BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: **Kenji A. Howard** Claim No. 22-ECO-07	**Amended Proposed Decision** **(Penal Code § 1485.55, subd. (d))**

I. Introduction

On February 25, 2022, Kenji A. Howard (Howard) submitted a claim to the California Victim Compensation Board (CalVCB) seeking compensation as an erroneously convicted person pursuant to Penal Code section 4900. The claim is based upon Howard's 1997 convictions for murder, attempted murder, and shooting at an occupied vehicle, all of which were vacated by a writ of habeas corpus and the charges dismissed upon remand in 2021. The claim, as recently supplemented, lacks a finding of factual innocence but includes an order mandating approval of compensation for demonstrated injury pursuant to subdivision (d) of Penal Code section 1485.55.[1] As revised, Howard seeks compensation in the amount of $1,346,800 for 9,620 days imprisonment. Throughout this administrative proceeding, Howard is represented by attorney Carol A. Watson (Watson).

The Attorney General is represented by Deputy Attorneys General Seth McCutcheon and Jonathan Krauss. By letter dated September 17, 2024, the Attorney General maintains that Howard's demonstrated injury amounts to $1,244,600 for having been imprisoned 8,890 days solely as a result of his vacated convictions. This calculation deducts 730 days, amounting to $102,200, for a two-year sentence that was consecutively imposed for Howard's unrelated, 2014 conviction while in prison.

[1] Pen. Code, § 1485.55, subd. (d), as added by Stats.2023, c. 702 (S.B. 78), eff. Jan. 1, 2024.

The matter was assigned to CalVCB Senior Attorney Laura Simpton. As required by subdivision (d) of Penal Code section 1485.55, CalVCB is mandated to approve payment to Howard in the amount of $1,244,600 if sufficient funds are available, upon appropriation by the Legislature, as indemnification for the demonstrated injury sustained by his 8,890 days imprisonment solely as a result of his vacated convictions.

II. Procedural History

A. Criminal Proceedings

On May 10, 1995, Howard was arrested and subsequently charged with one count of murder, three counts of attempted murder, one count of shooting at an occupied vehicle, and one count of possessing a concealed firearm in Los Angeles County Superior Court case number YA026865.[2] Enhancements for personal use of a firearm and great bodily injury were also alleged.[3] All of these charges related to a fatal drive-by shooting that occurred on March 17, 1995, when Howard was 16 years old. The driver of the car was codefendant Edward Powell (Powell), who was also convicted of murder and attempted murder as an aider and abettor.[4]

Although a juvenile, Howard was tried as an adult. On January 21, 1997, Howard was initially convicted of just one count of possessing a firearm, while the jury deadlocked on the remaining counts. Following a second jury trial, Howard was convicted on October 10, 1997, of all remaining charges and enhancements.[5] He was sentenced on November 7, 1997, to 35 years to life.[6]

The judgment was affirmed by the Second District Court of Appeal on June 8, 1999.[7] The California Supreme Court subsequently denied review on October 29, 2003.[8] In 2004, Howard

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[2] Pen. Code, §§ 187, 664/187, 246, 12101; Howard Application (App.) at pp. 1, 3, 6-7; *In re K.H.*, Second Appellate District case number B321890, opinion filed Feb. 16, 2024, at p. 4, submitted via email sent by Watson on Mar. 1, 2024.

[3] Pen. Code, §§ 12022.5, 12022.7, 12022.9.

[4] Howard App. at p. 8.

[5] Howard App. at p. 6; Docket for *People v. Kenji Ahmad Howard*, Los Angeles County Superior Court case number YA026865, available online at https://www.lacourt.org/criminalcasesummary/ui/; see also Cal. Code Regs., tit. 2, § 617.8 (official notice).

[6] Howard App. at pp. 1, 7; Attorney General Response Letter (AGRL) at pp. 2-3.

