold a car to earlier in the day but was unable to provide proof of the transaction, paperwork, or an address or description of Frye. During the search, deputies were informed by FBI there had been a bank robbery in Palmdale earlier that day, a stolen Ford Explorer was recovered near the scene of the robbery with red dye from an exploded bait pack in the backseat, and the money was likely taken from the robbery. Based on the information about the robbery, the money stained with red dye found in the vehicle, and Allen's statements regarding how he obtained the money, deputies arrested Allen for robbery and Tarkington for his outstanding warrant.[54] Deputies took Allen and Tarkington back to the station. When booking Tarkington, Deputy Moreno found $201 in cash stained with red dye in his left front pant pocket.[55] The money also smelled like bleach.[56] Tarkington spontaneously stated "Oh, he gave me that" referring to Allen.[57] Deputy Wheeler

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[49] AG Ex. 9, p. 1724, Ex. 11, p. 2301.

[50] AG Ex. 8, pp. 1631-1632, 1642.

[51] AG Ex. 30, p. 3249.

[52] AG Ex. 8, p. 1642, Ex. 30, p. 3249.

[53] AG Ex. 9, p. 1717.

[54] AG Ex. 30, p. 3250.

[55] AG Ex. 30, p. 3251.

[56] AG Ex. 9, pp. 1718-1719.

[57] AG Ex. 30, p. 3251.

discovered two of the bills found inside Tarkington's vehicle had serial numbers that matched bills taken in the Palmdale robbery.[58]

A small white plastic bag containing cash with red dye was located on the side of a basin approximately half a mile from where police found the stolen Ford Explorer. In that same area, police searched and located some of the detonating device from the dye packs and more red-stained currency.[59]

When Detective Lauren Brown (Brown) and Detective James Murren (Murren) inventoried Tarkington's vehicle, they found a black nylon stocking cap tied off at the top containing about $59 in coins with red dye in the back seat under a jacket.[60] Police located in the hatch of the vehicle a blue beanie and red stained white shirt and towel.[61] Among the documentation located in the vehicle, deputies located a letter from State Farm addressed to Michael Skaggs, two citations issued to Michael Skaggs, a birth certificate in the name of Michael Skaggs, a print out from Social Security for a Michael Skaggs, photographs with Tarkington and others making gang signs, and a finance sheet for the 2005 Dodge Magnum for the buyers Candace Powell and Tarkington.[62]

A. Interviews with Law Enforcement

1. Yesenia Bahena

Shortly after the robbery, Bahena was interviewed by the Los Angeles County Sheriff's Department. She reported two black males jumped over the counter and the robber who removed money from her drawer had a dark complexion with dark eyes, was approximately 170 pounds and five foot ten inches, wearing a black nylon jacket, black shirt, and navy blue jeans.[63] She was subsequently interviewed by the FBI and described the robber who removed money from her drawer as a black male with a dark complexion, approximately 170 pounds and five foot eight inches to five foot nine inches

[58] AG Ex. 30, p. 3251.
[59] AG Ex. 11, p. 2430, Ex. 33, p. 3261.
[60] AG Ex. 8, pp. 1674-1676, Ex. 34.
[61] AG Ex. 8, pp. 1672-1679.
[62] AG Ex. 8, pp. 1663-1674.
[63] AG Ex. 25, pp. 3229-3230.

with a medium to thin build, 22 to 28 years old, wearing a nylon black mask over his face, possible black baseball cap, black nylon thigh length oversized jacket, and dark navy jeans.[64]

2. Yolanda Moore

Moore reported to the Los Angeles Sheriff's Department that two black males jumped over the teller counter. All robbers were wearing masks and dark clothes. The robber near Bahena wore black and white Converse shoes.[65] Thereafter, she informed the FBI the robber who removed money from her drawer was a black male with a dark complexion, approximately 150 pounds and five foot five inches with a medium build, in his early twenties, wearing a nylon black mask over the lower portion of his face, dark hat, and dark clothing. She described the other robber behind the counter as a black male and the third robber who remained in the customer area as a black male with a lighter skinned complexion.[66]

3. Archna Rekhi

Rekhi informed the Los Angeles County Sheriff's Department the robber who told her and the customers in the lobby to keep their heads down was wearing a dark blue jacket and a mask.[67] Subsequently, she told the FBI the robber who stayed in the customer area of the bank was a black male (identified by voice), approximately 160 to 170 pounds and five foot eight inches to five foot nine inches with a slim build, wearing a dark mask covering his face and dark clothing.[68]

4. Claudia Rissling

Rissling reported to the Los Angeles County Sheriff's Department the robber who removed money from her drawer was a black male, approximately 25 to 28 years old, approximately 170 pounds and five foot ten inches to six foot, wearing baggie grey Dickie pants, dark blue windbreaker or

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[64] AG Ex. 35, pp. 3264-3265.
[65] AG Ex. 25, pp. 3231-3232.
[66] AG Ex. 35, pp. 3266-3267.
[67] AG Ex. 24, p. 3223.
[68] AG Ex. 35, p. 3268.

sweatshirt, Converse tennis shoes, black mask, and a cover on his head.[69] She subsequently informed the FBI the robber who removed money from her drawer was a black male with a medium complexion, approximately 170 to 180 pounds and five foot nine inches to five foot ten inches with a medium build, approximately 20 to 25 years old, wearing a nylon black mask over his face, hat or hood, baggy dark clothing, dark blue jacket, dark grey Dickie type pants, and blue Converse type shoes. She was able to observe the head of the robber who remained in the lobby and described him as a black male between 20 to 25 years old, approximately five foot nine inches to five foot ten inches, wearing a black nylon mask with a hat or hood.[70]

5. Amori Carias

Assistant Manager Amori Carias (Carias) reported to the Los Angeles County Sheriff's Department that the robber who remained in the lobby was wearing dark clothes, approximately 150 pounds and five foot seven inches.[71]

6. John Rudy[72]

John Rudy (Rudy) reported to the Los Angeles County Sheriff's Department that he saw a black male run by him with a black 9 millimeter handgun in his front waistband. He was wearing a blue jacket, white stocking cap, and dark pants.[73]

7. Darris Allen

While in custody at the Los Angeles County Sheriff's Department's Lennox Station, Allen was Mirandized and interviewed by FBI Agent Pat Connelly (Connelly), with Deputies Wheeler and Giovanni present.[74] Allen stated around 9:30 to 10:30 a.m. on December 14, 2005, he woke up at his residence in Los Angeles where he resides with his mother. His mother was not home. His girlfriend, Summer Kennedy (Kennedy), picked him up at 12:30 p.m. to go to her residence. He stayed at her apartment

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[69] AG Ex. 24, pp. 3220-3222.

[70] AG Ex. 35, pp. 3269-3271.

[71] AG Ex. 25, pp. 3232-3233.

[72] John Rudy's name was not in the police report; however, he testified at trial.

[73] AG Ex. 25, p. 3234.

[74] AG Ex. 11, pp. 2306-2307; *Miranda v. Arizona* (1966) 384 U.S. 436, 467-468.

for approximately an hour, drove Kennedy's car to Target, and returned to Kennedy's apartment. Shortly thereafter, Allen's friend, Ricardo Gant (Gant), Gant's girlfriend, and cousin picked up Allen to go hang out with friends. At approximately 4:00 p.m., a person named Flip picked up Allen and drove Allen back home. While Allen was home, he received a call from Frye who wanted to purchase Allen's car. Allen agreed to sell him his car for $3,500 and meet him at Washington and Harvard at 5:30 p.m. Allen called the DMV to determine what paperwork he needed to complete when he sold his car. Allen met Frye, went into Frye's house, and Frye paid Allen for his car. Shortly thereafter, Allen admitted that his story was a lie. He stated the money in his possession was from the sale of marijuana to Mark, also known as Little Rev, a Blood, who lives at Arlington Avenue and Adams Boulevard in Los Angeles. Later, Allen admitted the money was his and his "play uncle," Tarkington, gave him the money when they were stopped by the Los Angeles County Sheriff's Department. Tarkington told Allen to make up a story about selling his car. Allen indicated he did not know where the money came from.[75]

8. Lamont Tarkington

Tarkington was Mirandized and interviewed while in custody at the Los Angeles County Sheriff's Department's Lennox Station, by FBI Agent Connelly with Deputy Wheeler present.[76] Tarkington stated his nephew, Allen, called him earlier in the day at "B's" house. "B" answered the call and told Tarkington Allen wanted to talk to him. Allen told Tarkington he was about to pick up some money for his car he sold, needed a ride home, and to meet him near Washington Boulevard and Harvard Street in Los Angeles. Tarkington stated he picked up Allen from Harvard Street and Washington Boulevard around 6:00 p.m. Tarkington had Allen drive while he slept. On the way home, Tarkington woke up inside the car, which was parked at an apartment building. Allen was not in the car but returned within a few minutes and told Tarkington that he "had to take a piss." Tarkington went back to sleep and woke up again when they were pulled over by the Sheriff's department. At that time, Tarkington observed a bunch of money that was located by officers and noticed the money was dye stained.[77] Tarkington

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[75] AG Ex. 32, p. 3257.

[76] AG Ex. 32, p. 3255; *Miranda, supra,* 384 U.S. at pp. 467-468.

[77] AG Ex. 32, p. 3255.

stated he never saw the money or touched the money found in his vehicle, but then he later admitted he did see the red dye on the money and told Allen, "Are you crazy, you shouldn't have taken that money from that guy you sold the car to."[78] Tarkington again said he never touched the money and "really didn't know anything about it;" however, $201 of red-stained money was found in his pocket later during the booking process, and he stated he got it from Allen.[79]

After the Los Angeles County Sheriff's Department processed Tarkington's fingerprints, Tarkington's true identity was verified as Lamont Tarkington. They discovered he was currently wanted for robbery out of Virginia and was convicted of a 1997 takeover robbery of a Bank of America in Antelope Valley.[80] Tarkington was re-interviewed regarding his identity, admitted his real name was Lamont Tarkington, and stated the rest of the information he provided was accurate.[81]

III. Preliminary Hearing

A. Witnesses' Description and Identification of the Robbers

Rissling testified the robber who remained in the bank lobby was wearing a windbreaker, a dark colored beanie and a mask.[82] She could see the portion between the eyebrow and the lower portion of the eye.[83] She described him as a light-skinned black male.[84] When asked whether anyone in court matched the skin and body type of the robber who remained in the lobby, she pointed to Allen.[85] She described the robber who jumped over the teller counter next to her and removed money from her drawer as a darker black male who was taller and slimmer.[86] When asked if she saw a person in court

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[78] AG Ex. 30, p. 3251.

[79] AG Ex. 30, p. 3251.

[80] AG Ex. 30, p. 3251.

[81] AG Ex. 32, p. 3255.

[82] AG Ex. 1, pp. 99, 121.

[83] AG Ex. 1, p. 100.

[84] AG Ex. 1, p. 100.

[85] AG Ex. 1, pp. 100-101.

[86] AG Ex. 1, pp. 107-108, 111.

who looked similar to her description of the robber, she pointed to Tarkington.[87] On cross examination, she explained the skin color and body type of Allen was similar to the robber who remained in the lobby.[88] During the robbery, she focused most of her attention on the person in the lobby and the robber next to her.[89] She was looking at their faces to try to memorize what they were wearing and listen to what they were saying.[90] She testified the robber next to her was approximately five foot ten inches or six foot and the other two robbers approximately five foot nine inches.[91] She described the robber next to her as an average build and the other two robbers were a little stockier.[92]

Bahena testified she could see the jawline and necks of the two robbers who jumped over the teller counter and described the skin color of both the robbers as black with dark skin.[93] She testified they were wearing dark clothing. She indicated she would not be able to recognize the robbers if she saw them.[94]

IV. Tarkington and Allen's Trial

A. Prosecution's Case

In March 2007, Allen and Tarkington were tried together.[95]

1. Witness Identification of Tarkington and Allen

Rissling verified the bank's video surveillance footage of the robbery accurately depicted what occurred.[96] She testified the robber in the lobby was wearing a dark colored beanie and a windbreaker type jacket and the two robbers that jumped over the counter wore hoods similar to a hooded sweat

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[87] AG Ex. 1, pp. 107-108.
[88] AG Ex. 1, p. 113.
[89] AG Ex. 1, p. 114.
[90] AG Ex. 1, p. 116.
[91] AG Ex. 1, p. 111.
[92] AG Ex. 1, p. 112.
[93] AG Ex. 1, pp. 80, 88-89.
[94] AG Ex. 1, p. 87.
[95] AG Ex 3.
[96] AG Ex. 7, p. 1334.

shirt.[97] The masks covered their nose, mouth and side of the face including ears.[98] All three robbers were wearing gloves.[99] She described the robber in the lobby as a light skinned black male and the robber near her as a dark skinned black male.[100] When asked if she saw anyone in the courtroom with the same skin color as the robber in the lobby, she identified Allen.[101] When asked whether anyone in the courtroom had the same skin tone as the robber near her, she identified Tarkington.[102] The prosecution had both defendants stand and, when asked if anyone in the courtroom had a height or build similar to the robber in the lobby, she identified Allen and, when asked if anyone had a similar height and build as the robber next to her during the robbery, she identified Tarkington.[103] During cross examination, she explained Allen had a similar skin color and body type of the robber who remained in the lobby.[104] She believed the robber near her was tall and slim.[105]

2. Money Stolen from the Bank

Among the bills and coins stolen from the bank, bait money attached to dye packs in Rissling, Bahena, and Moore's teller drawers were stolen from the bank.[106] The bank attaches $20 bill denominations, $40 on top and $40 on the bottom of the dye pack and records the serial number, year and series of the bills.[107] The dye pack contains a sensor and when the robbers leave a certain area the dye pack explodes.[108]

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[97] AG Ex. 7, pp. 1336-1337, 1364, 1366-1367.
[98] AG Ex. 7, p. 1366.
[99] AG Ex. 7, p. 1336.
[100] AG Ex. 7, p. 1342.
[101] AG Ex. 7, p. 1343.
[102] AG Ex. 7, p. 1344.
[103] AG Ex. 7, pp. 1401-1402.
[104] AG Ex. 7, p. 1359.
[105] AG Ex. 7, pp. 1368-1369.
[106] AG Ex. 8, pp. 1465, 1479-1482, 1495, 1560.
[107] AG Ex. 8, pp. 1479-1482.
[108] AG Ex. 7, pp. 1345-1347.

3. Firearms

Rudy was the only witness who testified to actually seeing a gun. He was shopping at Albertsons when he saw a person jump over the top of the counter inside the bank, and come towards him holding a gun and a money bag.[109] Rissling testified the robber next to her had his hand in his jacket pocket, acted like he had a gun pointing at her, and told her to get down.[110] Bahena testified the robber near her kept his hand in his pocket and she thought he had a gun.[111] Carias testified while she did not see a gun, the robber in the lobby was holding something as he kept pointing with his jacket.[112]

4. Tarkington's Prior Conviction for Robbing a Bank of America

Tarkington had a prior conviction for robbing a Bank of America in Lancaster in 1997. During the robbery, two robbers with guns jumped the teller counter and grabbed money from the tellers' drawers while a third robber, Tarkington, remained in the lobby with a gun and walkie talkie while yelling for everyone to get down.[113] The robbers fled in a car in the parking lot. Bank employees identified Tarkington as one of the robbers in a photographic line up.[114] When he was interviewed in jail, due to a hit and run the previous day, he stated he knew he was wanted in connection with the bank robbery, admitted he was an 8 Trey Gangster Crip, but refused to identify the other bank robber.[115] Tarkington initially pled not guilty, but later accepted a plea agreement and pled guilty to robbing the Bank of America in Lancaster in 1997.[116]

5. Gang Evidence

A gang enforcement expert, who was assigned to gang enforcement detail of the 8 Trey Gangster Crips, testified one of the main crimes of the gang involved robberies to obtain money to

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[109] AG Ex. 8, p. 1589.
[110] AG Ex. 7, pp. 1338-1339.
[111] AG Ex. 8, p. 1460.
[112] AG Ex. 8, p. 1489.
[113] AG Ex. 9, pp. 1822-1826.
[114] AG Ex. 9, pp. 1826-1827.
[115] AG Ex. 9, pp. 1830-1831.
[116] AG Ex. 9, p. 1844.

further their criminal enterprise.[117] He testified that 8 Trey Crips have expertise in bank robberies.[118] Gang members inform other members how to commit crimes based on past experience.[119] Routinely during commission of crimes, a gang member shouts out the name of another gang to lead police to believe it was another gang who committed the crime.[120] He identified Tarkington in photographs displaying 8 Trey Gangster Crips gang signs with his hands, wearing clothing common with 8 Trey Gangster Crips, and possessing tattoos common to members of the gang.[121]

6. The White Ford Explorer

At trial, the parties stipulated the Ford Explorer with license plate number 5NNW366 was stolen from the Budget Rent-A-Car located at 9775 Airport Boulevard, Los Angeles, on December 11, 2005.[122] The parties further stipulated that Budget Rent-A-Car washes all of their cars before renting them to customers as part of their general and usual business practices.[123]

Bateman testified she was walking towards her car in the parking lot when she saw a running white SUV parked on the sidewalk near the door of Albertson's supermarket with no one in it.[124] When the prosecution showed her pictures of the stolen Ford Explorer, she testified it was the same vehicle that she saw.[125] She observed four masked persons run out of the Albertson's supermarket entrance door and get into the white SUV parked on the sidewalk and drive off. [126] One person was wearing a

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[117] AG Ex. 9, pp. 1871-1872.

[118] AG Ex. 9, pp. 1889-1890.

[119] AG Ex. 9, pp. 1898-1899, 1902.

[120] AG Ex. 9, pp 1941-1942.

[121] AG Ex. 9, pp. 1871-1878, 1884-1888, 1939-1940, 1944-1945.

[122] AG Ex.9, p. 1861.

[123] AG Ex. 9, p. 1861.

[124] AG Ex. 7, pp. 1422, 1427.

[125] AG Ex. 7, p. 1423.

[126] AG Ex. 7, pp. 1425, 1428, 1430, 1432. Bateman's statement in the police report indicated there were three black males.

stocking cap over the face.[127] She kept repeating the license plate number as the vehicle drove off.[128] She denied telling the deputy that arrived on scene they were black males, as she was unable to identify their race or gender.[129]

Los Angeles County Sheriff's Deputy Steve Crosby (Crosby) testified he was dispatched to a stolen white Ford Explorer idling in the street within a half mile of the Bank of America at about 6:44 p.m.[130] When he approached and looked inside the vehicle, he observed miscellaneous denominations of currency on the rear floorboard and seat and red dye or ink in the vehicle.[131] He recovered approximately $124 in currency.[132]

The lead detective, Detective Brown, met Deputy Crosby at the Ford Explorer. In the Ford Explorer, he saw a line of red dye on the back seats and inside the rear passenger door between the window and arm rest.[133] Detective Brown testified the lines of red dye suggested the stolen currency was placed inside an ice chest with water to diffuse the explosion from the dye pack, spread the dye to other money in the chest, and prevent the dye and pepper spray gas from exploding in the car.[134] Detective Brown testified the red dye lines in the car were straight lines which, based on his experience, indicated the seam between the ice chest and lid was not closed completely when the dye pack exploded.[135] He explained if the dye pack explodes in a vehicle without being enclosed, the entire vehicle would be covered with red dye and there would be a very heavy odor of pepper spray, which would inhibit driving.[136]

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[127] AG Ex. 7, p. 1431.
[128] AG Ex. 7, p. 1424.
[129] AG Ex. 7, p. 1428.
[130] AG Ex. 8, pp. 1576-1577, 1580-1581.
[131] AG Ex. 8, pp. 1577-1578, 1583.
[132] AG Ex. 8, p. 1578.
[133] AG Ex. 8, pp. 1685-1686.
[134] AG Ex. 8, p. 1687.
[135] AG Ex. 8, pp. 1688-1689.
[136] AG Ex. 8, pp. 1687-1688.

A sergeant from the Los Angeles County Sheriff's Department, who was a former crime scene investigator for the Los Angeles County Sheriff's Department during the investigation, testified he lifted a fingerprint off the exterior rear driver's side door of the 2005 Ford Explorer which matched Allen's left middle finger.[137] Based on the smudge, location, and direction of the fingerprint, he opined that Allen was likely inside the vehicle, exited that door, and closed the door with his left hand as he was leaving.[138]

7. Traffic Stop of the Dodge Magnum on December 14, 2005

Deputies Wheeler, Giovanni, and Moreno testified about the traffic stop of the 2005 Dodge Magnum around 9:00 p.m. on December 14, 2005.[139] The traffic stop was approximately 60 to 70 miles from the bank and approximately a mile away from 8 Trey Gangster Crips territory.[140] Tarkington provided Deputy Wheeler with his license in the name of Michael Skaggs with Tarkington's picture, and he was detained with Allen in the backseat of the deputies' car for approximately 20 minutes during the search.[141] Deputies Giovanni and Moreno searched the vehicle.[142] It was dark and their search was lit by streetlights and flashlights.[143]

During the search, Deputy Giovanni found stuffed between the driver's seat and the center console a black plastic bag containing $3,138 stained with red dye over every bill.[144] Deputy Giovanni testified the currency was moist and smelled like bleach.[145] Deputy Moreno searched the rear back seat of the Dodge Magnum and recovered a large amount of currency containing red dye from inside

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[137] AG Ex. 8, pp. 1500-1501, 1512-1518.

[138] AG Ex. 8, pp. 1519-1520.

[139] AG Ex. 8, pp. 1642, 1648, Ex.11 pp. 2296-2298.

[140] AG Ex. 8, pp. 1628, 1635-1636, Ex. 9, p. 1719.

[141] AG Ex. 8, pp. 1637-1639, Ex. 11, p. 2301.

[142] AG Ex. 8, p. 1630, Ex. 11, p. 2299.

[143] AG Ex. 8, pp. 1636-1637, Ex. 9, pp. 1724, 1742-1743.

[144] AG Ex. 8, pp. 1631-1632, 1642.

[145] AG Ex. 8, p. 1642.

the front pocket of a black jacket.[146] Deputy Moreno testified the stained money was dry, bleached and had a scent of bleach.[147] She testified the bills were apparently bleached in order to have the red dye removed as much as possible.[148]

Deputy Wheeler reported their findings and directed the deputies to search for weapons or anything that could be used in a robbery, as he was informed a robbery had taken place in Palmdale earlier that day.[149] The deputies did not know what they were looking for as they did not know the details of the bank robbery; however, they searched the vehicle as thorough as they possibly could.[150] They did not place items on the street during the search.[151] Although a large amount of clothing was present in the vehicle, deputies did not book the large amount of clothing that night. They did not associate the clothes with the robbery and only booked items that were readily apparent to be significant.[152] Deputy Wheeler opined they may not have been able to see pink stains on clothes at that time of night.[153]

Based on the information about a robbery, they booked the whole vehicle as evidence for a continuing investigation by the handling detectives.[154] Deputy Moreno explained a detective will do a lot more follow up than a patrol deputy and there may be items and situations detectives are aware of that deputies conducting a traffic stop may not know. Here, it was a bank robbery which occurred in a different city so the detective had firsthand information of items involved with the robbery, whereas patrol deputies doing a traffic stop may not correlate an item with the robbery.[155]

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[146] AG Ex. 8, p. 1643, Ex. 9, pp. 1716, 1721.

[147] AG Ex. 9, pp. 1717, 1749.

[148] AG Ex. 9, p. 1749.

[149] AG Ex. 11, pp. 2300, 2322.

[150] AG Ex. 9, p. 1745, Ex. 11, pp. 2324-2325.

[151] AG Ex. 9, p. 1745.

[152] AG Ex. 9, p. 1757, Ex. 11, p. 2303.

[153] AG Ex. 11, pp. 2303, 2306.

[154] AG Ex. 9, p. 1758, Ex. 11, p. 2303.

[155] AG Ex. 9, p. 1749.