[7] AGRL Exhibits (Ex.) at pp. 2-18.

petitioned for federal habeas relief, which was denied on July 21, 2005.[9] Thereafter, Howard pursued several petitions for state habeas relief in the Los Angeles County Superior Court, which were ultimately denied in 2008, 2011, and 2018.[10]

B. Unrelated Conviction

Meanwhile, in 2014, Howard was convicted of felony possession of a controlled substance while in prison in Kings County Superior Court case number 13CM7742B.[11] According to Howard, the conviction arose from the discovery of .33 grams of marijuana inside a chapstick cap located in Howard's prison cell.[12] But according to new evidence submitted by the Attorney General after the record closed, the conviction was based upon Howard's possession of 10.9 grams of methamphetamine.[13] Regardless of the specific circumstances, Howard pleaded guilty, and he was sentenced to the low term of two years imprisonment.[14] According to the Abstract of Judgment (AOJ), the full, two-year sentence for this in-prison offense was consecutively imposed with his indeterminate life sentence in case number YA026865.[15]

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[8] Howard App. at p. 7.

[9] Howard App. at p. 8.

[10] Howard App. at pp. 8-9.

[11] Pen. Code, § 4573.6; Attorney General Brief on Injury (AGBI) at p. 1; AGBI Ex. B, submitted via email on Sep. 17, 2024.

[12] Howard Injury Reply (IR) at p. 2 and Attachment (Attach.) 1, submitted by email on Sep. 27, 2024.

[13] Attorney General Rebuttal Argument (AGRA) at p. 2 and Exhibits A and B, submitted via email by Deputy Attorney General Krauss on Nov. 13, 2024.

[14] At this late stage in the administrative process, the hearing officer declines to resolve which controlled substance was possessed by Howard, as it is ultimately irrelevant to the final disposition of this claim. (See Cal. Code Regs., tit. 2, § 644, subds. (n) ("No argument will be considered by the hearing officer after the close of the hearing record … unless the hearing officer orders otherwise"), & (o) ("hearing officer retains the discretion to reopen the hearing record for good cause").)

[15] AGBI Ex. B; see also Pen. Code, § 1170.1, subd. (c) (authorizing full consecutive sentences for offenses committed while in prison). Howard does not challenge the validity of this unrelated conviction but does suggest that the sentence was concurrently imposed, notwithstanding the AOJ. (Howard IR at p. 2.)

C. Habeas Relief

In 2019, with the assistance of counsel Watson, Howard filed a petition for writ of habeas corpus in the Court of Appeal that challenged his convictions in case number YA026865 based upon newly discovered evidence of actual innocence. The petition included a declaration from Howard's codefendant Powell, who confessed to being the sole shooter. The appellate court initially denied the petition on November 26, 2019, but the California Supreme Court granted review on February 2, 2020. The matter was remanded to the Los Angeles County Superior Court, and after further briefing, a three-day evidentiary hearing ensued in March 2021, at which Powell did not testify. On July 16, 2021, the superior court granted the writ pursuant to Penal Code section 1473, concluding that the new evidence likely would have changed the outcome at trial. Accordingly, the court vacated all of Howard's convictions in case number YA026865 and allowed 60 days for the prosecution to retry the case.[16]

On August 27, 2021, the prosecution timely refiled the same charges against Howard in the Juvenile Division of the Los Angeles County Superior Court in case number YJ40829.[17] On September 9, 2021, while awaiting the jurisdictional hearing, Howard was released from custody.[18] It appears neither party, nor the court, considered Howard's two-year sentence for his unrelated conviction in case number 13CM7742B.[19] By the time of his release from prison on September 9, 2021, Howard had been incarcerated a total of 9,620 days since his arrest on May 10, 1995.[20] On December 2, 2021, the juvenile court dismissed the case with prejudice upon the prosecution's motion because of "lack of resources."[21]

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[16] Howard App. at pp. 22-24; AGRL Ex. at pp. 657-850 (evidentiary hearing transcript).

[17] AGLR at p. 855.

[18] AGBI at p. 1; AGBI Ex. A; Howard IR at p. 1.

[19] AGBI at p. 2.

[20] The number of days between Howard's arrest and release was calculated using the online "Days Calculator" located at https://www.timeanddate.com/date/durationresult.html.

[21] AGRL Ex. at p. 855 (dismissal minute order); *People v. Kenji Ahmad Howard*, Los Angeles County Superior Court Juvenile Division, case number YJ40829, decision dated Jun. 21, 2024 (Juvenile Court Decision), at p. 2, submitted via email by Watson on Jun. 24, 2024 (granting relief pursuant to Pen. Code, § 1485.55, subd. (d)).

D. Undercover *Perkins* Operation

Meanwhile, on November 21, 2021, law enforcement conducted a *Perkins*[22] operation, whereby an undercover agent was placed in a jail cell with Powell, and their conversation was surreptitiously recorded. During their discussion, Powell made several statements that implicated himself and exonerated Howard, but Powell also admitted that he had been promised money in exchange for his assistance with Howard's case.[23]

E. Denied Finding of Factual Innocence

On December 9, 2021, Howard moved the juvenile court for a finding of factual innocence pursuant to Welfare and Institutions Code section 781.5 and Penal Code section 851.8, which both require a showing of no reasonable cause to believe the person charged, whether as an adult or juvenile, committed the underlying offense.[24] The prosecution opposed the motion. Following a hearing on May 24, 2022, at which the *Perkins* operation was considered, the juvenile court denied the motion.[25] Howard appealed.

On February 16, 2024, the Court of Appeal affirmed the juvenile court's denial of Howard's motion for a finding of factual innocence. The appellate court explained that, even though Howard's proffered evidence raised "a substantial question as to whether he is guilty of the charged crimes," it nevertheless failed to meet "his burden to show no reasonable cause exists to believe he committed the offenses…."[26] Howard petitioned for review to the California Supreme Court, which was denied on May 15, 2024.[27]

F. CalVCB Proceedings

Previously, on February 24, 2022, Howard submitted a claim to CalVCB as an erroneously convicted person pursuant to Penal Code section 4900. The claim, as supplemented on March 7,

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[22] *Illinois v. Perkins* (1990) 496 U.S. 292, 294.

[23] AGRL at pp. 13-15; AGRL Ex. at pp. 857-949.

[24] AGRL Ex. at pp. 963-977; Welf. & Inst. Code, § 781.5, subd. (a); Pen. Code, § 851.8, subd. (b).

[25] AGRL Ex. at pp. 978-1000.

[26] *In re K.H., supra*, at p. 27.

[27] Howard's Request for Approval of Claim, at p. 2, submitted via email by Watson on Jun. 24, 2024.

2022, sought compensation for 9,625 days of Howard's alleged incarceration between May 10, 1995, and September 14, 2021, for his vacated convictions in case number YA026865, notwithstanding the two-year prison sentence for his unrelated, 2014 conviction in case number 13CM7742B. By email sent March 8, 2022, CalVCB notified the parties that the supplemented claim was deemed filed pursuant to subdivision (b) of Penal Code section 4900 and requested a response from the Attorney General within 45 days.

Following a single extension of time in accordance with Penal Code section 4902, subdivision (d), the Attorney General timely objected to Howard's claim by letter dated June 5, 2022. Along with the letter, the Attorney General submitted 12 exhibits spanning over 1,000 pages, plus audio recordings that included the *Perkins* operation. The Attorney General maintained that the proffered evidence provided clear and convincing proof of Howard's guilt and, therefore, his claim for compensation must be denied. The Attorney General did not otherwise dispute Howard's calculation for compensation or address Howard's unrelated conviction.