Deputy Moreno testified after transporting Tarkington and Allen to the station for booking, she conducted a booking search of Tarkington and recovered $201 containing red dye with the smell of bleach from his pant pocket.[156]

At the station, Deputy Wheeler received a copy of the report for the bank robbery.[157] The report listed the bait money taken from the bank. He compared the serial numbers on the bait money bills with the currency found in the vehicle and discovered there were bills matching the serial numbers on the bait money.[158]

Deputy Wheeler testified Allen did not tell him he stole a car during the traffic stop or his interview.[159] Allen told him he sold a car to Marcus Frye which was registered to his girlfriend, and when he told Allen they were going to locate Frye, Allen "broke down" and said he sold marijuana to Mark at Arlington and Adams.[160] During the interview, Allen became angry, uncooperative, and stated he was not a snitch.[161] Deputy Wheeler ran Frye's name in the Mobile Digital Computer and did not find a match.[162]

8. Search of the Dodge Magnum at Tow Yard

Sergeant Donald Young (Young), Detective Murren, and Detective Brown testified about searching the Dodge Magnum at B&H Tow yard on December 22, 2005.[163] Sergeant Donald Young supervised the search of the Dodge Magnum at B&H Tow yard on December 22, 2005, while Detective Brown, the lead detective, searched the vehicle, and Detective Murren aided in the search.[164] After the criminalist checked for fingerprints and took photos, Detectives Brown and Murren searched

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[156] AG Ex. 9, pp. 1718-1719.

[157] AG Ex. 8, p. 1632.

[158] AG Ex. 8, pp. 1632-1635.

[159] AG Ex. 11, p. 2312.

[160] AG Ex. 11, pp. 2312-2314.

[161] AG Ex. 11, pp. 2314, 2333.

[162] AG Ex. 11, pp. 2315, 2328.

[163] AG Ex. 8, pp. 1692, 2390, Ex. 11, pp. 2347, 2351, 2352, 2370, 2372.

[164] AG Ex. 11, pp. 2347-2348, 2351, 2352, 2370, 2372-2373.

the vehicle.[165] They searched the vehicle for over an hour.[166] During the search, they found documents containing the name Michael Skaggs and photographs of Tarkington and others making gang signs.[167] Underneath a jacket in the backseat, Detective Brown found a short black nylon stocking tied at the top containing approximately $59 in coins with red dye, which smelled of pepper spray.[168] Detective Brown explained when a dye pack explodes there is red dye, and inside the red dye is pepper spray to incapacitate the individual that is carrying it.[169] He tested the stocking for DNA as one of the robbers wore a black stocking type knit mask.[170] The DNA on the stocking did not match Tarkington or Allen.[171]

Prior to the search, Detective Brown viewed the bank and store video footage several times and searched the clothes still remaining in the vehicle to see if any matched.[172] In the rear hatch area, he found clothing, including a blue beanie with a bill, a white shirt with red dye stains the same color as the change, and a white cotton towel with dirt and a few spots with the same red dye color.[173] When looking at the hatch area, he could not see the red dye stained shirt and towel as there was a lot of clothing and some bags.[174] When searching through the clothes in the rear hatch area, he removed items and placed them on the ground.[175] He indicated he could not smell pepper spray in the front of the Dodge Magnum, but when he moved some of the clothing in the back, he could smell it.[176]

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[165] AG Ex. 11, p. 2352.

[166] AG Ex. 11, p. 2376.

[167] AG Ex. 8, pp. 1663-1674.

[168] AG Ex. 8, pp. 1674-1676, Ex. 11, p. 2372.

[169] AG Ex. 8, p. 1675.

[170] AG Ex. 8, p. 1690, Ex. 11, pp. 2385, 2393.

[171] AG Ex. 8, p. 1691.

[172] AG Ex. 11, p. 2383.

[173] AG Ex. 8, pp. 1672-1679.

[174] AG Ex. 11, p. 2387.

[175] AG Ex. 11, pp. 2387-2388.

[176] AG Ex. 8, p. 1692.

Detective Brown denied planting evidence in the vehicle.[177] Detective Murren similarly denied that Detective Brown, Sergeant Young or himself brought the bag of coins, jacket, and stained white towel and shirt to the tow yard.[178]

Detective Brown did not have the red dye on the coins or red dye stained white shirt and towel tested to determine what the red coloring was.[179] Nor did Detective Brown test the red stained currency discovered in the Dodge Magnum.[180] Detective Brown stated the currency appeared to be washed as a $20 bill had a pretty heavy stain in the middle and the stains were dissipated on the other money.[181] The shirt and towel were not tested because Sergeant Young, Detective Brown and Detective Murren, who were all senior detectives and worked many robberies, came to the same conclusion that the stains appeared to be the red dye from the dye pack.[182] The crime lab was very busy and he was able to convince the crime lab to perform a DNA test on the black stocking because it may have been worn by one of the robbers per the bank and supermarket video footage.[183]

Detective Brown brought the red dye-stained shirt and towel in a brown paper bag to court. When describing the shirt in the brown paper bag, Detective Brown stated, “when I opened it, I could still smell the pepper spray that they used to put in it.”[184] When Deputy District Attorney (DDA) Frederick Mesropi asked if there was only one item in the bag, he replied “No. There’s a towel, there’s a towel. I can smell that.”[185] When asked by DDA Mesropi as to whether he wanted him to take the brown paper bag with the shirt and towel away, Detective Brown replied, “I know it’s kind of a pain, but I

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[177] AG Ex. 11, p. 2388.
[178] AG Ex. 11, p. 2373.
[179] AG Ex. 11, pp. 2399, 2424.
[180] AG Ex. 11, pp. 2399, 2424.
[181] AG Ex. 11, p. 2397.
[182] AG Ex. 11, p. 2434.
[183] AG Ex. 11, pp. 2435-2336.
[184] AG Ex. 8, pp. 1678-1679.
[185] AG Ex. 8, p. 1678.

can already feel it in my eyes."[186] The court recessed so Detective Brown could go and wash his hands.[187] Upon returning, Detective Brown testified, "I could feel my eyes start to burn already and I could feel in my nose, to burn right already," adding he did not have that feeling prior to handling the shirt and towel.[188] Thereafter, when the judge was discussing the items with counsel, the judge indicated, "I can tell you that the odor was not good yesterday, and the court was affected by it."[189]

B. Defense's Case

1. Tarkington's Case

A. Tarkington's Alibi Witness

Phillip Wiley (Wiley) worked at Saint Andrews Recreation Center in Los Angeles County.[190] Wiley initially testified the last time he saw Tarkington was around 10:30 or 10:45 a.m. on December 14, 2005, at Saint Andrews Recreation Center.[191] He spoke with Tarkington for approximately 15 minutes.[192] He asked Tarkington if he was still going to coach the basketball team, Tarkington replied in the affirmative, and he informed Tarkington the clinic was starting around Christmas.[193] He recalled Tarkington was wearing Carmello Anthony shoes, as he wanted to purchase similar shoes.[194] Wiley recalled the date and time because it was shortly before Christmas, he had to ensure he got his time card in and meet his supervisor at 10:30 a.m., and he needed to pick up his wife to take her to an 11:30 a.m. doctor's appointment as it was her last week of work before she took maternity leave.[195] He left

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[186] AG Ex. 8, p. 1680.

[187] AG Ex. 8, pp. 1680-1681.

[188] AG Ex. 8, p. 1681.

[189] AG Ex. 9, p. 1711.

[190] AG Ex. 10, pp. 1999, 2002.

[191] AG Ex. 10, pp. 2000, 2004-2005.

[192] AG Ex. 10, p. 2035.

[193] AG Ex. 10, pp. 2002, 2005.

[194] AG Ex. 10, pp. 2003-2004.

[195] AG Ex. 10, pp. 2000-2001.

and picked up his wife about 11:15 a.m. to go to her doctor's appointment at 11:30 a.m.[196] On cross-examination, he testified he last saw Tarkington closer to 11:00 a.m. because he left closer to 11:00 a.m. to pick up his wife at 11:15 a.m. for her appointment.[197] While he did not remember what preceded every pregnancy appointment he had with his wife before she gave birth to all his children, he remembered what happened prior to this appointment because his son was due the following week.[198] He described Tarkington as strong with an athletic build.[199]

B. Private Investigator Joseph Szeles' Testimony

Private Investigator Joseph Szeles (Szeles) testified he worked at the Riverside County Sheriff's Department as a deputy sheriff, detective and sergeant for 25 years prior to opening his own investigation firm.[200] In his experience and training, pepper spray would air out of most fabrics in a couple days.[201] If evidence is placed in a porous paper bag the odors will dissipate and there would be no smell of pepper spray 15 months later.[202] When he interviewed Wiley, he told him he saw Tarkington about 11:00 a.m. and spoke to him for about 30 minutes.[203] Szeles was surprised that when he said the date, Wiley was able to remember specifics and details about what happened after nine months, even though nothing significant happened to him that day. Szeles wondered why Wiley would remember an incident with someone that he had merely met.[204] When he asked Wiley how he could remember this particular incident with Tarkington, he responded he remembered Tarkington was wearing Carmello Anthony shoes as he planned on buying the shoes.[205] He did not recall Wiley telling

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[196] AG Ex. 10, p. 2001.
[197] AG Ex. 10, p. 2033.
[198] AG Ex. 10, p. 2021.
[199] AG Ex. 10, pp. 2013-2014.
[200] AG Ex. 11, p. 2257.
[201] AG Ex. 11, p. 2271.
[202] AG Ex. 11, p. 2273.
[203] AG Ex. 11, p. 2281.
[204] AG Ex. 11, pp. 2282-2283.
[205] AG Ex. 11, pp. 2286-2287, 2290-2291.

him he remembered what happened because it was the last appointment before his wife was due to give birth.[206] Mapquest estimated the distance between St. Andrews Recreation Center to the Bank of America was 63 miles and travel time was one hour and 15 minutes. However, he believed Mapquest calculated travel time based on the speed of 50 to 60 miles per hour and, in his experience, it may take longer with traffic.[207]

C. Allen's Testimony

Allen testified he did not rob the bank or know anything about the robbery.[208] He became close friends with Tarkington in elementary school, then moved at age 14 and lost touch with Tarkington, and eventually returned to California at age 29.[209] On June 11, 2004, he was shot in the head and was unable to continue to work.[210] He resorted to being a car thief and was known for stealing cars and car parts.[211] In January 2005, he saw Tarkington at Chuck E. Cheese and thereafter hung out with him periodically.[212] On or about December 9, 2005, an acquaintance, Frye, called and offered him $3,500 to steal a new SUV for him.[213] Allen denied knowing what the SUV would be used for.[214] On December 11, 2005, he and his associate Jerome, also known as J-Money, stole a SUV from Budget Rent A Car near Los Angeles International Airport for Frye.[215] Two tires popped as they were leaving the Budget Rent A Car, and Allen drove to his friend's tire shop to replace the flat tires, paying $35 for each tire.[216]

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[206] AG Ex. 11, p. 2281.
[207] AG Ex. 11, pp. 2288-2289.
[208] AG Ex. 10, pp. 2194-2195, 2199, 2205, 2236.
[209] AG Ex. 10, pp. 2038-2041.
[210] AG Ex. 10, pp. 2042, 2201.
[211] AG Ex. 10, pp. 2044-2048, 2208.
[212] AG Ex. 10, pp. 2079-2080.
[213] AG Ex. 10, pp. 2046-2055.
[214] AG Ex. 10, pp. 2125, 2227.
[215] AG Ex. 10, pp. 2046, 2050, 2052, 2055, 2058-2059.
[216] AG Ex. 10, pp. 2135-2136, 2236.

At his mother's house, he wiped down the SUV using water and a towel to remove fingerprints.[217] He dropped the SUV and keys off with a man named Little Rev, who was with at least 10 people wearing Blood gang colors.[218]

On the morning of December 14, 2005, Allen was sleeping at his mother's house in Los Angeles when she came back from her lunch break between 9:00 a.m. to 11:00 a.m. and woke him up.[219] He left and arrived at his friend's house, Melanie Clark, about 3:30 p.m. and hung out with her until he received a call from Frye.[220] Frye called Allen a little before 5:00 p.m. and they met at a 7-eleven on Washington and Western. Allen entered Marcus Frye's vehicle, and Frye gave him a small black bag containing approximately $3,250.[221] There was "red stuff" on the bills, appearing as if fingernail polish or red soda was spilled on it.[222] Frye did not give Allen any coins.[223] Frye told Allen to "holler" at him in a couple days for the rest of the money.[224] Allen exited the vehicle around close to 6:00 p.m. He called his friend Booby, also known as Terrel Sykes, for a ride but Booby refused to pick him up.[225] About 6:30 p.m., he called Booby back again, and upon hearing Tarkington was with Booby at his house, asked to speak with Tarkington.[226] He asked Tarkington to pick him up, and he agreed.[227] Allen did not call for a taxicab because taxi rides cost too much.[228] Tarkington arrived about an hour later at Washington and

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[217] AG Ex. 10, p. 2137.
[218] AG Ex. 10, pp. 2060-2062, 2140.
[219] AG Ex. 10, pp. 2143-2144.
[220] AG Ex. 10, pp. 2144-2145.
[221] AG Ex. 10, pp. 2070, 2183.
[222] AG Ex. 10, pp. 2066, 2071-2072, 2106.
[223] AG Ex. 10, p. 2071.
[224] AG Ex. 10, p. 2072.
[225] AG Ex. 10, pp. 2075-2076, 2148.
[226] AG Ex. 10, pp. 2075-2077, 2081-2082, 2148.
[227] AG Ex. 10, p. 2082.
[228] AG Ex. 10, p. 2149.

Harvard in South Los Angeles to meet Allen.[229] Tarkington pulled up, exited the driver's seat of the vehicle, told Allen "drop yourself off at home," and got in the passenger seat. [230] While Allen was driving, he stopped at a stoplight, took off his jacket, and placed it in the backseat of the car with about $600 from Frye in the front pocket.[231] He kept $2,500 in the black bag and put it in his front pocket.[232] Allen gave Tarkington $200 for picking him up, and Tarkington took it and stuffed it in his pocket.[233] Allen did not have any coins, nor did he see a bag of coins in Tarkington's car.[234] Allen stopped at his sister's house at 79th and Normandy to see if she was home, but she was not.[235] After he and Tarkington were pulled over by law enforcement, deputies put him in the back of a police car with Tarkington for approximately 30 to 40 minutes while deputies searched the vehicle.[236] The last time he had seen Tarkington prior to that day was about two weeks prior.[237] Allen admitted he lied to the police and insisted he was not lying at trial.[238] Allen initially denied he told police he got the money from selling marijuana then stated he did not recall, but he insisted he told police he stole a car.[239]

Of the $3,250 he received for stealing the car, Allen planned to give $2,500 to the mothers of his two children, $300 to $400 to Jerome for helping him steal the SUV, and $200 to Tarkington for giving

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[229] AG Ex. 10, p. 2082.
[230] AG Ex. 10, pp. 2083-2084.
[231] AG Ex. 10, pp. 2086-2088.
[232] AG Ex. 10, pp. 2088, 2112.
[233] AG Ex. 10, pp. 2088-2090, 2210.
[234] AG Ex. 10, p. 2184.
[235] AG Ex. 10, p. 2085.
[236] AG Ex. 10, pp. 2110, 2220.
[237] AG Ex. 10, p. 2078.
[238] AG Ex. 10, p. 2200.
[239] AG Ex. 10, pp. 2189-2192.

him a ride.[240] He admitted he was paying Tarkington more for giving him a ride than what he was going to receive from stealing the SUV, as Allen would receive approximately $150 in profit.[241]

D. Detective Cheryl Suarez's Testimony

Los Angeles County Sheriff's Detective Cheryl Suarez (Suarez), who was formerly a patrol deputy at the time of the robbery, testified she interviewed Bateman after the robbery, and Bateman told her she saw three black males run out of the Albertson's market and get into a white SUV.[242] One of the males had a stocking cap over his face and the other two were masked.[243] At the time of the interview, Bateman was very afraid and "pretty shaken up."[244]

V. Tarkington and Allen's Appeal

After the jury found Tarkington and Allen guilty of all charges, they appealed to the Second District of the California Court of Appeal in *People v. Tarkington and Allen*, case number B199860. On March 3, 2009, the appellate court affirmed the convictions and struck the gang enhancement. In striking the gang enhancement, the court found ample evidence that Tarkington was an active member of the criminal street gang at the time of the robbery, but insufficient evidence that the robbery was committed for the benefit of that gang. As the court stated, "the evidence showed that Tarkington admitted to police in 1997 that he was a member of the 8 Trey Gangster Crips (8 Trey). Photographs of Tarkington flashing 8 Trey gang signs, along with money from the robbery, were found in Tarkington's car when he and Allen were arrested. At least one of those photographs was taken in 2005, the same year as the bank robbery. The evidence supports a finding that Tarkington was an active member of the 8 Trey gang at the time of the robbery and also supports a finding that he was

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[240] AG Ex. 10, p. 2183.

[241] AG Ex. 10, pp. 2183-2184.

[242] AG Ex. 10, pp. 2098-2099.

[243] AG Ex. 10, p. 2101.

[244] AG Ex. 10, p. 2102.

one of the robbers. There was no evidence, however, to support a finding that Tarkington or Allen robbed the bank for the benefit of the 8 Trey gang."[245]

Additionally, the Court of Appeal concluded the trial court abused its discretion in admitting Tarkington's 1997 bank robbery conviction, as the two robberies did not contain any one feature so unusual and distinctive to be "like a signature" or "virtually eliminated the possibility that anyone other than the defendant committed the charged offense."[246] However, the court found this error was ultimately harmless because it was not reasonably probable that Tarkington would have obtained a better result if the evidence had not been admitted, as the "evidence against Tarkington, although circumstantial, was very strong. Less than 11 hours after the robbery the police arrested Tarkington while a passenger in his own car containing over $3,000 in loot from the crime. The police even found some of that loot in Tarkington's pocket. Further supporting evidence of Tarkington's guilt included the testimony of one of the tellers who stated that Tarkington had the same or similar skin color, height and build as two of the robbers, Tarkington's giving the police a false identification at the traffic stop and the presence in his car of an unexplained bag of coins covered with red dye."[247]

VI. Tarkington's 2011 Petition for Writ of Habeas Corpus

On October 14, 2011, Tarkington filed a petition for habeas corpus in *In re Tarkington*, Second District Court of Appeal case number B236619. In it, he argued he was deprived of adequate assistance of trial counsel and the prosecutor withheld exculpatory evidence.[248] Specifically, he asserted his trial counsel failed to adequately investigate, subpoena and present Tarkington's cell tower location information on the day of the robbery, which would have supported the testimony of his witness Wiley that he was in South Los Angeles when the robberies were committed. He further claimed the prosecution withheld a FBI report showing witnesses described a robber that did not match his traits, footprint evidence and a Los Angeles County Sheriff's Department Crime Lab report

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[245] AG Ex. 17, pp. 2826-2827.

[246] AG Ex. 13, p. 2819 (citing *People v. Carter* (2005) 36 Cal.4th 1114, 1148 and *People v. Balcom* (1994) 46 Cal.2d 818, 836.).

[247] AG Ex.13, p. 2819.

[248] AG Ex. 18, pp. 2961-2966.

pertaining to the footprint evidence, and Tarkington's cell phone tower location information.[249] The court returned the case to the superior court to conduct an evidentiary hearing on his claims.

A. Habeas Evidentiary Hearings

1. FBI Evidence

FBI Special Agent Sonja Nordstrom (Nordstrom) testified she arrived at the Bank of America in Palmdale at 11:00 a.m. on December 14, 2005. As the primary investigator, she interviewed victims and witnesses at the bank. She requested and obtained incoming and outgoing call records and push to talk records for cell phones recovered by the Los Angeles County Sheriff's Department and turned the records over to Detective Brown.[250] She received records from Sprint Nextel and Verizon.[251] One of the Sprint Nextel records related to Tarkington's cell phone.[252] She did not request cell phone tower records as it was newer technology and it was not normal policy to request such records.[253] She explained push to talk was a Nextel function and is a walkie-talkie type of function, where a button is pushed, the phone chirps, and the person speaks.[254] Tarkington's phone records showed no calls or use of the direct connect feature during the time of the robbery.[255] On December 14, 2005, Tarkington received inbound calls at 12:34 a.m., 12:37 a.m., and 1:53 a.m., and outbound calls were made at 12:23 a.m. and 1:25 p.m. The 1:25 p.m. call was made to one of the other subpoenaed numbers. [256] For push to talk, there was a call at 3:12 a.m. and 11:55 a.m.[257]

She explained witnesses' descriptions can differ at bank robberies and often vary from reality due to witnesses' perception from where they are located, such as if they are crouching or lying on the

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[249] AG Ex. 18, pp. 2961-2966.

[250] AG Ex. 22, pp. 3041-3045.

[251] AG Ex. 22, pp. 3063-3064.

[252] AG Ex. 22, p. 3070.

[253] AG Ex. 22, p. 3047.

[254] AG Ex. 22, pp. 3066-3067.

[255] AG Ex. 22 pp. 3074-3075, 3079, Ex. 36, pp. 3276-3279

[256] AG Ex. 22, pp. 3071-3073.