After conferring with the parties regarding availability, CalVCB scheduled a hearing on the claim for November 2, 2022. Well in advance, Howard submitted a prehearing brief on June 17, 2022. However, on September 9, 2022, the parties mutually requested a stay of the administrative proceedings pending resolution of Howard's appeal of his denied motion for a finding of factual innocence. That same day, CalVCB issued an order that vacated the hearing date and stayed the proceedings throughout the appellate litigation, with directions for Howard to notify CalVCB within 30 days of the appellate court's decision.

On March 1, 2024, Howard notified CalVCB of the appellate court's decision affirming the denial of his motion for a finding of factual innocence. But rather than resume the administrative proceedings, the parties mutually requested another stay while Howard pursued a petition for review in the California Supreme Court, as well as a motion in the juvenile court for mandated approval of his administrative claim pursuant to recently enacted subdivision (d) of Penal Code section 1485.55. On March 5, 2024, in accordance with the parties' request, CalVCB issued a second order staying the administrative proceedings until all court proceedings concluded.

G. Motion For Relief Under Penal Code Section 1485.55, Subdivision (d)

On June 21, 2024, the juvenile court granted Howard's motion for relief pursuant subdivision (d) of Penal Code section 1485.55. This subdivision, which was effective January 2024, mandates CalVCB's approval within 90 days upon a properly submitted Penal Code section 4900 claim for demonstrated injury if, inter alia, the district attorney fails to present clear and convincing proof of guilt.[28] The juvenile court ultimately concluded that the prosecution "has not met is burden" because there were "so many issues raised by the facts of this case that the court cannot say with a high probability that [Howard] is responsible for these crimes." [29]

The prosecution moved for reconsideration on July 2, 2024, which was opposed by Howard on July 9, 2024.[30] The court denied reconsideration on July 26, 2024, but stayed the order until August 19, 2024, to allow the prosecution to consider an appeal or writ of mandate.[31] The prosecution ultimately declined to pursue further appellate action.[32]

H. CalVCB Proceedings Resumed

On August 20, 2024, CalVCB lifted the stay and resumed the administrative proceedings based upon Howard's uncontested representation that the litigation had concluded. To that end, CalVCB requested a response from the Attorney General within 14 days on the issue of injury pursuant to Penal Code section 4904, to be followed by a reply from claimant within one week thereafter.[33]

On August 29, 2024, the Attorney General requested a two-week extension to September 17, 2024, to conduct further investigation and research on Howard's unrelated conviction for purposes of injury. CalVCB granted the request without opposition by Howard. On September 10, 2024, the

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[28] Pen. Code, § 1485.55, subd. (d), as added by Stats.2023, c. 702 (S.B. 78), eff. Jan. 1, 2024).

[29] Juvenile Court Decision at p. 6.

[30] Email sent by Watson on Jul. 9, 2024, attaching prosecution's motion and Howard's opposition.

[31] Email sent by Watson on Jul. 26, 2024, attaching court order.

[32] Email sent by Watson on Aug. 14, 2024.

[33] CalVCB initially requested this briefing by email sent Jun. 25, 2024, after Howard advised CalVCB of the juvenile court's order granting relief pursuant to subdivision (d) of Penal Code section 1485.55. Later that same day, after Howard notified CalVCB that the juvenile court had granted a stay pending the prosecution's motion for reconsideration, CalVCB vacated the requested briefing and continued the administrative stay.

Attorney General requested another two-week extension to October 1, 2024. Initially, CalVCB conditionally granted the request absent an objection by claimant. Later that same day, Howard objected based, in part, upon his counsel's unavailability to submit a reply between September 29, 2024, and October 11, 2024.[34] The next day on September 11, 2024, CalVCB denied the Attorney General's second request for an extension of time. As a result, the Attorney General's response remained due on September 17, 2024. On September 16, 2024, the Attorney General moved for reconsideration, and Howard objected again.[35] On the morning of September 17, 2024, CalVCB denied reconsideration. Later that day, the Attorney General timely submitted a response on the issue of injury.[36]

In it, the Attorney General conceded the date of Howard's arrest for the challenged offenses on May 10, 1995, but insisted that Howard was released five days earlier on September 9, 2021, for an aggregate total of 9,620 days incarceration. The Attorney General further insisted that 730 days must be deducted from compensation because of the two-year sentence that was consecutively imposed for Howard's unrelated conviction in 2014 for possession of a controlled substance, without specifying any particular drug. As calculated by the Attorney General, Howard's compensation totaled $1,244,600 for having been incarcerated 8,890 days solely for his vacated convictions in case number YA026865.

After confirming receipt of the Attorney General's response, CalVCB requested a reply from Howard by October 15, 2024. The reply was timely submitted on September 21, 2024. In it, Howard conceded that he had been released on September 9, 2021, for a total of 9,620 days incarceration. However, Howard maintained no deduction was warranted for his unrelated conviction, which he insisted was based upon possession of a small amount of marijuana. Following review of both parties' submissions on the issue of injury, the record closed on October 10, 2024.

On October 22, 2024, CalVCB's Board Liaison notified the parties of the hearing officer's proposed decision, which recommended approving Howard's claim in the reduced amount of

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[34] Email sent by Watson on Sep. 10, 2024, attaching prison report for marijuana possession.

[35] Email sent by Deputy Attorney General Krauss at 10:23 a.m. on Sep. 16, 2024.

[36] Email sent by Deputy Attorney General McCutcheon at 5:51 on Sep. 17, 2024, attaching AGBI and Exhibits A and B.

$1,244,600 for 8,890 days of imprisonment, after subtracting 730 days for Howard's unrelated conviction, regardless of the amount of marijuana he possessed in prison. Pursuant to the California Code of Regulations, title 2, section 619.3, the Board Liaison allowed the parties to submit a response to the proposed decision for the Board's consideration by November 13, 2024.

On November 12, 2024, Howard expressly requested the Board adopt the proposed decision in its entirety for the reduced amount. However, on November 13, 2024, the Attorney General requested the Board adopt the proposed decision only in part. While the Attorney General agreed with the proposed decision's recommendation, the Attorney General argued, based upon newly presented evidence, that Howard's unrelated conviction was for possession of methamphetamine, not marijuana, and requested the proposed decision be amended accordingly.[37] The Attorney General did not address why this evidence had not been presented during the administrative proceeding.[38]

After reviewing the parties' responses, the hearing officer elected to draft an amended proposed decision to include a summary of the Attorney General's new evidence and argument. Otherwise, the hearing officer declined to resolve the belatedly disputed factual issue concerning the underlying conduct of Howard's unrelated conviction.[39] Regardless of which specific controlled substance Howard possessed while in prison, the hearing officer's recommendation remains the same.

III. Factual Summary

A. The Shooting

Around 10:00 p.m. on the evening of March 17, 1995, Arkett M. (Arkett) was fatally shot in a drive-by shooting while leaving a Los Angeles beach with her friends Travon J. (Travon), Landon M. (Landon), and Gail L. (Gail).[40] The shooting occurred while the foursome was riding in Landon's car, shortly after entering the freeway from the beach. Approximately ten shots were fired overall. A single bullet entered the left side of Arkett's back, continued up and across through her lungs, trachea, and

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[37] AGRA, at pp. 1-2.

[38] Cal. Code Regs., tit. 2, § 619.4, subd. (d)(5).

[39] Cal. Code Regs., tit. 2, § 644, subds. (n) & (o).