[257] AG Ex. 22, pp. 3074-3075.

ground and the stress of the situation.[258] It was her custom and practice to ask witnesses whether the suspects' complexions are light, dark, or medium; however, she could not remember if she asked Rissling.[259]

2. Tarkington's Testimony

Tarkington testified the cell tower location information from his Sprint Nextel cell phone would have shown he was in South Los Angeles when the robbery occurred; however, his trial counsel Carrie Foglesong (Foglesong) never discussed cell phone information with him.[260] He denied telling her not to pursue cell phone records and that he had numerous cell phones that he used at different times under different names.[261] He also denied telling her not to pursue cell phone records because he was trying to avoid being apprehended, it would incriminate him, or worsen his case.[262] Tarkington first learned about use of cell tower information after his conviction.[263] Tarkington indicated the Sprint Nextel cell phone records obtained by the FBI were manipulated or fraudulent because he made and received additional calls on December 14, 2005, but the records did not reflect those calls.[264] He made phone calls between December 8 and 14, 2005, but the records showed no activity.[265] Allen's Sprint records also showed no activity for December 8 through 14, 2005, and Tarkington believed it was deleted.[266]

Tarkington testified he had last spoken with Allen three or four days prior to the robbery and had last seen him a couple weeks before the robbery.[267] On the day of the robbery, he called Allen at 1:25 p.m. to pick Allen up around 3:00 or 3:30 p.m. Allen called him while he was on the north 405 freeway

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[258] AG Ex. 22, pp. 3061-3062.
[259] AG Ex. 22, pp. 3085-3086.
[260] AG Ex. 23, pp. 3156, 3160-3161.
[261] AG Ex. 23, pp. 3160-3161.
[262] AG Ex. 23, pp. 3161, 3185-3186.
[263] AG Ex. 23, pp. 3161-3162.
[264] AG Ex. 23, p. 3167.
[265] AG Ex. 23, p. 3167.
[266] AG Ex. 23, p. 3168.
[267] AG Ex. 23, p. 3179.

to make sure he was coming to pick him up.[268] He believed Allen called him a couple times while he was on the freeway, and one of the calls was from a number that was not Allen's number.[269] He picked up Allen at Lancaster around 4:30 or 5:00 p.m. at Allen's female friend's house.[270] Because he saw traffic was bad going back, he told Allen they should wait out the traffic.[271] Tarkington and Allen waited in Allen's female friend's house, sitting in her living room for a little over an hour.[272] They left her house about 7:00 p.m.[273] Allen gave Tarkington money for gas and paid him in bills. He did not give him any coins.[274] Tarkington testified he did not know where Booby lives but he had hung out with Booby in Lawndale or Hawthorne.[275]

When he was pulled over, he did not tell the police his real name because he was absconding on federal probation and did not want to go to jail. He admitted he lied to get out of trouble.[276] Other aliases he had used included Devonaire Smith, Donte Jones, and Corey Willard.[277] Tarkington testified, on the day of the robbery, he received a telephone call from a female friend, Jovani, at 10:30 a.m., and another call around that time from a woman he was in a relationship with at the time, Donna Taylor, but he did not inform his counsel Foglesong.[278] He testified the red stains on the white towel and shirt was vodka and ruby red cranberry juice, which he spilled in his car and used the items to wipe

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[268] AG Ex. 23, pp. 3180-3181, 3196.
[269] AG Ex. 23, p. 3196.
[270] AG Ex. 23, p. 3181.
[271] AG Ex. 23, pp. 3181-3182, 3189.
[272] AG Ex. 23, pp. 3181-3182, 3189, 3196.
[273] AG Ex. 23, p. 3189.
[274] AG Ex. 23, p. 3192.
[275] AG Ex. 23, p. 3183.
[276] AG Ex. 23, pp. 3201-3202.
[277] AG Ex. 23, p. 3201.
[278] AG Ex. 23, pp. 3186-3187.

up about a week prior to the robbery, and the black stain was dirt from cleaning the chrome on his rims.[279]

3. Carrie Foglesong's Testimony

Tarkington's trial counsel, Foglesong, testified Allen tried out different possible scenarios for testimony and what he should say or not with the intent to try to exonerate Tarkington.[280] She did not believe that Allen testifying with shifting stories was going to play well in front of the jury, but Tarkington disagreed.[281] Each time Allen, Tarkington, Foglesong and Allen's attorney met together to discuss the case, it seemed the story shifted. Allen asked along the lines of "what if I said this? Would that help? And what if I said that? Would that help?"[282] Tarkington was quiet and never told him to just tell the truth.[283]

Early on in the case, when they were attempting to nail down Tarkington's physical whereabouts and discussed use of cell phones, Tarkington specifically warded her off the notion of trying to get cell phone information.[284] He claimed it would not help, possibly incriminate him and would bring in gang issues, which was a major concern in his case.[285] Cell phones in his name were not necessarily on his person, and it could bring in evidence of aliases, ongoing criminalities, and the phones would be in places where she would not want them to be.[286] Tarkington was clear cell phones would not help and his cell phones would be "in the wrong place with the wrong people."[287]

The day prior to the robbery, Tarkington gave Allen a ride to the grocery store in Palmdale, where the bank robbery took place. Allen entered the grocery store and purchased the nylons used in

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[279] AG Ex. 23, pp. 3205-3208.
[280] AG Ex. 37, p. 3284.
[281] AG Ex. 37, p. 3285.
[282] AG Ex. 37, pp. 3285-3286.
[283] AG Ex. 37, p. 3286.
[284] AG Ex. 37, p. 3287.
[285] AG Ex. 37, p. 3287.
[286] AG Ex. 37, p. 3287.
[287] AG Ex. 37, pp. 3304, 3307, 3340.

the bank robbery. There was communication between Allen and Tarkington during the two days leading up to the robbery. She and Tarkington discussed how the cell phone records would further incriminate him and show he was in contact with Allen, which was not helpful.[288] They tried to decriminalize Tarkington and ensure no evidence of aliases, priors, cocaine use, parole violation, or being on the run was presented to the jury. Although Allen had contacted Tarkington for a ride on a friend's phone the day of the robbery, Tarkington refused to give that person's name because he was a gang member.[289] Foglesong testified Tarkington's alibi witnesses, alibi, and timeline changed. His first alibi witness and alibi did not pan out, the timeline did not work, and there was a gap of time, so they developed and worked on another alibi witness to cover the time of the robbery.[290]

Foglesong did not seek to have the red stains on the white shirt and towel tested, as the dispute over the source of the red stains came up close in proximity to the trial and she did not ask for a continuance to have it tested.[291] Tarkington told her the white shirt and towel were in the pile of clothes in the back of his vehicle and the stains on the items may have been Gatorade.[292] Foglesong did not smell an overwhelming odor on the white shirt and towel when she handled the items during her closing argument, but she acknowledged the items were not odorless.[293]

4. DDA Frederick Mesropi's Testimony

DDA Mesropi testified he prosecuted the criminal case against Tarkington and Allen.[294] It was determined by his supervisors and ethics department that the cell phone records were not relevant or exculpatory information and he did not have an obligation to turn it over to the defense.[295] Mesropi asked Detective Brown to submit photographs of shoe prints taken from the bank counter to the

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[288] AG Ex. 37, pp. 3289-3290.
[289] AG Ex. 37, p. 3290.
[290] AG Ex. 37, p. 3299.
[291] AG Ex. 37, pp. 3330-3331.
[292] AG Ex. 37, pp. 3334-3335.
[293] AG Ex. 37, pp. 3333-3334, 3342.
[294] AG Ex. 38, p. 3368.
[295] AG Ex. 38, pp. 3373-3374.

sheriff's crime lab and was told the evidence was not sufficient for a comparison because they were just photographs and not actual prints, such as a cast impression, which made it more difficult to form an opinion. Additionally, the case was not important enough for the sheriff's crime lab to do a tool mark analysis.[296] He did not receive any reports from the FBI regarding the incident that was charged.[297]

5. Deputy Wheeler's Testimony

Deputy Wheeler from the Los Angeles County Sheriff's Department testified when he pulled over Allen and Tarkington on December 14, 2005, Tarkington said he drove to the location where Allen sold a car. However, either Tarkington or Allen stated they went to Halldale and Washington Boulevard, which did not exist, and the other said they went to Harvard and Washington, which did exist.[298]

6. Cell Phone Information

a. Expert Testimony

Tarkington's forensic technologist, Jeff Fishbach, testified both Allen and Tarkington's phone records showed no inbound or outgoing cell phone calls from December 9, 2005 to December 13, 2005, but there was direct connect activity during this time.[299] He assumed the records may have been damaged or altered.[300] He found it odd because the phones did not receive a single phone call for five days, yet the phones were turned on at least long enough to make direct connect calls.[301] There was no activity during the robbery for both Tarkington and Allen.[302]

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[296] AG Ex. 38, p. 3376.

[297] AG Ex. 38, p. 3386.

[298] AG Ex. 38, pp. 3401-3402, Ex. 30, p. 3251 (Los Angeles County Sheriff's Department's Supplemental Report indicating Tarkington stated he picked up Allen from Halldale Street and Washington Boulevard).

[299] AG Ex. 38, pp. 3420, 3452.

[300] AG Ex. 38, pp. 3435-3456.

[301] AG Ex. 38, p. 3454.

[302] AG Ex. 38, p. 3453.

Sprint's Custodian of Records, Ray Clark, testified Tarkington's phone records were under the name Devonaire Smith.[303] Tarkington and Allen's phones stopped showing cell phone call activity within approximately one hour and 17 minutes of each other on December 8 and began again on December 14 with Tarkington's call activity starting around 11 hours prior to Allen's. He explained the gap in activity may be due to an agreement between them to not use those phones for calls during that time or it could be due to coincidental lack of use. He explained perhaps they thought only the calls would give away location information because it did not become public knowledge that the direct connect feature provided location information until later.[304] If there was a problem with the records for phone calls, there would be the same problem for direct connect as the databases are similar.[305]

b. Cell Phone Records

Allen and Tarkington's cell phone records show Allen and Tarkington contacted or attempted to contact each other through direct connect approximately two times on November 29, 2005, one time on November 30, 2005, three times on December 1, 2005, two times on December 2, 2005, three times on December 3, 2005, five times on December 7, 2005, five times on December 11, 2005, nineteen times on December 12, 2005, and six times on December 13, 2005.[306]

7. MAAQ Testing

According to the Los Angeles County Sheriff's Department Laboratory Examination Report dated April 14, 2014, issued by Senior Criminalist Joseph Cavaleri (Cavaleri), no MAAQ was detected on the red stains from the towel and shirt.[307] According to the Los Angeles County Sheriff's Department Laboratory Examination Report dated April 24, 2015, Cavaleri detected MAAQ on one red stained $20 bill recovered from Tarkington's vehicle.[308] In an email from Cavaleri to DDA Melissa Hammond (Hammond) dated May 26, 2015, he opined water washing and bleach, a water based product, can

[303] AG Ex. 38, p. 3461.
[304] AG Ex. 38, pp. 3472-3474.
[305] AG Ex. 38, p. 3475.
[306] AG Ex. 40, 47.
[307] AG Ex. 44.
[308] AG Ex. 43.

remove MAAQ from fabric. Cavaleri spiked a fabric swatch with MAAQ, rubbed the MAAQ into the fabric, washed the swatch with water for 5 minutes, and a faint stained area remained. The area with the faint stain was cutout, extracted with methanol solvent, and tested with gas chromatography with mass spectrometry to confirm the presence of MAAQ. MAAQ was not detected on the water washed fabric swatch. Additionally, he explained the chemicals used in tear gas, which are sometimes contained in bank dye packs, are volatile and evaporate with time. He opined if tear gas was originally present on the shirt and towel or any other items, it would have evaporated from the items and no longer be present. DDA Hammond also provided a picture of the currency with pink stains and Cavaleri opined the bills had the characteristics of exposure to MAAQ with subsequent treatment with a solvent.[309]

Tarkington's forensic criminalist, Barnett, testified he examined the white shirt and towel to see if the stains matched the kind of dye used in dye packs by banks.[310] He examined the items under magnification, removed samples from stained areas, extracted them with alcohol, and used a technique called thin-layer chromatography to compare the stains with MAAQ.[311] He opined the stains on the white towel and shirt were not MAAQ, but a liquid beverage of some kind. [312] He believed the stains were more consistent with a liquid with a coloring red agent rather than a solid.[313] He did not confirm the red stains from the shirt and towel were cranberry juice, nor did he test the items for bleach or pepper spray.[314] He opined the black stains on the towel were consistent with a footprint as if someone stepped on the towel with a dirty shoe or stepped on the towel on a dirty surface.[315]

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[309] AG Ex. 42.

[310] AG Ex. 22, p. 3096, Ex. 41.

[311] AG Ex. 22, pp. 3099-3100.

[312] AG Ex. 22, pp. 3106, 3117.

[313] AG Ex. 22, p. 3123.

[314] AG Ex. 22, pp. 3112-3113.

[315] AG Ex. 22, p. 3114.

In Barnett's Supplemental Report, he indicated "whether or not any manner of laundering could have selectively removed MAAQ from the shirt and towel, leaving the red stains that are now visible, has not been determined."[316]

8. Decision on Tarkington's Petition for Writ of Habeas Corpus

On May 28, 2015, the Court of Appeal issued a tentative ruling on the record stating "the evidence was sufficient for the jury to make a finding based upon the entire set of circumstances" and denied the petition for habeas.[317] The court indicated, despite the stipulation by the parties, there was no bank dye on the shirt and towel recovered at the crime scene, even if the jury did not hear evidence about the shirt and towel, the court was still of the opinion there were sufficient facts to sustain the jury verdict.[318] The court found "it isn't only the bank dye on the money, it is the entire set of circumstances surrounding this case. . . "[319] On June 12, 2015, the ruling took effect.[320]

VII. Counsel Foglesong's Interview

On January 3, 2012, Foglesong was interviewed by Los Angeles County Deputy District Attorney (DDA), Rhonda Saunders, and Senior Investigator, Debora Bailey, after Tarkington filed his petition for habeas corpus on October 14, 2011. Foglesong stated the cell phone records were a source of conflict between Tarkington and Foglesong as she told him if he was innocent she could help him, but he responded he has different cell phones, different numbers, he leaves them in places he doesn't want to be found, and she does not want to know where his cell phones were.[321] Tarkington was concerned cell phones would not put him where he was trying to say he was and put him in gang territory.[322] Furthermore, Foglesong stated Tarkington did not want to show where he was because he

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[316] Claimant's Ex. I.
[317] AG Ex. 21, p. 3027.
[318] AG Ex. 45, p. 3639.
[319] AG Ex. 45, p. 3640.
[320] AG Ex. 21, p. 3029.
[321] AG Ex. 16, pp. 2892-2893.
[322] AG Ex. 16, p. 2870.

gave Allen a ride to Palmdale to case the bank prior to the robbery.[323] Additionally, he did not want cell phone tower records determining his physical location because it would place him in downtown Los Angeles the night before the robbery when the prosecution had no evidence where he was.[324]

Foglesong stated Tarkington initially provided her with Faye Sutton (Sutton) as his alibi witness. Foglesong stated her investigation revealed there was no evidence they were at the East-West Motel in Los Angeles where Tarkington claimed they were. They said they checked in at 4 a.m.; however, based on their limited funds they would not have been able to afford to stay very long as it was a pay by the hour motel.[325] Foglesong could not find any records of him signing in or of any payments made.[326] Furthermore, Foglesong discovered they parted in the early morning hours of December 14, 2005, as Sutton had to be at work early in the morning, so it did not provide Tarkington with an alibi for the time of the robbery.[327] Foglesong stated it placed Tarkington's location closer to the bank and there was an unaccounted gap of time, which was problematic because it allowed enough time for him to get back and forth to Lancaster.[328] Foglesong also investigated Tarkington's notion he had been at his great aunt's house and his nephews washed his car that afternoon, but his family members refused to testify and would not cooperate.[329] After Foglesong's investigation concerning alibi witness Sutton was unsuccessful, Tarkington brought up witness Wiley who said he was with him at the time of the bank robbery.[330]

Foglesong felt there were many discussions between Tarkington and Allen as to Allen's testimony and they were talking outside of their attorneys.[331] Foglesong stated the stories changed so

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[323] AG Ex. 16, p. 2884.
[324] AG Ex. 16, p. 2891.
[325] AG Ex. 16, p. 2877.
[326] AG Ex. 16, p. 2885.
[327] AG Ex. 16, pp. 2872-2873, 2877.
[328] AG Ex. 16, pp. 2885-2886 (the record states Lancaster.)
[329] AG Ex. 16, p. 2888.
[330] AG Ex. 16, pp. 2877, 2886.
[331] AG Ex. 16, p. 2885.

many times as to what actually happened that day between the two men.[332] Foglesong heard many different stories from Allen, such as whether he stole the car or he didn't steal the car, whether he changed the flat tires, or whether he stopped to change the flat tires.[333] Foglesong stated one of the jurors figured out the tire testimony did not make sense and the jurors believed Allen was lying, and if Allen was lying to protect himself he was also lying to protect Tarkington.[334]

VIII. 2016 Supplemental Habeas Petition

In 2016, Tarkington filed a supplemental habeas petition in *In re Tarkington*, Second District Court of Appeal case number B270141, arguing he was denied effective assistance of counsel when his trial counsel failed to have the shirt and towel tested for the presence of red dye MAAQ, the test results constituted newly discovered evidence, the evidence at trial regarding the shirt and towel was false evidence under Penal Code section 1473, and the cumulative effect of the improperly admitted evidence and ineffective assistance of counsel denied Tarkington the right to a fair trial.[335] Tarkington relied upon the same evidence presented during the 2011 evidentiary hearing, which showed that post-trial testing of the shirt and towel excluded the presence of MAAQ, even though it was possible that MAAQ could have been removed by washing these items with water and bleach.

On October 20, 2017, the appellate court held Tarkington did in fact receive ineffective assistance of counsel when trial counsel inexplicably neglected to test the shirt and towel. The court explained that this testing would have undermined the "live 'test'" conducted by Detective Brown on the witness stand, "when he opened the paper bag" with the shirt and towel and claimed that he could "still smell the pepper spray," which he further claimed was causing him to experience "a burning sensation in his eyes and nose." Because neither the prosecution nor defense had tested the shirt and towel to determine if they actually contained MAAQ, the court characterized this aspect of Detective Brown's testimony as "impromptu, in-court scientific 'testing' which had been sprung on

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[332] AG Ex. 16, p. 2884.

[333] AG Ex. 16, pp. 2914-2916.

[334] AG Ex. 16, p. 2916.

[335] AG Ex. 17, p. 2943.

defense counsel without prior notice" in violation of the statutory discovery obligation. Thus, counsel's reliance upon cross-examination, rather than seeking a continuance to test the shirt and towel or move for sanctions of the discovery violation, amounted to deficient representation.

Moreover, counsel's deficient representation was ultimately prejudicial because there was a reasonable probability that, but for this omission, the result of the trial would have been different. As summarized by the appellate court,

> Given that only Allen's fingerprints were found inside the getaway car; that no DNA or other physical evidence put Tarkington either in the bank or the getaway car; that the DNA of two other people—but not Tarkington—were found on the nylon stocking containing the $59 in coins found in the back of his car; and that, as we have previously held, neither Tarkington's prior bank robbery conviction nor his gang affiliation should have been admitted into evidence, there is a reasonable probability Tarkington would have obtained a more favorable result had counsel's performance not been deficient.

Thus, the appellate court granted Tarkington's petition on the basis of his counsel's ineffective representation.

The court acknowledged Tarkington's argument that characterized Detective Brown's testimony as "greatly exaggerated" but did not express any other opinion as to Detective Brown's credibility. Nor did the court make a determination as to whether the MAAQ test results constituted newly discovered evidence or if they showed Tarkington was convicted based on false evidence. [336] As a result, Tarkington's convictions were reversed and the prosecution could elect to retry Tarkington within the statutory timeframe, otherwise, Tarkington was to be released from custody.[337]

IX. Tarkington's Retrial

On June 1, 2018, Tarkington was retried on five counts of second degree robbery and one count of second degree commercial burglary with a firearm enhancement for each count.[338] On June 4, 2018, the trial judge provided the DDA with Special Jury Instructions to remedy the Los Angeles County Sheriff's Department's failure to comply with a court order to preserve evidence, Los Angeles

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[336] AG Ex. 17, p. 2944.

[337] AG Ex. 17, p. 2957.

[338] AG Ex. 20.

County Sheriff's Department's failure to produce supporting documentation showing that three cellular phones seized and booked into evidence had been delivered to the court, and violation of *Youngblood* for failing to maintain the cell phones which could have been useful in Tarkington's defense.[339] Despite the court order to preserve evidence, the Los Angeles County Sheriff's Department failed to preserve three cellular phones and three disposable cameras seized and booked into evidence, the case file created by the investigating detectives, 9-1-1 calls, sheriff Mobile Digital Transmissions, and sheriff radio transmissions related to the crimes.[340] On June 4, 2018, the DDA announced she was unable to proceed because the Special Jury Instructions would potentially be fatal to the prosecution's case and the prosecution's witness, Detective Brown, would not be available until Friday to testify and the witnesses for the people were going to run out on Wednesday. The DDA stated Detective Brown was out of state and "stranded with his travel. He had to order a part for his vehicle, and he was in no way able to travel to Los Angeles until at the earliest the end of the week."[341] The DDA did not request a continuance. Instead, the case was dismissed under Penal Code section 1382 because the prosecution was unable to continue with the trial.[342]

X. CalVCB 4900 Proceedings

In his application filed with CalVCB, Tarkington claims the lead investigator, Detective Brown, framed him. Tarkington claims the Court of Appeal made factual findings that the only piece of evidence directly tying Tarkington to the robbery was Detective Brown's testimony that there was bank dye and pepper spray on the shirt and towel found in the back of Tarkington's vehicle and Detective Brown fabricated the existence of bank dye and pepper spray on the towel and shirt. He further contends the fact Detective Brown had to plant evidence is per se evidence Tarkington is factually innocent and therefore all evidence that Tarkington presents carries more weight and credibility. Tarkington claims he is innocent, as alibi witness Wiley testified at trial he was with Tarkington about

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[339] Claimant's Crime/Conviction Statement, pp. 10-12, Claimant's Ex. N, O (*Arizona v. Youngblood* (1988) 488 U.S. 51.).

[340] Claimant's Crime/Conviction Statement, pp. 10-12, Claimant's Ex. N, O.

[341] AG Ex. 49, pp. 3720-3723.

[342] AG Ex. 19.

the time of the robbery, Tarkington testified during the habeas proceedings he was not involved with the robbery, and Allen testified the bait money found in Tarkington's car and on his person was all his. He asserts the prosecution requested the charges be dismissed at retrial because they knew it would put Detective Brown in the position of either committing perjury or asserting the Fifth Amendment right against self-incrimination before the jury, and either would be fatal to the prosecution's case.[343]

Among the documents attached to the application was a declaration from Allen dated November 5, 2009. Allen declared he was currently incarcerated for the conviction of the December 14, 2005, robbery of the Bank of America in Palmdale. Allen stated he and two other people robbed the Bank of America in Palmdale and Tarkington was not involved. He was in Tarkington's vehicle at the time of their arrest because he called Tarkington for a ride and he kindly obliged. All of the spoils from the robbery found in the vehicle belonged to Allen.[344]

At the hearing, Barnett testified that he was able to analyze photographs of shoe sole impressions, which were photographed from the Bank of America in Palmdale.[345] He concluded the impressions of shoe soles from the bank did not match the photographs of the soles of Tarkington and Allen's shoes at the time of arrest, Carmello Anthony shoes and Adidas shoes, respectively. He felt it was apparent that Tarkington and Allen's shoes at the time of arrest did not match the photographs of shoe sole impressions from the bank and the analysis was not costly or time consuming.

Notably, Tarkington was not present at the CalVCB hearing and did not testify to support his application. Further, the Deputy Attorney General did not seek to question Tarkington. Incidentally, Tarkington's Fifth Amendment right against self-incrimination was not applicable to this administrative

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[343] Claimant's Application, pp. 13-14.

[344] Claimant's Ex. F.

[345] Claimant's Ex. 48, 65.

proceeding as any future criminal prosecution was barred by Double Jeopardy.[346]

On January 18, 2022, both parties submitted letters addressing the issue whether Penal Code section 4900, subdivision (b), and other corresponding amendments enacted on January 1, 2022, applied to Tarkington's claim since the claim was filed prior to enactment of the amendments. Both parties agreed the newly enacted amendments applied to Tarkington's claim and that the burden of proof is on the Attorney General to prove by clear and convincing evidence that Tarkington committed the crime.

In her letter, the Deputy Attorney General objects to compensation claiming there is clear and convincing evidence, through evidence in the trial record and outside the trial record, that Tarkington committed the bank robbery. Specifically, she asserts the post-conviction litigation evidence bolsters the evidence adduced at trial as Tarkington's and Allen's call and direct connect records show that in the two weeks leading up to the robbery they contacted or attempted to contact each other dozens of times; the day before the robbery, Tarkington drove Allen to the Palmdale Albertson's Supermarket in order to case the Bank of America and Allen bought the nylons used as masks during the robbery; Allen has since admitted he was one of the Bank of America robbers and both Tarkington's and Allen's call and direct connect records show an absence of activity during the time of the robbery; police found the two men together hours after the robbery in Tarkington's car containing money stolen from the bank; Tarkington had red-stained money in his pocket; and when questioned on the night of the robbery, Tarkington and Allen had conflicting stories of where they had just come from.

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[346] See *Reina v. U.S.* (1960) 364 U.S. 507, 513 ("the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime"); *Mitchell v. United States* (1999) 526 U.S. 314, 326 (confirming Fifth Amendment privilege is extinguished once a conviction and sentence has been imposed because "there can be no further incrimination" or "legitimate fear of adverse consequences"); see also *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 ("Where the plaintiff in a civil action refuses to testify by invoking the privilege against self-incrimination, the action may be dismissed by the court because 'One may not invoke the judicial process seeking affirmative relief and at the same time use the privileges granted by that process to avoid development of proof having a bearing upon his rights to such relief'").

She further asserts evidence and testimony from Foglesong demonstrates that Tarkington participated in the bank robbery and his denial lacks credibility. Specifically, she claims Tarkington told Foglesong he gave Allen a ride to the Albertson's store to case the bank inside on the day before the robbery; Tarkington gave her different alibis which changed each time she was unable to substantiate the alibi; and Tarkington's admissions he was a gang member at the time of the bank robbery and his cell phone records would show he spent time in gang territory was significant because Tarkington had previously been convicted of a bank robbery and his trial testimony established that Tarkington's gang specifically had committed robberies. Additionally, the Deputy Attorney General claims when Allen offered to change his testimony in an effort to exonerate Tarkington, Tarkington never asked Allen to tell the truth.

The Deputy Attorney General waived further hearing, submission of additional evidence, and briefing, and submitted on the record. Claimant's counsel stated he waived further hearing, raising new arguments, and submission of additional evidence, and submitted on the record.

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.[347] If the claim is ultimately approved, it results in a recommendation by CalVCB to the Legislature to make an appropriation for compensation at the rate of $140 per day for the pre- and post-conviction confinement that resulted from the erroneous conviction.[348]

Typically, claimants bear the burden to prove by a preponderance that (1) the crime with which they were convicted either did not occur or was not committed by them and (2) they suffered injury as a result of their erroneous conviction.[349] However, as of January 1, 2022, if a state or federal court has granted a writ of habeas corpus or if a state court has granted a motion to vacate pursuant to Penal Code sections 1473.6 or 1473.7, subdivision (a)(2), and the charges were

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[347] Pen. Code, § 4900.

[348] Pen. Code, § 4904.

[349] Pen. Code, §§ 4900, subd. (a); 4903, subd. (a).

subsequently dismissed, or the person was acquitted of the charges on a retrial, CalVCB is to recommend to the Legislature that an appropriation be made and the claim paid unless the Attorney General establishes by clear and convincing evidence claimant is not entitled to compensation.[350]

In that case, the Attorney General must timely object in writing, within 45 days from when claimant's claim is filed, with clear and convincing evidence that the claimant is not entitled to compensation.[351] Upon receipt of the objection, CalVCB shall fix a time and place for the hearing of the claim.[352] At the hearing, the Attorney General bears the burden of proving by clear and convincing evidence that the claimant committed the acts constituting the offense.[353] Claimant may also introduce evidence in support of the claim.[354] A conviction reversed and dismissed is no longer valid, thus the Attorney General may not rely on the fact that the state still maintains that claimant is guilty of the crime for which they were wrongfully convicted, that the state defended the conviction against claimant through court litigation, or that there was a conviction to establish that claimant is not entitled to compensation.[355] The Attorney General may also not rely solely on the trial record to establish that claimant is not entitled to compensation.[356]

When determining whether the Attorney General has satisfied its burden of proof, the Board may consider all relevant evidence if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, even if a common law or statutory rule might make its admission improper over objection in any other proceeding.[357] In addition, the Board may

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[350] Pen. Code, § 4900, subd. (b).

[351] Pen. Code, § 4902, subd. (d).

[352] Pen. Code, §§ 4902, subd. (d); 4903, subd. (b).

[353] Pen. Code, §§ 4902, subd. (d); 4903, subd. (b).

[354] Pen. Code, § 4903, subd. (b).

[355] Pen. Code, § 4903, subd. (d).

[356] Pen. Code, § 4903, subd. (d).

[357] Cal. Code Regs., tit. 2, § 641, subds. (c) & (d).

consider any other information that it deems relevant to the issue before it.[358] The traditional rules of evidence do not apply. [359]

Nevertheless, the Board is bound by any factual findings and credibility determinations rendered by a court during proceedings on a petition for writ of habeas corpus, a motion to vacate pursuant to Penal Code sections 1473.6 or 1473.7, subdivision (a)(2), or an application for a certificate of factual innocence.[360] The Board is likewise bound by any court finding that the claimant is factually innocent, "under any standard for factual innocence applicable in those proceedings," when either granting a writ of habeas corpus or vacating the judgment pursuant to Penal Code section 1473.6.[361]

If the Attorney General's office fails to meet its burden of proving claimant's guilt by clear and convincing evidence, and the Board has found that the claimant sustained injury through their erroneous conviction and imprisonment, then the Board shall recommend the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury.[362]

I. The Current Version of Penal Code Sections 4900, et seq. Apply to Tarkington's Claim

Both parties agree newly amended Penal Code section 4900, subdivision (b) and the corresponding amendments enacted on January 1, 2022, apply to Tarkington's claim and since the Attorney General objects to Tarkington's claim for compensation, the burden is on the Attorney General to prove by clear and convincing evidence that Tarkington committed the acts constituting the offense. As discussed below, CalVCB agrees newly amended Penal Code section 4900, subdivision (b) and the corresponding amendments enacted on January 1, 2022, apply to Tarkington's claim.

The amendments are applicable to Tarkington's claim. It is well-settled that "the legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending

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

[359] Cal. Code Regs., tit. 2, § 615.1, subd. (a).

[360] Pen. Code, §§ 1485.5, subd. (c), 4903, sub. (c).

[361] Pen. Code, § 1485.55, subd. (a).

[362] Pen. Code, §§ 4902, subd. (d); 4904.

actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired [citations omitted], and so long as a reasonably efficient remedy remains."[363] The amendments were enacted while Tarkington's claim was pending and prior to a final decision on his claim as a decision of the Board is not final until the Board adopts the proposed decision.[364] Furthermore, allocating the burden of producing evidence is paradigmatically a matter of procedure,[365] Penal Code section 4900 compensation claims do not involve a fundamental vested right or impair the obligations of contracts, and a reasonably efficient remedy remains in this proceeding.[366]

Applying the amendments prospectively to this claim is consistent with past CalVCB decisions. For instance, in the Penal Code section 4900 claim of Rafael Madrigal, CalVCB's final decision took into consideration procedural statutes which were enacted and amended while Rafael Madrigal's claim was pending with CalVCB.[367] While Government Code section 13959 states the Board shall apply the law in effect as of the date an application was submitted, section 13959 applies to victim compensation applications filed pursuant to Government Code sections 13950, et seq., and not to Penal Code section 4900 claims. Accordingly, the current version of sections 4900, et seq. prospectively apply to Tarkington's matter pending before the Board, regardless of when he applied to CalVCB for compensation.

II. Binding Court Determinations

Tarkington argues CalVCB is bound by the factual findings in the 2017 Court of Appeal opinion granting Tarkington's supplemental petition for habeas corpus based on ineffective assistance of counsel. In his claim, Tarkington argues the following factual findings bind CalVCB:

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[363] *San Bernardino County v. State Indus. Acc. Commission* (1933) 217 Cal. 618, 629 (citing *City of Los Angeles v. Oliver* (1929) 102 Cal.App. 299, 315.)

[364] Cal. Code Regs., tit. 2, §§ 618.1, subd. (f); 619.2; 619.5.

[365] *Lozano v. Workers' Comp. Appeals Bd*. (2015) 236 Cal.App.4th 992, 1000.

[366] *Tennison v. California Victim Comp. & Gov't Claims Bd.* (2007) 152 Cal.App.4th 1164, 1182.

[367] See *Madrigal v. California Victim Compensation and Government Claims Board* (2016) 6 Cal.App.5th 1108.

-"The only item found on Tarkington that tied him to the robbery was $200 in cash . . .",[368]

-"Thus, the shirt and towel were not merely cumulative pieces of evidence that tied Tarkington to the robbery without a viable explanation as to how they came into his possession; they were the only items to do so,"[369]

-". . . no DNA or other physical evidence put Tarkington either in the bank or the getaway car; that the DNA of two other people - but not Tarkington - were found on the nylon stocking containing the $59 in coins found in the back of his car,"[370]

-"Indeed, the case against Tarkington has been reduced to the false name he gave to law enforcement when pulled over - unsurprising given he was still on federal supervised release - and the alleged similarities between Tarkington's height, build, and skin color to one of the robbers,"[371]

-"It is undisputed that Tarkington has a dark complexion, is about five feet 11 inches tall, and does not have a medium build, weighing about 200 pounds in late 2005," [372] and

-Detective Brown's testimony was "greatly exaggerated."[373]

Express factual findings are findings established as the basis for the court's ruling or order.[374] While claimant contends the Court of Appeal made a determination that Detective Brown's testimony was "greatly exaggerated," it appears the court acknowledged Tarkington's argument that characterized Detective Brown's testimony as "greatly exaggerated" and did not express any other opinion as to Detective Brown's credibility. However, both parties agree this was a finding by the Court of Appeal and for purposes of this decision CalVCB will assume the determination is binding.

Pursuant to Penal Code sections 4903 and 1485.5, CalVCB accepts the above determinations as binding in this proceeding. While binding, the above statements have limits in CalVCB proceedings as the 2017 Court of Appeal opinion involves a different burden of proof, legal issues, and evidence. The 2017 Court of Appeal opinion determined whether Tarkington's counsel was ineffective in failing to

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[368] AG Ex 17, p. 2953.

[369] AG Ex 17, p. 2953.

[370] AG Ex 17, p. 2954.

[371] AG Ex 17, p. 2954.

[372] AG Ex 17, p. 2955, FN 9.

[373] AG Ex 17, p. 2955.

[374] Pen. Code, § 1485.5, subd. (d).

test the shirt and towel at his 2007 trial. Although the opinion may have found the incriminating evidence presented at trial was insufficient to overcome the likely prejudice resulting from his counsel's ineffective assistance, CalVCB's review is not confined to the evidence presented at trial. The determination at this proceeding is whether the Attorney General has proved by clear and convincing evidence that Tarkington committed the acts constituting the offense. Thus, the binding determinations do not preclude CalVCB from making an independent determination as to whether or not the Attorney General has satisfied its burden to demonstrate by clear and convincing evidence that Tarkington committed the acts constituting the offense.

Furthermore, these determinations alone do not establish that Tarkington is innocent. Contrary to Tarkington's claim, the "fundamental miscarriage of justice" exception to allow Tarkington to file a supplemental writ does not amount to a finding of innocence as previously determined by CalVCB in the April 24, 2019, preliminary decision denying mandated compensation. As explained in CalVCB's decision, "the Court of Appeal did *not* recite any evidence demonstrating Mr. Tarkington's actual innocence, nor did it express any opinion as to whether the proffered evidence that trial counsel had unconstitutionally failed to present at trial would have pointed unerringly towards innocence . . . the Court of Appeal excepted Mr. Tarkington's successive petition from the procedural bar based upon its determination that an 'error of constitutional magnitude' occurred, rather than any determination of actual innocence. Certainly, no express determination of actual innocence can be gleaned from the court's decision."[375] Thus, the court did not render a finding of factual innocence, under any conceivable standard for factual innocence applicable in the habeas proceeding when excusing Tarkington's procedurally barred petition.[376]

While this determination did not amount to a finding of factual innocence, CalVCB recognizes that the court's findings rendered in support of this procedural ruling are binding.[377] Those findings

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[375] Letter dated April 24, 2019, from CalVCB Senior Attorney Laura Simpton to Leo Terrell and Dina Petrushenko titled "Penal Code section 1485.5 Determination."

[376] Pen. Code, § 1485.55, subd. (a), as amended by SB 446.

[377] Pen. Code, § 1485.5, subd. (a), as amended by SB 446.

included the court's characterization of the trial evidence against Tarkington as "paucity" and "scant." But again, these binding determinations as to the weight of incriminating evidence presented at trial do not preclude CalVCB from making an independent determination as to whether or not the Attorney General has satisfied its burden to demonstrate by clear and convincing evidence that Tarkington committed the acts constituting the offense.

Moreover, Tarkington's contention that the Court of Appeal found Detective Brown fabricated the existence of bank dye and pepper spray on the towel and shirt is unsupported. Although the Court of Appeal may have found Detective Brown's testimony was "greatly exaggerated," the Court of Appeal did not make a finding that he fabricated the existence of bank dye and pepper spray on the towel and shirt. Additionally, contrary to Tarkington's assertion, the Court of Appeal did not make an express credibility finding as to whether Allen gave Tarkington $200 to pay for gas. The Court of Appeal also did not make an express factual finding that Tarkington did not match the witnesses' descriptions provided to the FBI. Rather, the Court of Appeal summarized the witnesses' descriptions and subsequently described Tarkington's characteristics as detailed in the binding determination noted above. The Court of Appeal summarized the witnesses' descriptions as follows:

> In interviews with the FBI, a teller said both robbers who jumped the counter had medium complexions, were five feet nine inches to five feet 10 inches tall, and had medium builds, weighing about 170 to 180 pounds. Other tellers said the robbers were similar, at five feet eight inches to five feet nine inches tall and 160 to 170 pounds.[378]

III. There Is Clear and Convincing Evidence that Tarkington Robbed the Bank of America

Upon reviewing the administrative record and giving binding effect to the 2017 Court of Appeal opinion, there is clear and convincing evidence that Tarkington robbed the Bank of America. California Supreme Court cases have held clear and convincing evidence requires a specific type of showing - one demonstrating a "high probability" that the fact or charge is true.[379] Similarly, civil jury instructions

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[378] AG Ex 17, p. 2955, FN 9.

[379] *In re White* (2020) 9 Cal.5th 455, 467 (citing *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090); *In re Angelia P.* (1981) 28 Cal.3d 908, 919.

instruct that clear and convincing evidence means "it is highly probable that the fact is true"[380] or "evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof."[381] The standard demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt.[382]

There is a high probability Tarkington robbed the Bank of America. The trial record shows Allen and Tarkington were pulled over in Tarkington's vehicle within 11 hours after the robbery with a substantial sum of red stained money containing bills matching the serial numbers on the money taken from the bank, coins with red dye, and a nylon stocking and beanie which were similar clothing items worn by the robbers. Furthermore, red stained money was found in Tarkington's pocket and an eyewitness described and identified Tarkington as one of the robbers. Further, through her testimony at the habeas evidentiary hearing, Foglesong testified the day prior to the robbery, Tarkington drove Allen to the grocery store in Palmdale where the bank robbery took place, Allen purchased the nylons used in the bank robbery from the grocery store, and there was communication between Allen and Tarkington during the days leading up to the robbery. During her post-trial interview, Foglesong stated one of the reasons Tarkington did not want cell phone records to show his whereabouts was because he gave Allen a ride to Palmdale to case the bank prior to the robbery. Cell phone records introduced at the habeas evidentiary hearing show Allen and Tarkington increasingly contacted or attempted to contact each other through direct connect in the days leading to the robbery, yet there was no phone activity from either phone during the time of the robbery. Additionally, through her post-trial interview

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[380] CACI No. 201. See also *Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 (trial court properly rejected that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." "Neither *In re Angelia P.,* 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases.").

[381] BAJI 2.62.

[382] *Conservatorship of O.B*. (2020) 9 Cal. 5th 989, 995.

and testimony at the habeas evidentiary hearing, Foglesong indicated Tarkington's alibi changed when she was unable to verify the alibi through investigation, Tarkington informed her cell phone information would not help him and possibly incriminate him, and Tarkington was complicit in allowing Allen to lie for him on the stand. Moreover, Tarkington was previously convicted for robbing another Bank of America branch in the same county several years earlier. Lastly, Tarkington's credibility is questionable as he has made numerous inconsistent statements to law enforcement, during his testimony at the habeas evidentiary hearing, and to Foglesong, as well as conflicting statements with Allen. In weighing the evidence from the trial record and outside the trial record, there is a high probability Tarkington robbed the Bank of America.

A. Tarkington's Allegations of Prosecutorial Misconduct

Tarkington claims he is factually innocent because the jury would not have convicted him if they were aware Rissling told the FBI that the robber who came to her station wore Converse shoes and had a medium complexion and that Detective Brown falsified evidence of bank dye on the towel and shirt. Tarkington further asserts Detective Brown suppressed Rissling's FBI witness statement and the shoe print evidence to frame Tarkington, and misrepresented why the shoe print evidence was never tested or turned over to the defense. He further states Rissling's employment relationship with the Los Angeles County Sheriff's Department was never disclosed to the defense.

However, CalVCB's review is limited to whether the Attorney General has shown by clear and convincing evidence that claimant committed the acts constituting the offense, not whether a jury would have convicted Tarkington if they had known this information or whether prosecutorial misconduct occurred. CalVCB is able to review and has reviewed all relevant and presented evidence when making its determination, including evidence Tarkington asserts was suppressed or discovered post-trial.[383]

B. Allen's Exonerating Declaration is Unconvincing

Tarkington contends he is innocent because Allen admitted in his November 5, 2009, declaration that Allen committed the robbery and Tarkington was not involved in the robbery. However,

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

Allen's declaration is unconvincing as his credibility is lacking due to his multiple different accounts of how he obtained the money, his contrary trial testimony, and demonstrated willingness to lie.

Allen changed his story to law enforcement multiple times about how he came into possession of the red stained money. He initially told law enforcement he obtained the money from selling a car to Frye, then admitted he lied and said the money in his possession was from the sale of marijuana to a Blood named Little Rev. Later, he changed his story again and said Tarkington gave him the money when they were stopped by the Los Angeles County Sheriff's Department, told Allen to make up a story about selling his car, and Allen did not know where the money came from.

During trial, Allen's story changed again when he testified he received the money from Frye after stealing a vehicle for him. Allen testified he told police he stole the car; however, this is untrue. His testimony also was untrue when he initially testified he did not tell police he received the dye-stained money from selling marijuana. Allen admitted he lied to law enforcement and insisted he was not lying at trial. However, at trial Allen repeatedly denied being involved in the robbery contrary to his declaration.

Furthermore, Foglesong testified in preparing for Allen's testimony, each time Tarkington, Allen, Allen's counsel, and she discussed the case it seemed the story shifted, and she heard many different stories from Allen. During these discussions, Allen tried out different possible scenarios for testimony and asked what he should say with the intent to exonerate Tarkington. Allen has repeatedly shown he is willing to lie under oath to help Tarkington. Accordingly, his declaration is unpersuasive.

C. Tarkington's Credibility is Questionable

Tarkington contends he is innocent because he testified at the writ of habeas corpus proceedings he was not involved with the robbery. However, his credibility is questionable for all of the reasons discussed below.

First, Tarkington's prior conviction for robbing the Bank of America in Lancaster in 1997 is a crime of moral turpitude which reflects dishonesty.[384] And while this prior bad act was found insufficiently unique to be admitted on the issue of identity under Evidence Code section 1101 in Tarkington's trial for robbing another Bank of America in Palmdale in 2005, the traditional rules of evidence do not apply to CalVCB proceedings.[385] In any event, the fact that Tarkington stands convicted of robbing two Bank of America branches, in the same county, by similar methods, eight years apart and approximately a year after being released from prison for his previous robbery conviction, may be considered under Evidence Code 1101 to show knowledge or a common plan.

Second, Tarkington's numerous inconsistent statements to law enforcement undermine his credibility. Tarkington initially stated he never saw or touched the red stained money in his car until deputies located the money. However, later he admitted he saw the money, even remarking to Allen that Allen should not have accepted red stained money in exchange for a car sale. Tarkington again insisted to law enforcement he never touched any of the money; however, red stained money was later found in his pocket during the booking process. Furthermore, it was not until the Los Angeles County Sheriff's Department processed Tarkington's fingerprints was Tarkington's true identity revealed, and in a subsequent interview Tarkington finally admitted his true identity. Moreover, Deputy Wheeler testified at the habeas evidentiary hearing that Tarkington and Allen provided him with inconsistent addresses of where Allen sold the car and one of the addresses was nonexistent.

Third, Tarkington's credibility is further eroded by his own inconsistent statements during his testimony at the habeas evidentiary hearing, along with contradictions with Allen and Foglesong. Tarkington testified he did not know where Booby lives yet told law enforcement he was at "B.'s" house when Allen called for a ride and Allen's testimony substantiates he was at Booby's house. Tarkington testified he called Allen at 1:25 p.m. about picking him up and Allen contacted him at 3:00 p.m. or 3:30

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[384] See *People v. Castro* (1985) 38 Cal.3d 301, 315; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925; *People v. Rodriguez* (1986) 177 Cal.App.3d 174, 178; *People v. Brown* (1985) 169 Cal.App.3d 800, 805-806.

[385] Cal. Code Regs., tit. 2, § 615.1, subd. (a).

p.m. while he was on his way to make sure he was coming; however, Allen testified he asked Tarkington for a ride around 6:30 p.m. when Tarkington was at Booby's house. Tarkington further contradicted his story to law enforcement by testifying he picked up Allen in Lancaster around 4:30 p.m. or 5:00 p.m. instead of near Washington Boulevard and Harvard Street in Los Angeles around 6:00 p.m., which he told law enforcement. This was further inconsistent with Allen's testimony where Allen stated Tarkington picked him up at Washington Boulevard and Harvard Street in Los Angeles about 7:30 p.m. Furthermore, Tarkington testified when he arrived to pick up Allen, they stayed at Allen's friend's house for over an hour until traffic died down, which is inconsistent with Allen's testimony.

Moreover, Tarkington testified the last time he had spoken with Allen was three or four days prior to the robbery and he had last seen him a couple weeks before the robbery, which was inconsistent with Allen's testimony that they last spoke a couple weeks before the robbery. Further, both of their testimonies are refuted by Foglesong's testimony that Tarkington gave Allen a ride to the grocery store in Palmdale where the bank robbery took place the day prior to the robbery and there was communication between Allen and Tarkington during the two days leading up to the robbery. Tarkington and Allen's cell phone records corroborate they spoke through direct connect the days leading up to the robbery. Further inconsistent statements provided by Tarkington include Tarkington testifying the red dye stains on the shirt and towel were vodka and cranberry, yet telling Foglesong the stains were Gatorade. Notably, Foglesong testified the stories changed many times as to what actually happened that day between Tarkington and Allen. Thus, Tarkington's credibility is undermined due to his own inconsistent statements and inconsistencies with Allen's and Foglesong's statements.

Fourth, Tarkington's alibi and alibi witnesses changed. Foglesong testified and stated during her post-trial interview that Tarkington's alibi witnesses, alibi, and timeline changed. When she was unable to confirm the alibi and alibi witness initially provided by Tarkington, she and Tarkington developed and worked on another alibi witness for the time of the robbery. Foglesong stated Tarkington initially told her he was with Sutton. However, Foglesong's investigation revealed Tarkington was not with Sutton at the time of the robbery, there was no evidence he and Sutton were at the East-West Motel in Los Angeles where he claimed they were, and they parted in the early morning

hours prior to the robbery because Sutton needed to be at work early in the morning. Additionally, Tarkington claimed he was at his great aunt's house and his nephews washed his car that afternoon; however, his own family members refused to testify he was with them. Only after Fogelsong's investigation into his alibi was unsuccessful did Tarkington claim he was with Wiley.

Furthermore, contrary to Tarkington's habeas testimony, Foglesong testified when they were attempting to nail down Tarkington's physical whereabouts during the robbery and discussed use of cell phone information, Tarkington was clear cell phones would not help, would possibly incriminate him, and be in places where she would not want them to be. Through Foglesong's post-trial interview, she also stated Tarkington was concerned his cell phones would not place him where he was trying to say he was. The changing alibis and Tarkington's reasons for warding off cell phone information, which might corroborate his whereabouts, raises doubt as to the truthfulness of his alibi.

Fifth, Tarkington's complicity in Allen's testimony casts doubt on Tarkington's truthfulness. Fogelsong testified during meetings with Allen's counsel, Allen and Tarkington, Tarkington remained silent and never told Allen to tell the truth when Allen tried out different possible scenarios for testimony and what he should say or not say in order to help Tarkington. Foglesong believed there were many discussions between Tarkington and Allen concerning Allen's testimony outside of their attorneys' presence and the stories changed many times as to what actually happened that day between the two men. Despite this knowledge, Tarkington disagreed with Foglesong and believed Allen should testify. Tarkington's complicities in allowing Allen to lie for him show Tarkington's willingness to contribute to the dishonesty and raise doubt as to Tarkington's credibility.

Sixth, Tarkington's claim in this proceeding that Sergeant Young, Detective Brown, and Detective Murren fabricated the existence of bank dye and pepper spray on the towel and shirt and planted the evidence is inconsistent with his other claims. Claimant appears to assert MAAQ would be present on the white shirt and towel due to Sergeant Young, Detective Brown, and Detective Murren's fabricating and planting the evidence, yet argued there was ineffective assistance of counsel when his trial counsel did not test the items to show there was no MAAQ. If the bank dye and pepper spray were planted on the shirt and towel, presumably Tarkington would not have known what the stains were on

the shirt and towel. Furthermore, if stains were already present on the shirt and towel, seemingly there would not have been a need for Sergeant Young, Detective Brown, and Detective Murren to fabricate and plant evidence.