[40] To protect their privacy, the victims are referred to by their first names only.

carotid artery, before finally stopping on the right side of her neck.[41] The trajectory indicated that Arkett, who was in the rear seat behind the front passenger Gail, was shot while bent forward at the waist, as if ducking down.[42] Travon, who was also in the rear seat behind the driver Landon, sustained multiple gunshot wounds that left him paralyzed from the neck down and in a coma. Landon and Gail were not physically injured.[43]

The shots were fired by someone inside an Oldsmobile Cutlass driven by codefendant Powell. Several passengers were inside, including 16-year-old Howard, who wore his hair in pigtails. Howard and Powell, who was approximately 25 years old, were both associated with the "Blood" street gang.[44] Howard was sitting in the rear seat behind the front passenger, LaKeyna Martin (Martin). Shortly before the shooting commenced, the Cutlass pulled up next to the driver's side of Landon's car, and Powell and Martin flashed gang signs.[45]

Landon did not see the gun or shooter, but he saw the muzzle flash coming from the "lower left corner" of the passenger's side window.[46] He also saw a person wearing pigtails in the back seat on the passenger's side of the Cutlass. Landon recalled seeing both of Powell's hands on the steering wheel seconds before the shooting commenced. Landon recognized the Cutlass from the beach earlier that night, where Powell had fired several gunshots at passing airplanes. As Landon and his friends were walking from the beach to his vehicle, he overheard someone in the Cutlass say "give me the strap" – asking for a gun.[47] Gail did not see the gun or shooter, but she did see a passenger with pigtails, who may have been seated in either the front or back seat.[48]

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[41] AGRL Ex. at pp. 177-181.

[42] AGRL Ex. at pp. 68, 180-181.

[43] Howard App. at p. 10; AGRL at p. 3; *In re K.H., supra*, at pp. 2, 4-5.

[44] *In re K.H., supra*, at pp. 5, 7.

[45] Howard App. at p. 10; AGRL at p. 3; *In re K.H., supra*, at p. 5.

[46] *In re K.H., supra*, at p. 7.

[47] *In re K.H., supra*, at p. 5.

[48] *In re K.H., supra*, at p. 7.

The next morning on March 18, 1995, Howard was arrested after police observed him attempting to hide the firearm that was used in the shooting. Howard was released because, at that time, law enforcement did not yet know the gun's connection to the shooting. Testing later confirmed that it was the murder weapon.[49]

On March 27, 1995, an anonymous tip to police identified Powell as the shooter. Powell was arrested that same day, and his Cutlass was impounded. Officers noted that the rear windows did not roll down.[50] A firearms examiner testified as an expert for the prosecution that gunshot residue was located on the inside of the Cutlass' passenger door, which was consistent with the gun being fired while inside the car, but no gunshot residue was found on the exterior door, which would be expected if the gun had been fired while outside the car.[51]

Police also questioned Howard on March 27, 1995. Howard admitted that he was a passenger in Powell's Cutlass when the shooting occurred, but he insisted that he sat in the rear seat. Howard claimed that he had fallen asleep and woke up just as Powell fired seven or eight shots through the open window of the front passenger door towards a car traveling next to them. Howard was released that same day and fled to another state until he was arrested for unrelated charges on May 2, 1995. When questioned again on May 10, 1995, Howard eventually confessed that he was the shooter. Howard claimed that he had fired the shots while his wrist rested on the top of the open window of the passenger door. Howard further claimed that he only did so after Powell threatened to hurt him if he did not shoot.[52]

Based on the above evidence, Howard was convicted of the murder of Arkett, the attempted murders of Travon, Landon, and Gail, and shooting at a vehicle occupied by all four victims. Howard was sentenced to an indeterminate life sentence as the direct perpetrator, while Powell was convicted as an aider and abettor.[53]

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[49] Howard App. at p. 11; *In re K.H., supra*, at pp. 5, 27.

[50] Howard App. at p. 11; *In re K.H., supra*, at pp. 5, 27

[51] *In re K.H., supra*, at p. 7.

[52] Howard App. at pp. 3, 11-12; *In re K.H., supra*, at p. 6.

[53] Howard App. at p. 8; *In re K.H., supra*, at p. 8.