Lastly, Tarkington's failure to take the stand, subject to cross examination, in this administrative proceeding raises questions as to his veracity. Unlike a criminal proceeding, the Fifth Amendment right against self-incrimination does not apply to this administrative proceeding, which Tarkington initiated after all charges were dismissed.[386] His unexplained failure to take the stand undermines his credibility as presumably, if innocent, he would testify as to his innocence.

Overall, Tarkington's protestations of innocence are not credible. Tarkington no longer carries the burden to prove his innocence by a preponderance of the evidence in this administrative proceeding.[387] Nonetheless, when evaluating whether the overall weight of evidence satisfies the Attorney General's burden to prove guilt by clear and convincing evidence, the absence of any credible assertion of innocence from the claimant may be considered.[388]

D. Wiley's Statements Are Suspicious

Tarkington further claims he is innocent because alibi witness Wiley saw him in Los Angeles about the time of the robbery. Wiley's statements are suspicious as there were inconsistencies in his testimony at trial and statements made to Szeles. Wiley initially testified he had a 15-minute conversation with Tarkington around 10:30 or 10:45 a.m., and on cross examination testified it was closer to 11:00 a.m. He testified he picked his wife up at 11:15 a.m. and made it to the doctor's

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[386] See *Reina v. U.S.* (1960) 364 U.S. 507, 513 ("the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime"); *Mitchell v. United States* (1999) 526 U.S. 314, 326 (confirming Fifth Amendment privilege is extinguished once a conviction and sentence has been imposed because "there can be no further incrimination" or "legitimate fear of adverse consequences"); see also *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 ("Where the plaintiff in a civil action refuses to testify by invoking the privilege against self-incrimination, the action may be dismissed by the court because 'One may not invoke the judicial process seeking affirmative relief and at the same time use the privileges granted by that process to avoid development of proof having a bearing upon his rights to such relief'").

[387] Pen. Code, § 4902, subd. (d).

[388] Cal. Code Regs., tit. 2, § 641, subd. (f) (allowing Board's consideration of any information it deems relevant).

appointment at 11:30 a.m. However, Wiley told Szeles they had a 30-minute conversation closer to 11:00 a.m., which likely would have delayed him from picking up his wife at 11:15 a.m. to take her to her doctor's appointment at 11:30 a.m. Lastly, Szeles, an experienced investigator, admitted he was surprised when he asked Wiley what happened on December 14, 2005, Wiley was able to remember specifics and details about what happened on that date after nine months. When asked how he remembered, Wiley appeared to fail to mention his wife's doctor's appointment to Szeles, despite testifying the doctor's appointment is among the reasons why he remembered the incident so clearly.

E. Compelling Evidence Against Tarkington

In looking at the totality of the evidence in this administrative record, there is clear and convincing evidence that Tarkington robbed the Bank of America, even when considering all binding court determinations. The 2009 Court of Appeal opinion summarized the prosecution's inculpating trial evidence against Tarkington as follows: "Less than 11 hours after the robbery the police arrested Tarkington while a passenger in his own car containing over $3000 in loot from the crime. The police even found some of that loot in Tarkington's pocket. Further supporting evidence of Tarkington's guilt included the testimony of one of the tellers who stated that Tarkington had the same or similar skin color, height and build as two of the robbers, Tarkington's giving the police a false identification at the traffic stop and the presence in his car of an unexplained bag of coins covered with red dye."[389] Similarly, in denying Tarkington's initial habeas petition, the court indicated even if the jury did not hear evidence about the shirt and towel, the court was still of the opinion there were sufficient facts to sustain the jury verdict based on "the entire set of circumstances surrounding this case. . ."[390]

Although the 2009 Court of Appeal opinion stated there was an "unexplained bag of coins covered with dye," the 2017 Court of Appeal opinion granting Tarkington's supplemental habeas petition later found that the "shirt and towel were not merely cumulative pieces of evidence that tied Tarkington to the robbery without a viable explanation as to how they came into his possession; they were the only items to do so," a finding which is binding upon CalVCB. The Court of Appeal decision

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[389] AG Ex.13, p. 2819

[390] AG Ex. 45, p. 3640.

further characterized the weight of the prosecution's trial evidence as "paucity" and "scant," which is likewise binding upon CalVCB. As detailed below, none of these binding court determinations bar CalVCB's conclusion that the overall administrative record satisfies the Attorney General's burden to prove Tarkington's guilt by clear and convincing evidence.

1. Despite the Binding Factual Findings, There is Compelling Evidence Proving Tarkington Committed the Acts Constituting the Robbery

While the habeas court's factual findings bind the CalVCB, there is compelling evidence proving Tarkington committed the robbery despite Tarkington's explanations to the contrary, as discussed more fully below.

a. Incriminating Evidence Found in Tarkington's Possession and Vehicle

i. Red Stained Money in Tarkington's Possession

When a person is shown to be in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances which tend to show guilt supports the conviction of robbery.[391] Tarkington was pulled over approximately 11 hours after the robbery and was in possession of red stained money. Tarkington initially told law enforcement he never saw or touched the red stained money. He later admitted he saw the red stained money. Although he maintained he never touched the red stained money, $200 of red-stained money was found in his pant pocket during the booking process.[392] While Tarkington claims the $200 found on his person was given to him by Allen, his attempt to deceive law enforcement, inconsistent statements and lack of credibility, the incriminating evidence discussed below, and possession of red stained money, which appeared to be covered in red bank dye from the robbery, tends to prove he committed the robbery.

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[391] *People v. Mulqueen* (1970) Cal.App.3d 532, 542; *People v. Hughes* (2002) 27 Cal.4th 287, 357; *People v. McFarland* (1962) 58 Cal.2d 748, 754) (Possession of recently stolen property is so incriminating that to warrant conviction there only needs to be slight corroboration in the form of statements or conduct of the defendant tending to show his guilt).

[392] The amount of $200 is based on the binding factual finding made by the 2017 Court of Appeal opinion. Deputy Moreno's testimony in the trial record indicated the amount was $201.

ii. Red Stained Money Found in Tarkington's Vehicle

The red stained money found in Tarkington's vehicle appeared to be money stolen from the bank robbery as two of the bills found inside Tarkington's vehicle had serial numbers that matched bills taken in the robbery and the money was moist and smelled of bleach implying the money had recently been washed. As discussed above, Allen's statements that the money found in Tarkington's vehicle was his money is unconvincing as he lacks credibility and has provided differing accounts of how he acquired the money.

iii. Nylon Stocking Enclosing Approximately $59 in Coins with Red Dye Found in Tarkington's Vehicle

Coins were stolen during the robbery and detectives surmised the coins with red dye enclosed in the nylon stocking were from the robbery and the red dye was bank dye. Furthermore, one of the robbers had been wearing a nylon stocking and coincidentally a nylon stocking was found in Tarkington's vehicle.

Tarkington contends Sergeant Young, Detective Murren, and Detective Brown planted the black nylon stocking and bag of coins in the rear seat of Tarkington's car. In support of his contention, Tarkington asserts Deputies Wheeler, Giovanni, and Moreno did not find the black nylon stocking and coins during their search of Tarkington's car on December 14, 2005, and neither Tarkington nor Allen's DNA was found on the nylon stocking. Tarkington further claims if the bag of coins and black nylon stocking were inside the vehicle on December 14, 2005, Deputies Wheeler, Giovanni, and Moreno would have smelled pepper spray.

Although the black nylon stocking and coins were absent from the deputies' booking report and deputies testified they did not smell pepper spray during the search, this does not establish the evidence was planted. Deputies Wheeler, Giovanni, and Moreno conducted the search during a traffic stop around 9:00 p.m. It was dark and deputies searched the car for 20 to 25 minutes lit by streetlights and flashlights. The deputies did not know the circumstances or details of the robbery and did not know what to specifically look for. Additionally, Deputy Moreno did not appear to remember whether she saw the bag of coins. She testified that she did not recall whether she saw a bag of coins and

when provided the inventory report to refresh her memory and asked "so having read this and all that, would you agree that there was that jacket with the bills in the back seat, but you didn't see anything, any kind of coins?" she responded "I suppose."[393] While being deposed, Deputy Moreno maintained that she did not remember seeing a bag of coins during the search. Due to the brief search on the side of the road, limited knowledge of the robbery, and lighting conditions, it is conceivable deputies may not have seen the coins in the black nylon stocking or, if they saw it, may not have attributed the coins to the robbery. Accordingly, the deputies booked the entire car into evidence for a continuing investigation and search by the handling detectives. Deputy Moreno explained the detectives were aware of the items involved in the robbery whereas the patrol deputies performing the traffic stop were not.

Furthermore, although Detective Brown stated the coins smelled of pepper spray, he testified he did not smell pepper spray in the front of the Dodge Magnum. He did not smell pepper spray until he moved some of the clothing in the back of the vehicle. It is conceivable the deputies did not smell pepper spray as they did not do as extensive a search through the clothing in the back as Detective Brown had done since they did not associate the clothes with the robbery.

Moreover, the absence of Tarkington and Allen's DNA on the nylon stocking does not prove Sergeant Young, Detective Murren, and Detective Brown planted evidence. Detective Murren denied Detective Brown, Sergeant Young or he brought the bag of coins to the tow yard. Detective Brown also denied planting the coins in the vehicle. Moreover, all three robbers wore gloves during the robbery, so it remains entirely possible that Tarkington or Allen may have held these coins or nylon stocking without leaving any DNA trace. It is also possible that the remaining, unidentified third robber may have left these coins or nylon stocking in Tarkington's car. Accordingly, the absence of Tarkington or Allen's DNA evidence fails to show the evidence was planted.

Additionally, Tarkington asserts Sergeant Young, Detective Murren, and Detective Brown's misrepresentation of the date of the search of Tarkington's vehicle evidences their conspiracy to frame Tarkington for the bank robbery. Tarkington contends the manipulation of the date of the search gave

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[393] AG Exhibit 9, pp. 1725-1727.

the jury the impression that it is unlikely they could have planted the bag of coins and black stocking in light of the significant passage of time between the search of the car at the tow yard on December 22, 2005, and the robbery on December 14, 2005. As discussed above, CalVCB's review is limited to whether the Attorney General has demonstrated by clear and convincing evidence that Tarkington committed the acts constituting the offense, not whether a jury would have convicted Tarkington if they had known the above information. Nevertheless, Sergeant Young, Detective Murren and Detective Brown testified the search was conducted on December 22, 2005. Although there is documentation indicating the date of search may have been December 15, 2005, even assuming there was a discrepancy on the dates when the search was conducted, Tarkington's allegation of a conspiracy to frame him is unpersuasive. While it is not Tarkington's burden to prove his innocence, the difference in dates of the search fails to show there was a conspiracy to frame Tarkington for the robbery and, ultimately, does not negate the Attorney General's proof of guilt by clear and convincing evidence.

iv. Beanie Found in Tarkington's Vehicle

Tarkington contends the dark colored beanie found in Tarkington's vehicle is a common clothing item, there has been no showing Tarkington's beanie matches the beanie worn by the robbers, and the Court of Appeal did not cite to the beanie as evidence pointing to guilt. Although no DNA test was performed on the beanie and the Court of Appeal did not cite to the beanie, Rissling testified the robber in the lobby, who she identified in court as Allen, was wearing a dark colored beanie. While no direct evidence links the dark colored beanie to the robbery, it is a striking coincidence a similar clothing item worn by one the robbers was discovered in Tarkington's vehicle among the other incriminating items found in his vehicle and in his possession.

b. Incriminating Evidence Against Tarkington Involving Witnesses' Identification and Tarkington's Behavior

i. Witnesses' Description and Identification of Tarkington

Tarkington contends he is innocent because he does not match the bank tellers' description of the robbers. However, at the preliminary hearing, when Rissling was asked if she saw a person in court who looked similar to her description of the robber who was near her, she identified Tarkington.

Similarly, during trial, she identified Tarkington as having the same skin tone and similar height and build as the robber who was near her. Although Rissling told the FBI he had a medium complexion, at the preliminary hearing and trial she described the skin tone of the robber who was near her as darker black and dark which coincides with the Court of Appeal's binding determination that Tarkington had a dark complexion. Moore's description to the FBI also described the robber who removed money from her and Rissling's teller drawers as a black male with a dark complexion and, at the preliminary hearing, Bahena testified both of the robbers behind the teller counter were black with dark skin.

The inconsistencies in the bank tellers' description of Tarkington's appearance do not seem significant so as to warrant his necessary exclusion as the robber. Rissling's descriptions to the Los Angeles County Sheriff's Department and FBI were the same or similar to Tarkington's height and her estimation of his weight was off by approximately 20 or 30 pounds. These are not significant differences given the stress of the situation. None of these differences are so stark as to raise a serious concern it must be a different person given she subsequently identified him during the preliminary hearing and trial. Moreover, while other bank tellers' descriptions may not have been precise, FBI agent Nordstrom testified witnesses' descriptions can differ at bank robberies and vary from reality due to witnesses' perceptions from where they are located, such as if they are crouching or lying on the ground and the stress of the situation.

ii. Tarkington's Suspicious Behavior

Tarkington's behavior was suspicious prior to and after the robbery. Foglesong testified in the habeas evidentiary hearing, the day prior to the robbery, Tarkington drove Allen to the grocery store in Palmdale where the bank robbery took place and Allen purchased the nylons used in the bank robbery from the grocery store where the bank is located. During her post-trial interview, Foglesong stated one of the reasons Tarkington did not want cell phone records to show his whereabouts was because he gave Allen a ride to Palmdale to case the bank prior to the robbery. Cell phone records introduced at the habeas evidentiary hearing show Tarkington and Allen increasingly contacted or attempted to contact each other through direct connect in the days leading to the robbery and coincidentally during the time of the robbery their cell phone records showed no activity. After the

robbery, Tarkington's inconsistent statements to law enforcement, at the habeas evidentiary hearing, and to Foglesong, along with his conflicting version of events with Allen, his changing alibis, complicity in Allen's testimony, and reasons provided to Foglesong for warding off cell phone information all tend to show his guilt.

F. Tarkington's Unpersuasive Allegations of Fabrication, Falsification and Conspiracy Concerning the Shirt and Towel

Tarkington claims the negative bank dye test results show Sergeant Young, Detective Murren, and Detective Brown falsified evidence of bank dye and pepper spray on the towel and shirt to frame Tarkington. In support of his argument, Tarkington submitted an Office and Recurrent Witness Information Tracking System (ORWITS) report from the Los Angeles County District Attorney's Office on Detective Brown and contends the fact the deputies did not smell pepper spray in the rear compartment of the vehicle during the December 14, 2005, search proves there was no bank dye and pepper spray on the towel and shirt.

The Los Angeles County District Attorney's ORWITS report does not indicate Detective Brown falsified evidence, rather it indicates the appellate court noted Detective Brown exaggerated his testimony regarding the pepper spray and the court overturned the case based on ineffective assistance of counsel because it held the defense should have tested the items before trial. Moreover, Detective Brown, Detective Murren, and Sergeant Young, who were all experienced detectives, deduced that the stains appeared to be the red dye from the dye pack and Detective Brown testified no forensic test was done on the items. Forensic tests were not conducted on the towel and shirt until post-trial and, as indicated in the habeas opinion, the court held there was ineffective assistance of counsel due to the defense failing to test the items before trial. There is no evidence that Sergeant Young, Detective Murren, and Detective Brown actively falsified evidence of bank dye and pepper spray on the towel and shirt. While forensic criminalists Cavaleri and Barnett did not detect MAAQ on the red stains from the towel and shirt, Cavaleri opined water washing and bleach can remove MAAQ from fabric and, therefore, did not conclusively rule out the possibility that MAAQ could have been on the shirt and towel. Moreover, Detective Brown's physical reaction to the odor on the shirt and towel,

while testifying at trial, was corroborated by the trial court on the record at that time. Accordingly, Tarkington's claim that Sergeant Young, Detective Murren, and Detective Brown falsified evidence of bank dye and pepper spray on the towel and shirt to frame Tarkington is unconvincing and, ultimately, does not negate the Attorney General's proof of guilt by clear and convincing evidence.

Further, as discussed above, although the deputies did not smell pepper spray during the December 14, 2005, search, Detective Brown testified he did not smell pepper spray until he started moving the clothing in the back of the vehicle. Detective Brown testified he could not see the red dye-stained shirt and towel when looking at the hatch area because there was a lot of clothing and bags. Detective Brown discovered the white towel and shirt upon removing and placing the items of clothing on the ground to determine whether any clothing matched the clothing the robbers wore in the video recording of the bank robbery. Detective Brown's search of the vehicle and clothing in the back of the vehicle was more comprehensive than the deputies' search of the vehicle on the side of the road. It is conceivable the deputies may not have smelled pepper spray as they did not extensively search the clothes in the hatchback.

G. Tarkington's Unpersuasive Allegations of the District Attorney's Office's Shakedown and Admissions

Tarkington claims the Los Angeles County District Attorney's Office's attempted shakedown and admission there was no forensic evidence linking Tarkington to the robbery shows he is innocent. Tarkington asserts the District Attorney retried Tarkington only to shield the County of Los Angeles, the Los Angeles County Sheriff's Department, Sergeant Young, Detective Murren, and Detective Brown from a civil rights lawsuit for constitutional violations. He claims the prosecution requested the charges be dismissed at retrial because the prosecution knew it would put Detective Brown in the position of either committing perjury or asserting the Fifth Amendment right against self-incrimination before the jury, and either would be fatal to the prosecution's case. As discussed above, whether prosecutorial misconduct occurred is outside the scope of this proceeding. Nevertheless, according to the trial transcript, the DDA indicated she was unable to proceed with trial because prosecution's witness, Detective Brown, was traveling from out of state but "stranded with his travel," would not arrive by the

time the prosecution finished calling their witnesses, and the Special Jury Instructions would potentially be fatal to the prosecution's case.[394] The DDA made no indication she was requesting the charges be dismissed because it would put Detective Brown in the position of either committing perjury or asserting his Fifth Amendment right. Additionally, while there may not be forensic evidence linking Tarkington to the robbery, there is extensive incriminating evidence he was involved which, when taken as a whole, ultimately demonstrates his guilt by clear and convincing evidence.

H. Tarkington's Footprint Analysis

At the CalVCB hearing, Barnett testified that he analyzed photographs of shoe sole impressions which were photographed from the Bank of America in Palmdale and concluded the impressions of shoe soles from the bank did not match the photographs of the soles of Tarkington and Allen's shoes at the time of arrest, Carmello Anthony shoes and Adidas shoes respectively. However, Rissling stated the robber that removed money from her drawer was wearing Converse shoes and almost eleven hours had passed from the time of the robbery to the traffic stop, providing ample time to change shoes. The robbers likely switched their shoes and clothing as soon as possible after the bank's red dye packs exploded. Accordingly, the difference in shoes does not negate the remaining clear and convincing evidence of Tarkington's guilt.

I. Tarkington's Use of an Alias During the Traffic Stop

Tarkington claims he is innocent because the Court of Appeal found Tarkington's use of an alias was unrelated to the bank robbery. Although Tarkington used the alias Michael Skaggs prior to the robbery and his use of an alias appeared to be unrelated to the bank robbery on December 14, 2005, this evidence fails to negate the weight of incriminating evidence offered by the Attorney General.

J. Clear and Convincing Evidence Tarkington Robbed the Bank of America

Even taking into consideration the binding factual findings from the 2017 Court of Appeal opinion, overall, the Attorney General has met its burden to present clear and convincing evidence that Tarkington robbed the Bank of America. The exculpating evidence includes an incredible declaration

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[394] AG Ex. 49, pp. 3720-3723.

from Tarkington's codefendant Allen, a suspect alibi from Wiley, unpersuasive claims of a conspiracy to frame Tarkington, and the absence of any physical evidence that directly ties him to the robbery. By comparison, compelling evidence implicates Tarkington. According to the trial record, Tarkington was detained within 11 hours after the robbery with one of the three robbers (i.e., Allen), with a large sum of red-stained cash in his vehicle, containing bills with serial numbers matching the bills stolen from the bank, plus red-stained cash on his person, along with red stained coins. Additionally, similar items of clothing worn by the robbers, a nylon stocking and beanie, were found in Tarkington's vehicle. Tarkington's inconsistent statements made to law enforcement and during his testimony at the habeas evidentiary hearing, along with Foglesong's testimony at the habeas evidentiary hearing concerning Tarkington's changing alibi and admission to her that a review of his cell phone records would not aid his defense, and conflicting statements with Allen, undermine his credibility. Foglesong testified at the habeas evidentiary hearing Tarkington had driven Allen to the scene of the crime the day prior and Allen purchased nylons from the grocery store where the bank was located. During her post-trial interview, Foglesong stated one of the reasons Tarkington did not want cell phone records to show his whereabouts was because he gave Allen a ride to Palmdale to case the bank prior to the robbery. Further, cell phone records introduced at the habeas evidentiary hearing indicate Tarkington and Allen increasingly contacted or attempted to contact each other by direct connect in the days leading to the robbery and during the time of the robbery there was no activity on their phones. Additionally, Tarkington previously committed a similar robbery of another Bank of America branch in the same county several years earlier. And finally, Tarkington was identified as having the same skin tone and similar build and height to one of the robbers by an eyewitness. Even though Tarkington's robbery convictions are no longer legally valid, there is clear and convincing evidence Tarkington committed the robbery. This incriminating evidence includes new information not presented at trial and does not rely upon the state's opinion as to Tarkington's guilt or his prior conviction for this offense.

This conclusion is also consistent with the Court of Appeal's binding factual findings. To the extent the court characterized the trial evidence against Tarkington as "paucity" and "scant" and "the case against Tarkington was reduced to the false name he gave law enforcement . . . and the alleged

similarities between Tarkington's height, build, and skin color to one of the robbers," these findings recognize only the trial evidence and the prosecutor's burden of proof beyond a reasonable doubt. CalVCB's review is not restricted to the evidence presented at trial nor is the burden the same in this proceeding. In regard to the court's factual findings that the "only item found on Tarkington that tied him to the robbery was $200 in cash" and the shirt and towel were "not merely cumulative pieces of evidence that tied Tarkington to the robbery without a viable explanation as to how they came into his possession; they were the only items to do so," there is compelling evidence proving Tarkington committed the robbery despite his explanations as to how items came into his possession. Although there was "no DNA or physical evidence" putting Tarkington in the bank, getaway car, or on the nylon stocking containing the $59 coins, there is incriminating evidence showing he committed the robbery. Further, while CalVCB is bound by the court's description of Tarkington's physical characteristics, an eyewitness identified Tarkington as having the same skin tone and similar build and height to one of the robbers. Although Detective Brown's testimony was found to be "greatly exaggerated," the court did not express any other opinion as to Detective Brown's credibility nor does this finding prove Detective Brown fabricated evidence on the shirt and towel. In considering all the binding factual findings, and weighing all the evidence, there is clear and convincing evidence Tarkington robbed the Bank of America.

CONCLUSION

Based on a careful and thorough review of the evidence, the Hearing Officer recommends that Tarkington's claim for compensation as an erroneously convicted person be denied. The Attorney General has met its burden of proving by clear and convincing evidence that Tarkington committed the robbery. Thus, he is ineligible for compensation under Penal Code section 4900.

Date: February 28, 2022

Jenny Wong

Jenny M. Wong
Hearing Officer
California Victim Compensation Board

Attorney Leo Terrell

RESPONSE RECEIVED

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April 1, 2022

California Victim Compensation Board ("VCB")
Email: board.meeting@victims.ca.gov

re: In re LaMont Tarkington, Case No.: 18-ECO-25

To the VCB:

Claimant LaMont Tarkington ("LaMont") submits the following letter brief in response to Hearing Officer Jenny Wong's ("Hearing Officer") proposed decision denying his claim:

I. Introduction

Senate Bill no. 446 amended P.C. §4900 et seq. to require the California Victim Compensation Board ("VCB") to presume LaMont's innocence and pay his claim unless the Attorney General ("AG") establishes by clear and convincing evidence he committed the acts constituting the crime. The AG "may also not rely solely on the trial record to establish that the claimant is not entitled to compensation." (P.C. 4903(d).) According to the author of Senate Bill no. 446, "[The bill] recognizes that the wrongfully convicted are once again presumed innocent. It shifts the burden of proof to the State to determine whether compensation should be granted."[1]

LaMont requests the VCB approve his claim and not adopt the Hearing Officer's proposed decision ("decision") because it is based on speculation, unsupported by clear and convincing evidence, circumvents the Court of Appeals' findings of act and credibility determinations, and flouts Senate Bill no. 446 by, inter alia, reallocating the burden of proof on LaMont. As will be discussed in detail below, the Hearing Officer inappropriately recycled evidence the Court of Appeals found did not directly tie LaMont to the crime and premised her decision on a lying cop and biased and impeached statements of former defense counsel Carrie Foglesong ("Foglesong") to deny LaMont's claim. Notably, the AG presented no testimonial evidence to resolve any of the conflicting evidence. Yet, the Hearing Officer consistently and effortlessly interpreted the conflicting evidence in the AG's favor. By so doing, the Hearing Officer ignored the mandate of Senate Bill no. 446 by not holding the AG to a clear and convincing evidence standard or presuming Lamont's innocence.

The most troubling aspect of the decision is the Hearing Officer's failure to apply amended P.C. §4900 et seq. The Hearing Officer stated on at least three occasions she interpreted the evidence against LaMont because he did not testify to his innocence. (See decision at 5:2-3, 45:18-46:1, 60:4-8; see 60:7-8 ("[LaMont's] unexplained failure to take the stand undermines his credibility as presumably, if innocent, he would testify as to his innocence").) Yet, LaMont is presumed innocent and need not present any evidence, testimonial or otherwise, to support his claim and it is the AG who carries the burden of proof but choose not to call any witnesses, including LaMont. The burden of proof does not shift during trial-it remains with the party who originally bears it. (Evid. C. §500; Mathis v. Morrissey (1992) 11 Cal.App.4th 332, 346; Smith v. Santa Rosa Police Dept. (2002) 97 Cal.App.4th 546, 569.) The Hearing Officer cited CCR §

[1] See Legislative digest: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB446

641(f) to justify her authority to conclude that she may consider LaMont's failure to testify to his innocence as evidence of his guilt. (See decision, p. 60 fn. 386.) Yet, CCR § 641 refers to claims where a claimant bears the burden of proof, which LaMont does not bear.

A summary of the procedural history of this claim sheds light on the Hearing Officer's failure to apply amended P.C. §4900 et seq. A Hearing was held on 10/27/2020. On 01/05/2022 and before the Hearing Officer had issued a decision, LaMont asked the Hearing Officer to adjudicate his claim under P.C. §4900 et seq. as amended by Senate Bill no. 446. On 01/05/2022, the Hearing Officer asked the parties to submit briefs on why amended P.C. §4900 et seq. should apply to LaMont's claim, which suggested the Hearing Officer did not consider it while drafting her decision up to that time. On 01/19/2022, the Hearing Officer agreed amended P.C. §4900 et seq. applies. The Hearing Officer allowed the AG to reopen the Hearing to present evidence to comport with amended P.C. §4900 et seq., which the AG waived. On 03/01/2022 at 5:13 p.m., the Hearing Officer sent an email to LaMont stating the claim will be calendared for the VCB's consideration on 03/17/2022 without disclosing she had denied the claim. Believing the decision was in his favor, LaMont agreed to the hearing on 03/17/2022. Then on 03/02/2022, the VCB sent LaMont a copy of the Hearing Officer's decision dated 02/28/2022 totaling 71-pages. Since LaMont disagreed with the decision and needed more time to respond, he requested and was granted a continuance of the hearing to 05/19/2022. LaMont contends the Hearing Officer had reviewed the evidence and drafted a significant portion of the decision before amended P.C. §4900 et seq. went into effect. LaMont further contends the Hearing Officer did not re-analyze all the evidence and properly adjudicate the claim under amended P.C. §4900 et seq. because she authored a 71-page decision on 02/28/2022 less than 6-weeks from acknowledging amended P.C. §4900 et seq. applied on 01/19/2022. Indeed, a review of the decision supports this conclusion as the Hearing Officer repeatedly stated she interpreted the evidence against LaMont because he failed to testify and she consistently and easily interpreted conflicting evidence in the AG's favor without the AG presenting any testimonial evidence to address its conflict, weight, and credibility. The Hearing Officer simply repackaged her outdated interpretation of the evidence in a pre-drafted 71-page decision and tried to pass it on as complying with amended P.C. §4900 et seq. when it does not. Thus, the decision simply cannot stand.

II. AG Did Not Present Clear and Convincing Evidence LaMont Committed the Crime

The Hearing Officer failed to cite clear and convincing evidence to show LaMont committing the bank robbery. Instead, the evidence she did cite to bar compensation is recycled, speculative, unsubstantiated, and based on a misapplication of the law. Notably, neither the Hearing Officer nor the AG presented new and reliable independent evidence to overcome the Court of Appeals' credibility determinations and factual findings.

To be clear, the Court of Appeals found the lead detective Lauren Brown "greatly exaggerated" his testimony regarding the bank dye and pepper spray on the towel and t-shirt. In legal parlance, the cop lied. The Court of Appeals held the evidence against LaMont was "scant" and described it as "paucity of evidence." The Hearing Officer cited no clear and convincing evidence to overcome the following findings by the Court of Appeals:

> The only item found on Tarkington that tied him to the robbery was the $200 in cash, which Allen said he gave to Tarkington as payment for the ride. … The shirt and towel found in the back of the vehicle were thus used by the prosecution to help directly connect Tarkington to the robbery. … Thus, the shirt and towel were not merely cumulative pieces of evidence that tied Tarkington to

> the robbery without a viable explanation as to how they came into his possession; they were the only items to do so.
>
> Given that only Allen's fingerprints were found inside the getaway car; that no DNA or other physical evidence put Tarkington either in the bank or the getaway car; that the DNA of two other people—but not Tarkington—were found on the nylon stocking containing the $59 in coins found in the back of his car; and that, as we have previously held, neither Tarkington's prior bank robbery conviction nor his gang affiliation should have been admitted into evidence, there is a reasonable probability Tarkington would have obtained a more favorable result had counsel's performance not been deficient. [] Indeed, the case against Tarkington has been reduced to the false name he gave to law enforcement when pulled over—unsurprising given he was still on federal supervised release—and the alleged similarities between Tarkington's height, build, and skin color to one of the robbers. Even if we apply the trial court's incorrect sufficiency of the evidence standard of review, the case against Tarkington is simply not strong enough to uphold.

(Opening Brief, Ex. 3, pp. 35-36.)

In light of the Court of Appeals' factual findings and credibility determinations and amended P.C. §4900 et seq., there simply is no clear and convincing evidence that LaMont committed the robbery.

A. Red Stained $201 Found on LaMont and His Untruthfulness to Arresting Officers Are Not Clear and Convincing Evidence LaMont Robbed the Bank

The AG did not cite clear and convincing evidence that the $201 found on LaMont proved he robbed the bank. First, the Court of Appeals found credible LaMont received the $201 from Allen for a ride. The Court of Appeals opined that this evidence did not directly tie LaMont to the bank robbery and was scant. The Court of Appeals held that without the towel and t-shirt, the case against LaMont was reduced to the false name he gave law enforcement when pulled over thereby further confirming their finding that the $201 did not directly tie him to the robbery. Thus, the Hearing Officer's attempt to recycle this evidence to convict LaMont must fail.

Second, the circumstances show Allen gave LaMont the $201. Three (3) robbers took $12,000 from the bank in Lancaster. Logically, the three (3) robbers would each get 1/3 of the $12,000, which equals $4,000. When Allen and LaMont were pulled over for a traffic violation, deputies found $3,138 red stained currency on Allen, $600 in red-stained currency in Allen's black jacket but only $201 in red-stained currency on LaMont. The total red-stained currency found was about $3,939. Allen eventually admitted he robbed the bank, which is not surprising since his print was found on the getaway car. This certainly explains why only 1/3 of the loot (i.e. $4,000) was found. If LaMont was one of the robbers, one would expect deputies to find 2/3 (i.e. $8,000) of the loot on LaMont and Allen. Yet, deputies only found 1/3 of the loot, which shows LaMont received it from Allen as payment for the ride. It is also important to note LaMont was pulled over for a traffic violation about 60 to 70 miles away in Los Angeles and about 11-hours after the robbery. Given the distance and elapse in time, the finding of $201 on LaMont supports he received stolen property. Moreover, LaMont's conduct on the night of his arrest showed he did not rob the bank. If LaMont was one of the robbers, he would have known there was loot from the bank robbery in his car and therefore not give the officer probable cause to search his car. Yet, after being pulled over LaMont freely told deputies he had smoked marijuana thereby giving them probable cause to search his car. LaMont's admission to smoking marijuana is evidence he was unaware of the loot from the bank robbery in his car.

Third, The Hearing Officer's attempt to recycle LaMont's lying to the arresting officers as clear and convincing evidence he robbed the bank must fail. The Court of Appeals already found LaMont's reasoning for lying was not surprising because he was on Federal supervised release and did not want to go back to prison. Thus, the Hearing Officer's attempt to recycle LaMont's reasons for lying as evidence of guilt is improper as she failed to abide by the Court of Appeals' findings.

Fourth, the Hearing Officer failed to comply with amended P.C. §4900 et seq. in evaluating the $201 and LaMont's reasons for lying to arresting deputies. LaMont is presumed innocent and the AG bears the burden of proof. The AG presented no testimonial evidence from any witnesses, including LaMont or Allen, to resolve the conflict over whether LaMont received the $201 from Allen for a ride or LaMont lied to deputies for reasons other than to avoid violating probation. The Hearing Officer easily resolved the conflicting evidence in the AG's favor, which is not surprising as the Hearing Officer declared she would interpret the evidence against LaMont because he did not testify to his innocence. Thus, the Hearing Officer's finding on these pieces of evidence must fail as it did not comply with the standards outlined in amended P.C. §4900 et seq.

B. Alleged Witnesses' Identification Do Not Incriminate LaMont

The alleged witnesses' identification of LaMont as one of the robbers was unreliable, speculative, tainted, and impeached. First, the Court of Appeals discounted the reliability of the witnesses' identification evidence by describing the evidence as "scant" and "paucity of evidence." The Court of Appeals also pointed out the significant disparity between the tellers' descriptions of the robbers when compared to LaMont's. (Opening Brief, Ex. 3, p. 35 fn. 9.)

Second, the Hearing Officer cited teller Claudia Rissling's identification of LaMont at the preliminary hearing and trial as the "darker skinned" robber who came to her station wearing Converse shoes and Allen as the "light skin" robber in the lobby as evidence LaMont committed the robbery. Yet, the Hearing Officer conveniently failed to inform the VCB that Rissling first identified LaMont and Allen as the robbers at the preliminary hearing while they were both wearing prison garb, handcuffed, and sitting at the defense table. Rissling's in-court identification of LaMont is tainted and unreliable because it was made under prejudicial circumstances.

Third, the Hearing Officer conveniently ignored the significant disparity between tellers' and Rissling's statement to the FBI wherein she described the robber who came to her station as "medium complexion." Rissling's statement to the FBI is significant because it impeached her in-court ID of LaMont as the "darker skin" robber who came to her station. Even the Court of Appeals observed the significant impeachment value of the FBI witness statement because they pointed out [Rissling] told the FBI the robbers who jumped the counter had a medium complexion, were 5'9" to 5'10" tall, and had medium builds, weighing 170 to 180 pounds and other tellers said the robbers were similar, at 5'8" to 5'9" and 160 to 170 pounds whereas it is undisputed LaMont has a dark complexion, is about 5'11" inches tall, and does not have a medium build, weighing about 200 pounds in late 2005. (Opening Brief, Ex. 3, p. 35 fn. 9.)

Fourth, the Hearing Officer simply cherry-picked favorable facts, ignored unfavorable facts from the FBI witness statements, and even created facts to reconcile alleged inconsistencies in witnesses' statements to manufacture evidence against LaMont. The Hearing Officer conveniently concluded inconsistencies between the FBI witness statements, Rissling's in-court identification, and LaMont's appearance are not significant and reasonable because tellers were under the stress of a robbery. Yet, the Hearing Officer did not cite any evidence, testimonial or otherwise, from the tellers to support this. The Hearing Officer simply made up this fact by citing the opinion of FBI agent Nordstrom who has no personal knowledge of whether the tellers' perceptions were

affected by the robbery. To further support speculation the tellers' identification of LaMont as the robber was reasonable and not significantly inconsistent, the Hearing Officer cited teller Yolanda Moore's description to the FBI described the robber who removed money from her and Rissling's teller drawers as a black male with a darker complexion and teller Yesenia Bahena testified at the preliminary hearing both of the robbers behind the teller counter were black and dark skin. Yet, the Hearing Officer conveniently omitted the fact Moore told the FBI robber #1 who when to Rissling's teller drawer and then her teller drawer was 5'5", medium build, 150 lbs.; that robber # 2 was black and "other" was similar to robber #1; and that robber #3 (lobby) was black (lighter skinned) and "other" was similar to robber # 1. (Opening Brief, Ex. 1, p. 165.) The hearing officer also conveniently failed to reconcile, explain, and omitted from her proposed decision that Bahena told the FBI robber #1 was "medium to thin build", (Opening Brief, Ex. 1, p. 163), that Bahena had testified at the preliminary hearing she cannot physically describe the robbers, and that Bahena did not make an in-court identification of either LaMont or Allen as the robbers. (Opening Brief, Ex. 4, p. 6-7.) In sum, the Hearing Officer's reckless statement Lamont fit witnesses' identification of him as a robber is deceptive and manufactured.

Fifth, the AG bears the burden of proof. Yet, the AG did not call any of the bank tellers to explain the apparent conflict between their description of the robbers at the preliminary hearing on 03/09/2006 with their differing accounts to the FBI on the day of the robbery. If the AG had called Rissling as a witness, LaMont would have impeached her with her FBI witness statement and undisclosed cozy relationship with the sheriff's department, her job application to become a sheriff deputy, and the ride-longs she took with other sheriff's deputies. Despite the AG not presenting any testimonial evidence from the tellers to resolve the conflicting evidence, the Hearing Officer easily interpreted it against Lamont in violation of amended P.C. §4900 et seq.

Last, the Hearing Officer conveniently ignored detective Brown's misconduct in suppressing the FBI witness statements despite being told by the Court of Appeals of his history of lying on the stand. Detective Brown had the FBI witness statements but did not disclose them to LaMont before his conviction. (Opening Brief, Ex. 1 pp. 161-172.) Detective Brown was aware of the FBI reports and involvement in the robbery investigation since the day of the robbery because the prosecution had asked detective Brown for FBI reports on 12/15/2005 and the FBI's analysis of the cell phones recovered from the suspects. (Opening Brief, Ex. 13.) The Hearing Officer disregarded detective Brown's misconduct when evaluating the evidence, such as the FBI witness statements. The Court of Appeals saw through detective Brown's misconduct by pointing out the tellers' obvious inconsistencies in describing Lamont's appearance. Again, the AG bears the burden of proof and they took no steps to have detective Brown testify to explain why he suppressed the FBI witness statements. The obvious answer is that LaMont would have impeached detective Brown. The VCB should consider the AG's failure to call detective Brown to testify as evidence LaMont did not commit the robbery.

C. Cell Phone Records Do Not Incriminate LaMont

The Hearing Officer's finding cell phone records evidence LaMont's guilt is without merit. First, LaMont filed a *writ* in 2011 contending trial counsel Carrie Foglesong's failure to subpoena cell phone records constituted ineffective assistance of counsel because they would have shown he was in South Los Angeles at the time of the robbery. During *writ* proceedings, Foglesong testified she did not subpoena the cell phone record because LaMont told her not to do it, it might incriminate him, it will bring in gang issues or ongoing criminalities, or would put him in the wrong place with the wrong people. LaMont denied these claims. It is not surprising that Foglesong would testify in this manner given she is being charged by LaMont as having committed malpractice in failing to subpoena the cell phone records. It is also Foglesong's obvious desire to

avoid having the *writ* granted because if LaMont is released from prison, she would be subjected to a malpractice claim. The Hearing Officer ignores Foglesong's bias when assessing the weight and credibility of Foglesong's statements and testimony regarding the cell phone records. The transcripts and recorded statements show an obvious conflict between LaMont and trial Carrie Foglesong regarding the cell phone records. The Hearing Officer is required to presume LaMont is innocent. The AG bears the burden of proof in persuading the Hearing Officer that Foglesong's story is clear and convincing. Yet, the AG presented no testimony from any witness, including Foglesong, to persuade the Hearing Officer that Foglesong's story regarding the cell phone records is clear and convincing. In the same vein, the Hearing Officer failed to comply with amended P.C. §4900 et seq. The Hearing Officer failed to presume LaMont is innocent when she simply placed greater weight and credibility on Foglesong's version of events without hearing any testimony to resolve the conflict.

Second, the Hearing Officer conveniently ignored the following glaring facts about the cell phone records: (1) detective Brown received the cell phone records from the FBI before LaMont's conviction but suppressed its existence; (2) the cell phone records were not used as evidence to convict LaMont; (3) at the retrial, LaMont sought to have experts analyze the three cell phones that were seized to show detective Brown manipulated the cell phone records by deleting phone call logs that were made on the days leading up to the date of the robbery and on the day of the robbery but was unable to because the sheriff's department and detective Brown had lost and misplaced the three cell phones in violation of a court order, which resulted in the Judge issuing a Special Jury Instruction directing the jury to infer the lost cell phones would have favored LaMont. If the cell phone records evidenced LaMont's guilt, why did detective Brown suppress it and not turn it over to the prosecution and LaMont before he was convicted? The obvious answer was it could have helped LaMont and therefore detective Brown suppressed it. Yet, the Hearing Officer ignored when assessing the weight and credibility of the cell phone records.

Third, the Hearing Officer's interpretation of the cell phone records as evidence of LaMont's guilt further demonstrates her failure to comply with amended P.C. §4900 et seq. During the criminal retrial in 2018, LaMont sought to have the three cell phones analyzed by an expert to show that detective Brown manipulated the cell phone records. The Judge found the sheriff's department and detective Brown lost and destroyed the three cell phones in violation of a court order, which resulted in the Judge issuing a Special Jury Instruction directing the jury should infer it would have favored LaMont. The Hearing Officer did not explain to reconcile these issues. It is illogical and patently unfair for the Hearing Officer to interpret the cell phone records as evidence of LaMont's guilt when there is a judicial finding that detective Brown and the Sheriff's department destroyed the cell phones LaMont sought to analyze to show the cell phone records were manipulated. This is another clear example of the Hearing Officer failing to comply with amended P.C. §4900 et seq. by simply interpreting evidence against LaMont, failing to presume LaMont is innocent, and not requiring the AG to present any testimonial evidence to address the weight and credibility of the evidence.

D. Black Nylon Stocking and Coins Do Not Incriminate LaMont

There is no clear and convincing that the clear plastic bag containing coins covered with bank dye and a black nylon stocking found underneath a jacket by Sergeant Young, detective Brown, and detective Murren connected LaMont to the robbery. On the contrary, the evidence showed that sergeant Young, detective Brown, and detective Murren planted it during the impound search on December 15, 2005, to frame LaMont.

During the initial traffic stop on December 14, 2005, at 9:00 a.m., deputies Wheeler, Moreno, and Giovanni found money stained with red dye belonging to Darris Allen. They were informed by the FBI that the red-stained money was likely taken from a bank robbery in Palmdale. Deputy Moreno testified she thoroughly searched the interior of LaMont's car for evidence of a bank robbery, such as items stained with red dye. There is no evidence cited by the Hearing Officer these deputies smelled pepper spray inside LaMont's car during the search. Notably, the deputies did not find an obvious clear plastic bag containing coins and a black nylon stocking during the search for further evidence of a bank robbery or smell pepper spray. Deputy Moreno testified she picked up the jacket and searched the pockets but she does not recall seeing it. Yet, detective Brown claimed the bag of coins, towel, and t-shirt in the rear compartment, and inside of the car smelled of pepper spray during the impound search. The Hearing Officer concluded the deputies overlooked the clear plastic bag containing coins and a black nylon stocking because it was dark. Yet, the Hearing Officer cites no evidence to support this and therefore simply made it up.

The DNA testing of the black nylon stocking shows two possible sources of DNA and both Allen and LaMont were excluded as possible contributors to the mixture. (Opening Brief, Ex. 1, p. 8-9.) It is undisputed Allen was one of the robbers and only three individuals robbed the bank because eyewitness Brandi Bateman saw a white SUV parked in front of the Albertson's, she thought it was strange the SUV's engine was running but the vehicle was empty, and she saw three blacks run out of the Albertsons, jump into the white SUV, and sped off. (Opening Brief, Ex. 1, p. 120.) Thus, LaMont could not have been one of the robbers. Indeed, the Court of Appeals even noted the two possible sources of DNA on the nylon stocking and Allen's fingerprint on the getaway car when commenting the case against LaMont was reduced to the false name he gave deputies when arrested.

Notably, the Hearing Officer disregarded the Court of Appeals' findings regarding the clear plastic bag containing coins and a black nylon stocking did not connect LaMont to the robbery. Moreover, the Hearing Officer failed to comply with amended P.C. §4900 et seq. because she simply interpreted the evidence against LaMont without the AG presenting any testimonial evidence from witnesses to resolve the conflicting evidence.

E. The Beanie Found In LaMont's Car Is Unrelated to the Bank Robbery

The Hearing Officer's finding the beanie was somehow evidence connecting LaMont to the bank robbery is illogical. First, the AG presented no clear and convincing evidence, testimonial or otherwise, that the beanie found in LaMont's car is the same beanie worn by one of the robbers during the robbery. Indeed, the evidence confirms that the beanie found in LaMont's car is not even the same beanie worn by one of the robbers. Still color photos of the three robbers walking into the store depict a robber wearing a bright blue colored beanie. (Opening Brief, Ex. 1, 190-192.) Still photos of the robber standing in the lobby wearing the bright blue beanie depicted a noticeable mark on the base of the bright blue beanie. (Opening Brief, Ex. 1, p. 193-194.) In stark contrast, the beanie found in LaMont's car bears no such mark and it is much darker than the bright blue beanie depicted in the still photos. (Opening Brief, Ex. 1, p. 198, 301; Claimant's Trial Ex. 68, photo of beanie designated P55.) At the preliminary hearing, Claudia Rissling testified the beanie was dark, like blue or black, but she did not know for sure. (Opening Brief, Ex. 4, p. 48:7-14.) Despite Rissling's testimony and the still photos, the Hearing Officer conveniently concluded the bright blue beanie used in the robbery is similar to the beanie found in LaMont's car.

Second, a beanie is a common clothing item worn during cold months. Since the robbery occurred on December 14, 2005, it is not surprising to find this type of warm clothing.

Third, the AG presented no evidence, testimonial or otherwise, that the beanie belonged to LaMont as opposed to Allen, who admitted to robbing the bank. Notably, the AG did not even call LaMont or Allen as witnesses to clarify to who the beanie belonged. Again, the AG bears the burden of proof and made no efforts to clarify the ambiguity of ownership over the beanie between Allen and LaMont. Yet, the Hearing Officer simply concluded it belonged to LaMont. Again, it is not surprising that the Hearing Officer has continued to interpret the evidence against LaMont in this fashion since she has declared on at least three occasions that she would interpret evidence against LaMont due to his failure to take the stand and testify during these proceedings.

Last, the Court of Appeals already held the other items found in LaMont's car did not place him in the bank or the getaway car and without the towel and t-shirt, the case against LaMont was reduced to the false name he gave officers when arrested. Yet, the Hearing Officer once again inappropriately attempts to recycle the beanie as evidence to directly tie LaMont to the crime.