B. Habeas Evidence

In separate declarations signed in 2006 and 2007, Powell claimed sole responsibility as the shooter and denied any involvement by Howard. According to Powell, he told his front passenger to bend down, and then he fired multiple shots with his right hand through the open window of the passenger door, all while continuing to drive the Cutlass. Powell insisted that Howard was asleep in the backseat when the shooting commenced. After Powell drove home, he handed the gun to Howard, who was arrested with it the next morning.[54] Powell did not testify at the evidentiary hearing.

The same firearms examiner, who had testified as an expert at Howard's trial, reconsidered his opinion. As explained in his declaration and testimony at the evidentiary hearing, the expert concluded that the gunshot residue located inside the Cutlass was inconsistent with Howard's confession to firing the shots while holding his hand on the opened door window. The expert further concluded that the location of gunshot residue on the inside of the passenger door was consistent with the driver of the car shooting the gun.[55]

Based upon this new evidence, the superior court granted Howard's petition for writ of habeas corpus pursuant to Penal Code section 1473, subdivision (b)(3).[56] The court determined that Howard "has met his burden of proving that more likely than not" the new evidence of Powell's confession, as well as the gunshot residue expert testimony, "would have changed the outcome at trial."[57]

C. *Perkins* Evidence

Several months after Howard's convictions were vacated, the prosecution surreptitiously recorded Powell speaking to an undercover agent in a jail cell. During their conversation, Powell admitted that he "did the popping" and Howard "didn't do nothing. Nothing at all. He was just in the car" while Powell "was driving."[58] Powell added, "But I can't tell y'all everything that happened if y'all don't

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[54] Howard App. at pp. 14-16; *In re K.H., supra*, at pp. 8-9.

[55] Howard App. at pp. 11-14; *In re K.H., supra*, at p. 11.

[56] Howard App. at pp. 20, 24.

[57] Howard App. at p. 23.

[58] AGRL Ex. at p. 863.

grant me immunity, because I'll be telling on myself."[59] Powell later explained that he did not believe the prosecution could use his declaration unless he testified, and he would refuse to do so unless he received immunity.[60]

At one point, an investigator separately spoke to Powell about Howard's case and claimed to have heard allegations involving promises for money. Powell returned to the jail cell and made the following admissions to the undercover agent:

> "They know some information. He spilled the beans about some bread being exchanged homie."[61]
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> "He spilled the beans. He said, 'Man we got some, we got some, we got some word about some money being exchanged –' like regarding this affidavit. So somebody said something to them, man. 'Cause they wouldn't know that. Somebody'd have to tell – maybe Kenji? I don't know. Somebody'd have to tell them that." [62]
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> "…I'm not counting homie (UI) wouldn't have been to his benefit to say, 'Yeah. I'm paying him to do this (UI)." [63]
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> "…Somebody spilled the beans. Spilled the beans on me. I know that little homie didn't tell them that. That wouldn't be in his best interest. To talk about some money, any type of money."[64]

Powell also described how he cleaned his Cutlass the day after the shooting because he heard the murder was mentioned on the local news. As Powell recalled, he took his car to the "hand car wash," removed the backseat, and "found like 40 shells" that were "not just from that night.…" Powell explained that he had been "gang banging in my car. Because the Mexicans shot my shit up" so "We was at war with some Mexicans in the hood."[65] As the juvenile court later commented, these statements by Powell concerning prior shootings that he committed while inside the Cutlass and the

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[59] AGRL Ex. at p. 866.

[60] AGRL Ex. at p. 932.

[61] AGRL Ex. at p. 926.

[62] AGRL Ex. at p. 926.

[63] AGRL Ex. at p. 926. The term "UI" indicates the audio was unintelligible. (AGRL Ex. at p. 857.)

[64] AGRL Ex. at p. 934.