In sum, there is no clear and convincing evidence that the beanie found in LaMont's car is somehow connected to the bank robbery. This is another example of the Hearing Officer failing to comply with amended P.C. §4900 et seq. in interpreting evidence against LaMont.

F. Overwhelming Evidence Shows LaMont was Framed for the Robbery

Overwhelming evidence shows LaMont was framed for the robbery, which was exposed by forensic testing showing detective Brown lied about the existence of bank dye and pepper spray on the towel and t-shirt and the deputies who searched LaMont's car did not find any bag of coins, nylon stocking, or bank dye on the towel and t-shirt and did not smell pepper spray inside the car. Thus, it was not surprising that the Court of Appeals gave a scathing opinion regarding detective Brown's credibility and opining the evidence used to convict LaMont was "scant" and "paucity of evidence." Since the evidence against LaMont was tainted by misconduct committed by law enforcement, the Hearing Officer cannot cite any clear and convincing evidence of LaMont committing the robbery. It is improper for the Hearing Officer to not consider law enforcement's misconduct when evaluating the tainted evidence.

First, Los Angeles County Sheriff senior criminalist Joseph Cavalieri and criminologist Peter Barnett conducted forensic testing of the red stains on the towel and t-shirt and did not detect bank dye (i.e. MAAQ). During *writ* proceedings, criminologist Peter Barnett testified he tested the towel and t-shirt with an analytical process called thin-layer chromatography and did not detect any bank dye. (Opening Brief, Ex. 6, p. 309:20-316:16.) Criminologist Peter Barnett opined that the red stains on the towel and t-shirt were "some kind of beverage of some kind" and it is more consistent with a liquid other than some kind of solid like bank dye. (Opening Brief, Ex. 6, p. 316, 323, 326, 333.) In response to questioning by the people, criminologist Peter Barnett testified Gas Chromotography Mass Spectrometry ("GCMS") testing can confirm the existence of bank dye and it probably can do it in smaller amounts. (Opening Brief, Ex. 6, p. 317:28-320:28.) Criminologist Peter Barnett testified he did not test the towel and t-shirt for juice, bleach, or pepper spray. (Opening Brief, Ex. 6, p. 322:28-323:10.) Los Angeles County Sheriff Senior Criminologist Joseph Cavaleri conducted GCMS testing on the towel and t-shirt and did not detect bank dye. (Opening Brief, Ex. 20, 21.) During the criminal retrial in 2018, the People did not attempt to test the towel and t-shirt for bank dye, juice, pepper spray, or bleach. During this proceeding before the VCB, the AG also did not attempt to test the towel and t-shirt for bank dye, juice, pepper spray, or bleach despite bearing the burden of proof. The AG presented no evidence to dispute criminologist Peter Barnett's opinion that the red stains on the towel and t-shirt were some kind of beverage. In light of the overwhelming forensic evidence showing no bank dye on the towel and

t-shirt and the fact that neither the People nor AG attempted to test the towel and t-shirt for bank dye, juice, pepper spray, or bleach, it is incredible that the Hearing Officer continued to interpret that there is bank dye and pepper spray on the towel and t-shirt and that it was washed off. It is illogical for the Hearing Officer to take up the AG's position bank dye was washed off the towel and t-shirt because if it was washed off, how can detective Brown possibly can still smell pepper spray on these items. The obvious explanation is that detective Brown lied about the evidence.

Second, detective Brown's evasive conduct about the bank dye during civil proceedings further confirmed he lied about the existence of bank dye and pepper spray on the towel and t-shirt. During the 2007 trial, Detective Brown testified pepper spray is an ingredient in bank dye, he smelled pepper spray on the towel, t-shirt, and bag of coins, and the red stains on the towel and t-shirt were bank dye. After criminal charges against LaMont were dismissed at the criminal retrial in 2018, LaMont filed a §1983 Civil Rights action against detective Brown and others for, inter alia, fabrication of evidence and suppressing evidence. As the VCB is aware, witnesses are immune from suit for testifying falsely at a criminal trial. During his civil deposition, detective Brown craftily testified he did not recall representing pepper spray as an ingredient placed in bank dye, he did not recall telling the district attorney [in LaMont's criminal case] that pepper spray was an ingredient inside of bank dye, and that he does not recall telling anyone since 2005 up until the day of his deposition that pepper spray is an ingredient in bank dye. (Opening Brief, Ex. 27, 73:2-25.) Detective Brown's sudden amnesia about pepper spray being an ingredient in bank dye speaks volumes as to his misconduct during the 2007 criminal trial. Yet, the Hearing Officer conveniently ignored this in interpreting the evidence against LaMont.

Third, the Hearing Officer's statement that LaMont's claim that Sergeant Young, detective Brown and detective Murren fabricated evidence of bank dye and pepper spray on the towel and t-shirt is inconsistent with his other claims is incorrect. LaMont never claimed Sergeant Young, detective Brown and detective Murren planted actual bank dye on the towel and t-shirt. Instead, LaMont claimed they falsified the existence of bank dye and pepper spray on the towel and t-shirt to mislead the jury. In addition to making this inaccurate statement (seemingly to further discredit LaMont), the Hearing Officer did not cite a single passage, sentence, or otherwise wherein LaMont claimed Sergeant Young, detective Brown and detective Murren planted actual bank dye was planted on the towel and t-shirt.

Last, in addition to fabricating the existence of pepper spray and bank dye on the towel and t-shirt, law enforcement also suppressed exculpatory FBI witness statements, suppressed exculpatory shoe print evidence, and planted the bag of coins and nylon stocking in LaMont's car. As mentioned repeatedly, the Hearing Officer easily interpreted all this evidence in the AG's favor without hearing any testimony from witnesses to resolve its weight and credibility.

G. Statements Made by Former Defense Counsel Carrie Foglesong Is Unreliable

The Hearing Officer's decision cannot stand because it relies heavily upon biased, impeached, and hearsay statements and testimony of former defense counsel Carrie Foglesong.

First, LaMont filed his initial *writ* in 2011 charging his defense attorney Carrie Foglesong with inadequate assistance of counsel for failing to subpoena his cell phone records to support the testimony of defense witness Philip Wiley that he was in a different and distant location at the time of the robbery. LaMont then filed a supplemental *writ* charging Foglesong with inadequate assistance of counsel for failing to test the towel and t-shirt found in his car for bank dye. Based on the circumstances, it was apparent Foglesong was motivated to testify against LaMont to avoid being sued for malpractice in the event LaMont prevails on his *writ* and is released from prison.

Thus, it was not surprising that Foglesong made up facts to incriminate LaMont, such as claiming LaMont had changed alibis, admitted cell phone records would not aid his defense and had conflicting statements with Allen, which LaMont denied. Indeed, upon his release from prison, LaMont did file a civil lawsuit against Foglesong for malpractice due to her failure to subpoena his cell phone records and test the towel and t-shirt for bank dye. (See Claimant's Trial Ex., 06/14/2019 Deposition of Carrie Foglesong, Los Angeles Superior Court Case no. BC712546.) The Hearing Officer completely ignored Foglesong's bias. Moreover, the Hearing Officer did not reference any document, letter, or otherwise that Foglesong relied on.

Second, the AG carries the burden of proof and LaMont is presumed innocent. There are obvious conflicting accounts regarding LaMont's alibis, cell phone records, testing of the towel and t-shirt, and conflicting statements with Allen. The AG called no witnesses to show Foglesong's alleged accounts are more credible than LaMont's. Yet, the Hearing Officer simply believed everything Foglesong stated and testified. The Hearing Officer failed to comply with the requirements of amended P.C. §4900 et seq. in interpreting the evidence against LaMont.

In sum, the Hearing Officer's decision cannot be relied upon because it is based on the unreliable statements and testimony of former defense counsel Carrie Foglesong and misapplication of the law.

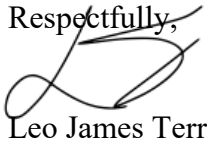
H. The Hearing Officer Fail to Cite Any New Independent Evidence Outside of the Trial Record to Show LaMont Committed the Robbery

Other than recycling the evidence presented at the Trial, which the Court of Appeals described as "scant" and "paucity of evidence," and unreliable statements and testimony of Foglesong, the AG did not present any new independent evidence, testimonial or otherwise, showing LaMont committed the robbery. Again, the AG carries the burden of proof. Yet, the AG did not attempt to conduct forensic testing of the towel and t-shirt to show that the red stains were not juice. Moreover, the AG called no witnesses to resolve any of the conflicting evidence. Thus, the AG has failed to present clear and convincing evidence that LaMont committed the robbery.

III. Conclusion

Based on the foregoing, the AG's failure to carry its burden of proof, the Hearing Officer's failure to comply with amended P.C. §4900 et seq., and binding findings by the Court of Appeals, LaMont requests that the VCB approve his claim.

Respectfully,



Leo James Terrell, Esq.

cc: Dina Petrushenko (sent via email dina.petrushenko@doj.ca.gov)
Hearing Officer Jenny Wong (sent via email jenny.wong@victims.ca.gov)

Encl(s): relevant portions of Claimant's exhibits from Opening Brief and Trial

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of San Bernardino, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 13089 Peyton Drive, Ste. C-432, Chino Hills, CA 91709

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On 04/01/2022, I served the within **04/01/2022 LETTER BRIEF TO VCB IN RESPONSE TO HEARING OFFICER'S PROPOSED DECISION** via:

[X] email to the addresses as follows:

CALIFORNIA VICTIM COMPENSATION BOARD
400 R STREET, SUITE 500 – LEGAL DIVISION
SACRAMENTO, CA 95811
Email: board.meeting@victims.ca.gov

Jenny Wong
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Dina Petrushenko, Deputy Attorney General
PO Box 944255
Sacramento, CA 94244-2550
Email: Dina.Petrushenko@doj.ca.gov

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

Executed on 04/01/2022, at Ontario, California.

Tony Su

Deputy Attorney General Jessica Leal

RESPONSE RECEIVED

ROB BONTA
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State of California
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May 19, 2022

Laura Simpton, Senior Attorney
Victim Compensation Board
Legal and Appeals Office
400 R Street, Suite 500
Sacramento, CA 95811-6234

RE: *In the Matter of the Claim of: Lamont Tarkington*
Case No. Claim 18-ECO-25

Dear Ms. Simpton:

The Attorney General's Office has reviewed Hearing Officer Jenny M. Wong's proposed decision as well as claimant's letter in response. The Attorney General's Office agrees with the Hearing Officer's proposed decision and maintains that the evidence is clear and convincing that claimant committed the crimes of which he was convicted.

I. APPLICATION OF SENATE BILL NO. 446

As stated in the proposed decision, both claimant and the Attorney General agree that newly added Penal Code[1] section 4900, subdivision (b), as well as other amendments enacted by Senate Bill No. 446 (2021-2022 Reg. Sess.), apply to claimant's case. As relevant here, sections 4900, subdivision (b), and 4902, subdivision (d), now require the California Victim Compensation Board ("Board") to recommend compensation, without a hearing, when a court grants a habeas petition and the charges are subsequently dismissed, unless the Attorney General proves that the claimant is not entitled to compensation. The Attorney General can so accomplish by showing there is clear and convincing evidence that the claimant committed the acts constituting the offense. Additionally, section 4903 was amended to add subdivision (d), which states that a conviction which is reversed and dismissed is no longer valid, "thus the Attorney General may not rely on the fact that the state still maintains that the claimant is guilty of the crime for which they were wrongfully convicted." Subdivision (d) also prohibits the

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

Attorney General from relying solely on the trial record to establish that a claimant is not entitled to compensation.

Significantly, none of the amendments enacted require the Attorney General to present new "testimonial evidence" (Claimant's Apr. 1, 2022 Letter, pp. 1, 2, 4-8, 10) before the Board in order to meet his burden that clear and convincing evidence demonstrates claimant committed the acts constituting the offense. While the Attorney General may not rely *solely* on the trial record to establish that claimant is not entitled to compensation, he may still rely partly on the trial record if also relying on other evidence outside the trial record, which in this case is abundant. (See AG Jan. 18, 2022, Letter.) This is not "recycling" evidence and it is not an "improper" use of evidence. (Claimant's Apr. 1, 2022 Letter, pp. 1-4, 8, 10.) The Attorney General is allowed to rely on all available evidence to meet his burden, and the Hearing Officer is similarly entitled to and should consider all available evidence to propose a decision.

Claimant emphasizes the "presumption of innocence" he is entitled to, as described in the Senate Bill No. 446 legislative digests (Claimant's Apr. 1, 2022 Letter, pp. 1, 4, 6), and he asserts the Hearing Officer failed to presume he is innocent in finding that the Attorney General met his burden (*id*., p. 6). Claimant appears to believe that such a presumption and "amended P.C. § 4900 et seq." entitles him to a view of the evidence that is most favorable to him, regardless of his highly questionable credibility and that of his alibi witnesses and regardless of how inculpating the evidence might be. (*Id.*, p. 8.) He is mistaken. A Hearing Officer does not "fail to comply with amended PC. § 4900 et seq. in interpreting evidence against" a claimant (*ibid.*) where the evidence points to guilt. The presumption of innocence does not serve as an impenetrable shield to inculpatory evidence, which in this case, clearly and convincingly proves claimant committed the bank robbery he was convicted of.

II. CLAIMANT'S ACCUSATIONS AGAINST THE HEARING OFFICER AND HER INTERPRETATION OF THE EVIDENCE ARE UNSUPPORTED

Claimant's accusations that the Hearing Officer "made up" facts (Claimant's Apr. 1, 2022 Letter, pp. 4, 7) and declared "on at least three occasions that she would interpret the evidence against [him] due to his failure to take the stand and testify" (*id.*, p. 8) are unfounded. The Hearing Officer's reasonable conclusions based on the available evidence are not "made up," however unfavorable they may be to claimant; and the Hearing Officer's three mentions of claimant's failure to testify appear in the context of (1) the accurate representation of the procedural background in this case without any further commentary (Proposed Decision, p. 5); (2) the detailed factual summary without any comments as to whether claimant's failure to testify was favorable or prejudicial to

claimant (*id.*, p. 45); and the determination of issues, the only section in the proposed decision where the Hearing Officer actually commented on claimant's failure to testify (*id.*, p. 60). The Hearing Officer concluded that it "raise[d] questions as to his veracity" and "undermine[d] his credibility as presumably, if innocent, he would testify as to his innocence." (*Ibid*.) At no point throughout the proposed decision did the Hearing Officer indicate that she would interpret the evidence against claimant due to his failure to testify. Instead, the Hearing Officer indicated that claimant's failure to testify was one of numerous factors that were harmful to his credibility. (See *id.*, pp. 56-60.) In other words, claimant's failure to testify was simply a fact worth noting that added to the already clear and convincing evidence showing he committed the robbery he was convicted of.

Claimant contends, without any proof, that the Hearing Officer had drafted a significant portion of the proposed decision before Senate Bill No. 446 went into effect and failed to re-analyze the evidence afterwards. (Claimant's Apr. 1, 2022 Letter, p. 2.) While Senate Bill No. 446 requires the Hearing Officer to apply a different standard of proof to the evidence in this case—clear and convincing versus preponderance of the evidence—Senate Bill No. 446 does not require the Hearing Officer to re-analyze the evidence in a way that is more favorable to claimant. As previously explained, a presumption of innocence does not mean that the evidence must be viewed in the light most favorable to claimant, disregarding his credibility and the inculpating weight of the evidence. After all, regardless of whether the Hearing Officer drafted a significant portion of the proposed decision before the passage of Senate Bill No. 446, Senate Bill No. 446 did not change the weight of the evidence introduced in this case in any way. It did not change, for instance, claimant's highly questionable credibility and that of his alibi witnesses, it did not change he is a convicted bank robber, it did not change he is an admitted gang member, it did not change that he had money from the robbery on his person and in his car only hours after the robbery, it did not change that he was with one of the admitted bank robbers only hours after the robbery, and it did not substantiate claimant's claims that he was framed. The evidence remained the same after the passage of Senate Bill No. 446, and that same evidence both prevented claimant from proving by preponderance of the evidence that he was innocent and allowed the Attorney General to prove by clear and convincing evidence that claimant was guilty. The Hearing Officer's proposed decision "compli[es] with amended P.C. § 4900 et seq." (Claimant's Apr. 1, 2022 Letter, p. 2) because it properly applies the required standard of proof to evidence that remained unaltered after the passage of Senate Bill No. 446. Claimant's disagreement with the Hearing Officer's conclusion does not support his accusations against her.

Lastly, the Hearing Officer was not required to cite any "new independent evidence outside the trial record" (Claimant's Apr. 1, 2022 Letter, p. 10) to find that the Attorney General had met his burden of proof. As previously explained, while the Attorney General may not rely solely on the trial record to meet his burden, he need not provide "new independent evidence" to meet his burden, as long as he is also relying on evidence outside the trial record. The Attorney General does not "fail[] to present clear and convincing evidence" (*id.*, p. 10) merely because he produced no new evidence during the instant administrative proceeding. The evidence, as is and as explained in the Attorney General's three prior responses to claimant's claim, meets the Attorney General's burden.

III. THE COURT OF APPEAL'S BINDING FINDINGS

Preliminarily, while the Board is bound by the factual findings and credibility determinations made by the Court of Appeal in granting claimant's habeas petition, the Court of Appeal's opinion is not dispositive. (See AG Mar. 29, 2019, Letter, pp. 35-37.) This Board's review of the evidence is not limited to the evidence analyzed by the Court of Appeal in narrowly deciding whether there was ineffective assistance of counsel in claimant's case, and the Board is also not limited or bound by the legal conclusions the Court of Appeal may have reached.

Throughout his April 1, 2022 letter, claimant submits that the following numbered statements were factual findings and determinations pursuant to sections 4903 and 1485.5.

1. The Court of Appeal found Detective Brown "greatly exaggerated" his testimony regarding the bank dye and pepper spray on the towel and shirt. (Claimant's Apr. 1, 2022, Letter, p. 2.) "[T]he Court of Appeal[] gave a scathing opinion regarding detective Brown's credibility . . . ." (*Id.*, p. 8.)

The "scathing opinion" regarding Detective Brown's credibility consists of characterizing Detective Brown's reaction to the towel and shirt as "greatly exaggerated" and a "pantomime." (Opinion, pp. 28, 36.) To the extent that these characterizations by the Court of Appeal may be considered credibility determinations, they are binding upon the Board. However, they do not stop the Board from also considering the corroborating reaction of the trial court to the towel and shirt. Specifically, when the trial court was discussing defense counsel's handling of the items, the trial court stated, "I can tell you that the odor was not good yesterday, and the court was affected by it." (AG Exh. 9, p. 1711.) Thus, although Detective Brown's reaction to the towel's and shirt's smell may have been "greatly exaggerated," the trial court's own reaction to the smell of those items demonstrates a negative physical reaction to their smell was warranted.

2. The Court of Appeal "held" the evidence against claimant was "scant" and described it as "paucity of evidence." (Claimant's Apr. 1, 2022, Letter, pp. 2, 4.)

As previously explained (AG Mar. 29, 2019 Letter, p. 36), the Court of Appeal's characterization of the evidence as "scant" and a "paucity of evidence" is a legal conclusion, and not a factual finding, which is not binding upon the Board. The Board can and should arrive at its own conclusions after reviewing all of the evidence, which includes the trial record and all post-trial evidence.

3. "The Court of Appeal[] found credible [claimant] received the $201 from Allen for a ride. The Court of Appeal[] opined that this evidence did not directly tie [claimant] to the bank robbery and was scant." (Claimant's Apr. 1, 2022, Letter, pp. 3, 8.)

Claimant's interpretation of the Court of Appeal's statements regarding the $201 as facts or credibility determinations is not supported. It is important to note that the Court of Appeal's findings were made in the context of an ineffective assistance claim. When the Court of Appeal stated, "The only item found on [claimant] that *tied him to the robbery* was the $200 in cash, which Allen said he gave to [claimant] as payment for the ride" (Opinion, p. 34, italics added), it did not opine that the $201 in cash did not tie claimant to the robbery; to the contrary, the Court of Appeal explicitly stated that it did. Further the Court of Appeal did not necessarily find credible the explanation for claimant's possession of the $201, either; instead, the Court of Appeal mentioned the explanation in the context of a harmless error analysis after determining that counsel's failure to test the T-shirt and the towel fell below the objective standard of reasonableness. Under that framework, the fact that there was testimony explaining claimant's possession of the $201 as payment for the car ride, which had a better chance of being believed by a jury if the towel and T-shirt found in his car did not test positive for MAAQ, weighed in favor of finding counsel's failure as prejudicial. This does not mean that the Court of Appeal found the explanation credible.

4. "The Court of Appeal[] held that without the towel and t-shirt, the case against [claimant] was reduced to the false name he gave law enforcement when pulled over thereby further confirming their finding that the $201 did not directly tie him to the robbery." (Claimant's Apr. 1, 2022, Letter, p. 2.) "[T]he Court of Appeal[] already held the other items found in [claimant's] car did not place him in the bank or the getaway car and without the towel and t-shirt, the case against [claimant] was reduced to the false name he gave the officers when arrested." (*Id.*, p. 8.)

Again, the Court of Appeal in fact stated that "[t]he only item found on [claimant] that *tied him to the robbery* was the $200 in cash" (Opinion, p. 34, italics added), so claimant's characterization that the Court of Appeal found that the $201 did not directly tie him to the robbery is unsupported and not a binding fact upon this Board. Additionally, even if the Court of Appeal found that the rest of the items in claimant's car did not necessarily place claimant in the bank, that does not mean that this Board cannot consider the items as circumstantial evidence, together with all other evidence, to find that claimant in fact committed the robbery. Moreover, even if in the Court of Appeal's view the evidence against claimant had been reduced to the false name and the similarities between claimant and the robbers, the Court of Appeal was referring to the admissible evidence presented at claimant's trial. (Opinion, p. 35.) Unlike the Court of Appeal, this Board can consider any relevant evidence "even though there is a common law or statutory rule which might make its admission improper over objection in any other proceeding." (Cal. Code Regs., tit. 2, § 641.) Thus, the Board can consider claimant's "prior bank robbery conviction [and] his gang affiliation," which the Court of Appeal noted should not "have been admitted into evidence" at claimant's trial. (Opinion, p. 35.) The Board can additionally consider claimant's questionable credibility and that of Allen and Allen's now-admitted involvement in the robbery, as well as defense counsel's statements regarding claimant casing the bank with Allen before the robbery, claimant's ever-changing alibi stories, and claimant's insistence that phone records not be obtained. And the Board can consider all of the evidence adduced post-trial, which was not analyzed by the Court of Appeal in its focused discussion on whether counsel rendered ineffective assistance at trial by failing to test the towel and shirt. (See Opinion, p. 35.)

5. "The Court of Appeal[] already found [claimant]'s reasoning for lying was not surprising because he was on Federal supervised release and did not want to go back to prison." (Claimant's Apr. 1, 2022, Letter, p. 4.)

The Court of Appeal stated that the case against claimant had been "reduced to the false name he gave to law enforcement when pulled over—unsurprising given he was still on federal supervised release." (Opinion, p. 35.) The Court of Appeal added a footnote reading, "At trial it was revealed [claimant] had a driver's license in the false name he had given to law enforcement and had received two traffic citations in that name before the robbery. Thus, [claimant]'s use of the alias was longstanding and unrelated to any attempt to avoid being connected to the bank robbery." (*Id.*, p. 35, fn. 8.)

While the Court of Appeal did find claimant's lying unsurprising and his use of the false name unrelated to the robbery itself, that does not preclude this Board for considering claimant's willingness to lie about his name and to produce documentation

with said name to avoid being caught by the federal government as reflective of claimant's general character for untruthfulness. It also does not stop this Board from finding additional reasons for claimant's use of the name. While it is unsurprising claimant would use a false name given his federal supervised release, it is also not surprising that he would use a false name to protect himself during his criminal engagements. Claimant need not have a single "surprising" reason to use a false name, and his use of a false name in general harms his credibility.

6. "The Court of Appeal also pointed out the significant disparity between the teller's descriptions of the robbers when compared to [claimant]." (Claimant's Apr. 1, 2022, Letter, p. 4.)

The Court of Appeal's notation on the differences between the tellers' descriptions of the robbers is not accompanied by any analysis by the Court or any credibility determinations. (See Opinion, p. 36.) A recitation of the facts in the record, without any finding as to their truth or their credibility, is not binding upon this Board.

7. "[T]he Court of Appeal [found that] the clear plastic bag containing coins and a black nylon stocking did not connect [claimant] to the robbery." (Claimant's Apr. 1, 2022, Letter, p. 7)

The Court of Appeal's comments on the coins and nylon stocking were that (1) claimant "never disputed that any of these items . . . came from the bank robbery. Both the coins and the $3,138 in the plastic bag were stayed with red dye, while the cash also smelled like bleach and had serial numbers matching money taken in the robbery" (Opinion, p. 31); and (2) "the DNA of two other people—but not [claimant]—were found on the nylon stocking containing the $59 in coins found in the back of his car" (*id.*, p. 35). These statements are an accurate recitation of the facts in the record and are binding upon this Board. Claimant's conclusion that the items did not connect him to the robbery is not. The Board may and should consider this evidence, together with all other evidence, in determining whether the Attorney General has met his burden. To the extent claimant is arguing that the items did not connect him to the robbery because the Court of Appeal also stated that the case against him had "been reduced" to his use of a false name and the witness identifications to the exclusion of the coins and the stocking, again, that was the Court of Appeal's determination of the physical evidence that directly implicated claimant at trial. Just because the physical evidence did not directly implicate claimant does not mean that it has no circumstantial value, and additional inculpating evidence has been adduced since claimant's trial. The Board may consider all of it.

IV. THE ATTORNEY GENERAL HAS PRESENTED SUFFICIENT EVIDENCE TO MEET HIS CLEAR-AND-CONVINCING BURDEN OF PROOF

Claimant faults the Attorney General for not presenting evidence, testimonial or otherwise, to clarify certain details regarding the case and "resolve any of the conflicting evidence" (Claimant's Apr. 1, 2022 Letter, p. 1), such as whether claimant in fact received $201 from Allen for the car ride (*id.*, p. 4), who owned the beanie found in claimant's car (*id.*, p. 8), whether Rissling could explain her different descriptions of the robber's complexion to the FBI and at trial (*id.*, p. 5), and whether claimant's trial attorney was credible at the evidentiary hearing (*id.*, p. 10). He also faults the Attorney General for not testing the towel and T-shirt to show that the red stains were not juice. (*Id.*, p. 10.)

Notably, at the time of claimant's hearing in October 27, 2020, which occurred well before the enactment of Senate Bill No. 446 in 2022, it was claimant's burden to prove his innocence, and he failed to call any witnesses or test any items to clarify any of the above details and resolve the conflicting evidence that he now finds so important to his innocence claim. Perhaps he failed to do so because he reasonably concluded that such efforts would have been fruitless, considering in part that the crime occurred well over 15 years ago and has been extensively litigated. Now that the burden is on the Attorney General, claimant has numerous recommendations he did not heed himself for how the Attorney General should meet his burden. But any further investigation to clarify any of the unresolved details claimant complains of would not only have been mostly inconsequential, but it also would not undermine the already-available clear and convincing evidence pointing to claimant's guilt as summarized by the Hearing Officer in her proposed decision. The Attorney General need not over prove his case. The evidence, as is, is sufficient to meet his burden.

Claimant's challenges to individual pieces of evidence are addressed below to the extent they have not already been previously addressed by the Attorney General's three prior responses in this case. In challenging individual pieces, claimant ignores the compound inculpating effect of all of the evidence he attacks when considered together with the rest of the inculpating evidence against him. The totality of the trial record and the post-conviction litigation evidence establishes by clear and convincing evidence that claimant is not entitled to compensation.

A. $201 from the bank robbery found in claimant's pocket and his lies to the arresting officers contribute to the clear and convincing evidence that he committed the bank robbery

Claimant had $201 of the stolen money in his pocket only 11 hours after the robbery, which ties him to the robbery. Claimant provides a speculative math calculation

regarding the division of the bank robbery loot (Claimant's Apr. 1, 2022 Letter, p. 3) and suggests that if he was one of the robbers, his part of the loot would have been found in the car (*id.*, p. 3). First, the car was claimant's and $3,939 was found in his car of the $12,000 robbed from the bank. Claimant appears to assume that because Allen admitted he was one of the robbers, then it must be presumed that the money in the car belonged to Allen. But that is merely a self-serving speculation. The money could have very well been claimant's own part of the loot. Or claimant could have dropped off his part of the loot at some point during the 11 hours that transpired between the robbery and the traffic stop. Whatever the case, the fact that he was in the car, with money from the robbery, with one of the robbers, hours after the robbery, and after casing the bank with the robber, contributes to the clear and convincing evidence that claimant, too, committed the bank robbery. Second, claimant states that if he had known that there was loot from the bank robbery in his car, he would not have given the police officer "probable cause" to search his car by mentioning he had smoked marijuana. (*Id.*, p. 3.) However, the record shows that, by the time claimant admitted his marijuana use, Allen had already been detained for driving with a suspended license and the police had found out that Allen had a warrant out for his arrest. (AG Exh. 30, p. 3249.) The car was going to be searched. The fact that claimant admitted to smoking marijuana is not necessarily evidence he was unaware of the loot from the bank robbery in his car; it could just as well be evidence that he had in fact been smoking marijuana and his judgment was impaired.

B. The witnesses' descriptions, which overall matched claimant's appearance, contribute to the clear and convincing evidence that he committed the bank robbery

Claimant reasserts his claim that the witnesses' descriptions did not incriminate him. (Claimant's Apr. 1, 2022 Letter, p. 4.) This claim has been addressed by the Attorney General (AG Pre-Hearing Brief, pp. 8, 15) and it will not be discussed further but to say that the Hearing Officer did not "make up" any facts in her assessment of the evidence regarding the witnesses' identifications (Claimant's Apr. 1, 2022 Letter, p. 4). Instead, she drew reasonable conclusions from the evidence in finding that the differences were not significant given the stress of the situation (Proposed Decision, p. 66).

C. The absence of any cellphone communication between claimant and admitted-bank-robber Allen during the commission of the robbery contributes to the clear and convincing evidence that claimant committed the bank robbery

Claimant also reasserts his claim that the absence of any cellphone communication between claimant and Allen did not incriminate him, alleging that the records were manipulated. He offers no proof of that. The trial court's remedy of allowing the defense

at the second trial to draft a jury instruction informing the jury about law enforcement's neglect in maintaining the relevant cellphone (Claimant's Exh. N, pp. 2, 5) is no proof that the cellphone records were in fact manipulated. It is not "unfair" for the Hearing Officer to interpret the cellphone records as she did where only conjecture contradicts the data showing frequent contact between claimant and Allen two weeks prior to the robbery but no contact during the time of the robbery. (See AG Mar. 29, 2019 Letter, p. 31.)

D. The black nylon stocking, which was similar to what the robbers were wearing and which was filled with coins and found in claimant's car, contributes to the clear and convincing evidence that claimant committed the bank robbery; he was not framed

Simply put, evidence in claimant's car that was tied to the robbery tends to, in turn, tie *him* to the robbery. Claimant renews his claim that law enforcement planted the coins covered with bank dye and the black nylon stocking, and that he was framed. (Claimant's Apr. 1, 2022 Letter, p. 6; see also *id.*, pp. 8-9.) These claims have already been fully addressed by the Attorney General. (See AG Mar. 29, 2019 Letter, pp. 37-38; AG Pre-Hearing Brief, pp. 5-7.) Claimant's claims remains unfounded.

E. The beanie found in claimant's car, which was similar to the beanie worn by one of the robbers, contributes to the clear and convincing evidence that claimant committed the bank robbery

The Hearing Officer's discussion on the beanie found in claimant's car was three-sentences long. She concluded that "no direct evidence links the dark colored beanie to the robbery," but that it was "a striking coincidence a similar clothing item worn by one of the robbers was discovered in [claimant]'s vehicle among the other incriminating items found in his vehicle and in his possession." (Proposed Decision, p. 65.) The Hearing Officer's reasoning is sound. Despite claimant's argument, at no point did the Hearing Officer "simply conclude[] it belonged to [claimant]." (Claimant's Apr. 1, 2022 Letter, p. 8.) Calling a witness to "clarify to who the beanie belonged" (*id.*, p. 8) would be pointless because it does not matter *who* the beanie belonged to, it matters that *one of the robbers* wore a beanie. And if a beanie was found in a car where several other items related to the robbery were also found, as well as an admitted bank robber, it is reasonable to conclude that the beanie might also be connected to the robbery. Claimant's assertion that the beanie worn by one of the robbers was "bright blue" and not a dark color is not confirmed by the low-quality still photos he provides, and it is also unclear from the photos provided whether the beanie found in claimant's car had the "noticeable mark" on the base that the robber's beanie had. (*Id.*, p. 7.) The beanie contributes to the clear and convincing evidence that claimant committed the bank

robbery because it resembles the beanie that was used during the robbery and it was found in claimant's car where more items related to the robbery were also found.

F. Statements made by claimant's defense counsel Carrie Foglesong are credible

Claimant asserts that the statements made by his former defense counsel Carrie Foglesong were unreliable and faults the Hearing Officer for finding her credible even though Foglesong had an interest in making up facts against claimant; i.e. avoiding a malpractice suit. (Claimant's Apr. 1, 2022 Letter, pp. 9-10.) Even assuming Foglesong was incentivized to lie, it is also plainly obvious claimant had his own interest in making up facts against Foglesong so that he could regain his liberty and, now, so that he can obtain compensation. In this battle of credibility between Foglesong—an attorney of almost 20 years who is a Board Member of the Orange County Bar Foundation, and a Chairperson of the nonprofit agency iCAN!, Project Youth—and claimant—a convicted robber who made up a name to avoid the federal government and who lied to law enforcement and made inconsistent statements at his evidentiary hearing—it is far from surprising the credibility scales did not tilt in claimant's favor. The Attorney General does not need to call any witnesses to show Foglesong is more credible than claimant. The record speaks for itself.

V. CONCLUSION

Accordingly, the Attorney General continues to object to compensation and respectfully asks the Board to adopt the well-reasoned proposed decision by the Hearing Officer.

Sincerely,

/s/ Jessica C. Leal

JESSICA C. LEAL
Deputy Attorney General
State Bar No. 305099

For ROB BONTA
Attorney General

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RESPONSE RECEIVED

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June 3, 2022

California Victim Compensation Board ("VCB")
Email: board.meeting@victims.ca.gov

re: In re LaMont Tarkington, Case No.: 18-ECO-25

To the VCB:

Please take notice claimant LaMont Tarkington ("LaMont") hereby submits the following letter brief in reply to the Attorney General's ("AG") letter dated 05/19/2022 and in further objection to the Hearing Officer Jenny Wong's ("Hearing Officer") proposed decision and LaMont's letter dated 04/01/2022:

I. Objection to Request for Further Briefing

LaMont objects to the Hearing Officer's request for further briefing because it is unusual and procedurally unfair as reflected by the recent procedural history.

On 03/02/2022, the California Victim Compensation Board ("VCB") sent LaMont a copy of the Hearing Officer's 73-page proposed decision dated 02/28/2022 denying his claim. To prevent LaMont from preparing a well-reasoned response to challenge the defects with the proposed decision, the Hearing Officer simultaneously calendared the matter for a Board meeting on 3/17/2022 and only gave LaMont 12-days up until 03/14/2022 to submit a response. Upon LaMont's plea, the Board meeting was continued to 05/19/2022 and the Hearing Officer advised the parties they may submit a response to the Hearing Officer's proposed decision within 28-days up until 04/01/2022. On 04/01/2022, LaMont submitted a response, and the AG did not. On 04/21/2022 and with the 05/19/2022 Board meeting fast approaching, the Hearing Officer unilaterally continued the Board meeting to 07/21/2022 and generously offered the AG a second opportunity to submit a response to her proposed decision within 30-days, which the AG never even requested. Notably, the Hearing Officer did not specify what issues are to be address or why additional briefing from the AG is needed. Indeed, LaMont is not certain as to what issues needs to be addressed and why.

In sum, LaMont objects to the Hearing Officer's request for further briefing, which appears to be an effort taken by the Hearing Officer to further hinder LaMont's ability to respond to the adverse proposed decision while giving the AG a second opportunity to submit a response to cure the proposed decision. Irrespectively, LaMont hereby submits this brief in support of his claim.

II. The Hearing Officer Failed to Comply with the Law in Denying LaMont's Claim

As set forth in LaMont's 04/01/2022 response, the VCB should disregard the Hearing Officer's proposed decision denying his claim because she failed to comply with Senate Bill No. 446, improperly shifted the burden of proof to LaMont, failed to presume LaMont's innocence, improperly interpreted conflicting evidence in the AG's favor despite the AG's failure to present persuasive testimonial and/or new evidence, and failed to cite any clear and convincing evidence

LaMont committed the robbery. The AG's 05/19/2022 responsive brief does nothing to cure the issues with the proposed decision.

First, the AG continued to fail to explain its failure to present clear and convincing evidence showing LaMont committed the robbery. As set forth in detail in LaMont's 04/01/2022 brief, the evidence cited by the AG and Hearing Officer to bar LaMont's claim are disputed. Yet, neither the AG nor Hearing Officer cited any testimonial and/or new evidence to resolve the disputed evidence. Instead, the Hearing Officer biasedly interpreted all the disputed evidence in the AG's favor simply because LaMont elected not to testify. For example, LaMont presented evidence showing the bank tellers' identification of LaMont as one of the robbers is inconsistent. FBI reports impeached Claudia Rissling's in-court identification of LaMont as one of the bank robbers. Evidence showed Claudia Rissling applied for and secured employment with the sheriff's department that investigated the robbery. Evidence showed detective Lauren Brown was in possession of the FBI reports but suppressed it to frame LaMont. Evidence confirmed the beanie found in LaMont's car does not even match the beanie worn by one of the robbers. Evidence showed the arresting officers did not smell pepper spray nor find a clear plastic bag containing a nylon stocking and coins covered with red dye in the car while searching it for bank robbery evidence. Evidence showed sergeant Young, detective Brown, and detective Murren fabricated the existence of bank dye and pepper spray on the towel and t-shirt and planted the clear plastic bag containing the nylon stocking and coins covered in bank dye in LaMont's car. Evidence showed detective Brown suppressed shoe print evidence and cell phone records, manipulated the cell phone records, and destroyed the cell phones. Evidence showed former deference counsel Carrie Foglesong testified against LaMont because she wanted to avoid being sued in a civil action for malpractice for failing to obtain cell phone records and conducting forensic testing of the towel and t-shirt for bank dye. Evidence showed LaMont gave the arresting officer a false name to avoid violating federal supervised release. Evidence showed Darris Allen gave LaMont the $201 for a ride. In sum, the wealth of evidence cited by LaMont equally proves he did not commit the crime and was framed. Yet, the Hearing Officer consistently interpreted the disputed evidence in the AG's favor without requiring the AG to present any testimonial and/or new evidence to show whose evidence is more credible and carries more weight simply because LaMont elected not to testify.

Second, contrary to the AG's assertions, the Hearing Officer improperly shifted the burden of proof to LaMont by failing to presume LaMont is innocent in evaluating the evidence. At page 60 of her proposed decision, the Hearing Officer specifically stated she interpreted the evidence against LaMont because he elected not testify: "**Lastly, Tarkington's failure to take the stand, subject to cross examination, in this administrative proceeding raises questions as to his veracity. Unlike a criminal proceeding, the Fifth Amendment right against self-incrimination does not apply to this administrative proceeding, which Tarkington initiated after all charges were dismissed. His unexplained failure to take the stand undermines his credibility as presumably, if innocent, he would testify as to his innocence. Overall, Tarkington's protestations of innocence are not credible. Tarkington no longer carries the burden to prove his innocence by a preponderance of the evidence in this administrative proceeding. Nonetheless, when evaluating whether the overall weight of evidence satisfies the Attorney General's burden to prove guilt by clear and convincing evidence, the absence of any credible assertion of innocence from the claimant may be considered**." Yet, LaMont is presumed innocent and does not bear the burden of proof under Senate Bill No. 446, and his decision not to testify cannot be held against him. Thus, it is misleading for the AG to assert the Hearing Officer did not interpret the evidence against LaMont due to his failure to testify when that is exactly what the Hearing Officer stated she did in evaluating the "overall weight of the evidence."

There are numerous examples of the Hearing Officer clearly interpreting evidence against LaMont simply because he elected not to testify. For example, the bank tellers' identification of LaMont as one of the robbers was questionable, inconsistent, and disputed. FBI reports impeached bank teller Claudia Rissling's in-court identification of LaMont as one of the robbers. The Court of Appeals noted [Claudia Rissling]'s identification of one of the robbers was impeached by FBI reports. The Court of Appeals noted LaMont's physical characteristics at the time of the robbery did not match the bank teller's description.

In another example, LaMont charged Sergeant Young, detective Brown, and detective Murren with fabricating the existence of bank dye and pepper spray on the towel and t-shirt and planted the clear plastic bag with coins and black stocking in the rear of LaMont's car to directly link LaMont to the bank robbery. At the criminal trial, detective Brown testified the red stains on the towel and t-shirt looked like bank dye and smelled of pepper spray, which is an ingredient in bank dye. Detective Brown also testified to smelling pepper spray in LaMont's car. Yet, forensic testing confirmed the red stains were not bank dye. The arresting officers did not find the clear plastic bag containing the nylon stocking and coins covered in red dye while searching LaMont's car for bank robbery evidence, and they did not smell pepper spray while searching LaMont's car. Expert witness criminologist Peter Barnett testified the red staining on the towel and t-shirt are consistent with juice stains as opposed to bank dye. During his deposition in LaMont's federal civil rights lawsuit, detective Brown denied knowledge of pepper spray being an ingredient in bank dye.

In another example, photographic evidence shows the beanie found in LaMont's car is not the same color and does not bear the same mark as the beanie used by one of the robbers. Yet, the Hearing Officer wildly concluded it supports LaMont's guilt because it is a beanie.

In another example, LaMont charged former defense counsel Carrie Foglesong of committing malpractice by failing to test the towel and t-shirt for bank dye and failing to obtain cell phone records, which could show he was not near the place of the robbery. Foglesong alleged LaMont told her not to subpoena the cell phone records because it might incriminate him. Foglesong also alleged LaMont gave differing alibis and told her that he was at the place of the robbery the day before. LaMont disputed Foglesong's allegations. Foglesong had an incentive to prevent LaMont from being released to avoid being sued for malpractice.

Despite disputes over the foregoing evidence and the AG presenting no testimonial and/or new evidence to resolve the disputes, the Hearing Officer simply interpreted it against LaMont.

The Hearing Officer's failure to comply with Senate Bill No. 446 is further highlighted by her finding the AG's evidence to be more credible than LaMont's despite the AG calling no witnesses. Again, the AG carries the burden of proof but did not call witnesses Claudia Rissling, former defense counsel Carrie Foglesong, the arresting officers, Sergeant Young, detective Brown, or detective Brown to support any of their contentions. If the Hearing Officer had complied with Senate Bill No. 446, then she should have considered the AG's failure to call witnesses as evidence in favor of LaMont's claim.

Third, the AG fails to provide a reasonable explanation regarding the Hearing Officer making up adverse facts to bar LaMont's claim, which further evidence the Hearing Officer's failure to comply with Senate Bill No. 446. For example, the Hearing Officer concluded the bank tellers' inconsistent description of the bank tellers was affected by the robbery without any of the bank tellers so stating. The AG cited no evidence to cure this guesswork. The Hearing Officer also had stated the arresting officers overlooked the clear plastic bag containing a nylon stocking

and coins covered in red dye in the back seat of LaMont's car because it was dark during the search when none of the arresting officers testified their search was affected by the dark. Yet, the AG cited no evidence to cure this as well.

In sum, the Hearing Officer failed to comply with Senate Bill No. 446 by failing to presume LaMont's innocence and interpreting disputed evidence against LaMont because he elected not to testify. Moreover, the Hearing Officer interpreted disputed evidence against LaMont despite the AG presenting no testimonial and/or new evidence to resolve the disputes.

III. The AG Failed to Present Clear and Convincing Evidence LaMont Committed the Crime

LaMont had addressed in detail each piece of evidence cited by the AG and Hearing Officer to bar LaMont's claim as not being credible in prior briefs and therefore will not recite them in detail here.

It is important to note the AG and Hearing Officer did not cite any clear and convincing evidence showing LaMont committed the crime. At a minimum, they cited clear and convincing evidence LaMont received $201 in stolen property from Darris Allen, and he lied to arresting officers about his name to avoid violating federal supervised release.

The most troubling aspect of the Hearing Officer's proposed decision is her applying a double standard in finding for the AG. Again, the Hearing Officer explicitly stated on at least three occasions that she interpreted the evidence against LaMont because he elected not to testify, which is improper under Senate Bill No. 446. Yet, the Hearing Officer did not find any credibility issues with any of the AG's evidence despite the AG's failure to call any witnesses to substantiate any of its disputed evidence. If the Hearing Officer can consider LaMont's failure to take the stand as adverse evidence of his credibility under Senate Bill No. 446, then the Hearing Officer must consider the AG's evidence as not credible because they called no witnesses to substantiate any of their disputed evidence.

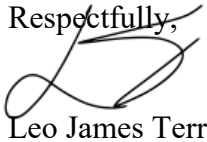
Additionally, the Court of Appeals branded detective Brown a liar. Yet, the Hearing Officer did not make any adverse findings regarding any of the evidence that detective Brown had tainted, manipulated, and falsified, such as detective Brown fabricating the existence of bank dye and pepper spray on the towel and t-shirt, the Superior Court finding detective Brown had destroyed the cell phones, detective Brown suppressing the shoe print evidence, detective Brown suppressing the FBI reports, detective Brown's sudden amnesia regarding pepper spray being an ingredient in bank dye, detective Brown lying about the date of the impound search, and detective Brown's failure to appear at LaMont's criminal retrial to testify against LaMont. The Hearing Officer's refusal to consider this evidence against the AG exhibits her failure to comply with Senate Bill No. 446.

In arguing Foglesong is more credible than LaMont, the AG oddly cites Foglesong's resume. Yet, this is not a resume contest. There are credibility issues with Foglesong, which the AG never clarified, such as Foglesong's desire to avoid being sued for malpractice, that she took on LaMont's felony case as lead counsel about three years after graduating from law school, and the Court of Appeals finding that she was incompetent. Furthermore, if the AG wanted Foglesong's testimony to be substantiated and more credible than LaMont's evidence, then they should have called her as a witness. The AG's failure to do so must be considered against them by the Hearing Officer, which the Hearing Officer did not do because of her ongoing failure to comply with Senate Bill No. 446.

IV. Conclusion

In sum, LaMont contends he is entitled to compensation because the Hearing Officer failed to comply with Senate Bill No. 446 in evaluating the evidence and the AG failed to produce clear and convincing evidence LaMont committed the crime. Thus, LaMont respectfully requests that the VCB disregard the Hearing Officer's proposed decision denying his claim and approve his claim.

Respectfully,



Leo James Terrell, Esq.

cc: Dina Petrushenko (sent via email dina.petrushenko@doj.ca.gov)
Hearing Officer Jenny Wong (sent via email jenny.wong@victims.ca.gov)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of San Bernardino, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 13089 Peyton Drive, Ste. C-432, Chino Hills, CA 91709

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 3, 2022, I served the within **06/03/2022 LETTER TO VCB**:

[X] email to the addresses as follows:

CALIFORNIA VICTIM COMPENSATION BOARD
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 2022, at Ontario, California.

Tony Su