[65] AGRL Ex. at p. 939.

exterior car wash shortly after the murder rendered the expert's testimony about gunshot residue "much to do about nothing…"[66]

IV. Determination of Issues

Penal Code section 4900 allows a person, who has been erroneously convicted and imprisoned for a felony offense that they did not commit, to submit a claim for compensation to CalVCB. Typically, the claimant bears 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.[67] In this context, injury means that, but for the erroneous conviction, the claimant would have been free from custody.[68] Once a properly submitted claim is filed, Penal Code section 4902 requires the Attorney General to submit a written response, after which an informal administrative hearing ensues pursuant to Penal Code section 4903. If the claimant satisfies their burden at the hearing, then Penal Code section 4904 requires CalVCB to approve payment for the purpose of indemnifying the claimant for the demonstrated injury, at the rate of $140 per day of their incarceration, if sufficient funds are available, upon appropriation by the Legislature.[69] No compensation is authorized for any time spent on supervised released.[70]

In limited circumstances, a different and expediated procedure may apply to properly filed claims by claimants whose convictions have been reversed under specified circumstances. First, under Penal Code section 1485.55 or 851.865, if the claimant received a court finding of factual innocence, then CalVCB must approve the claim, without a hearing and within 90 days, for the

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[66] AGRL Ex. at p. 995.

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

[68] Cal. Code of Regs., tit. 2, § 640, subd. (f).

[69] Pen. Code, § 4904.

[70] Pen. Code, § 4904; see also proposed Pen. Code, § 4904, subd. (d), conditionally operative July 1, 2024, subject to appropriation, as added by Stats.2022, c. 771 (A.B. 160), § 21; Governor's May Revision (2024-25), Introduction at pp. 9-10 (rejecting A.B. 160's conditional expenditures due to "the negative multiyear projections" to the General Fund), available at https://ebudget.ca.gov/2024-25/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf.

demonstrated injury.[71] Second, under subdivision (b) of Penal Code section 4900, if the claimant's conviction was vacated by a grant of habeas relief or pursuant to Penal Code section 1473.6 or 1473.7, subdivision (a)(2), and the charges were dismissed or acquitted on remand, and the Attorney General declined to object with clear and convincing proof of guilt, then CalVCB must approve the claim, without a hearing and within 90 days, for the demonstrated injury.[72] Third, under recently-added subdivision (d) of section 1485.55, if a court granted a motion for relief based upon a conviction that was vacated by a grant of habeas relief or pursuant to Penal Code section 1473.6 or 1473.7, subdivision (a)(2), the charges were dismissed or acquitted on remand, and the district attorney failed to timely object with clear and convicting proof of the claimant's guilt, then CalVCB must approve the claim, without a hearing and within 90 days, for the demonstrated injury.[73] While a court order under subdivision (d) of section 1485.55 does not constitute a finding of factual innocence, it nevertheless requires expediated approval of a filed claim.[74]

Even when approval is mandated under any of these three, enumerated circumstances, CalVCB is statutorily obligated by Penal Code section 4904 to determine the extent of injury caused by the erroneous conviction and incarceration.[75] To that end, CalVCB may "request from both parties additional documents or arguments as needed to calculate compensation."[76] The burden to prove injury rests with the claimant by a preponderance of the evidence.[77]

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[71] Pen. Code, §§ 851.865; 1485.55, subds. (a), (b), and (e), 4902, subd. (a); see also Cal. Code of Regs., tit. 2, § 640, subds. (e)(1)-(2).

[72] Pen. Code, §§ 4900, subd. (b), 4902, subd. (d); 4904.

[73] Pen. Code, § 1485.55, subd. (e).

[74] See *Larsen v. CalVCB* (2021) 64 Cal.App.5th 112, 129 (confirming that "a court finding of factual innocence must be made by at least a preponderance of the evidence and must reflect a determination that the person charged and convicted of an offense did not commit the crime").

[75] Pen. Code, § 4904.

[76] Pen. Code, § 4904, as amended by Stats. 2023, c. 702 (S.B. 78), § 5, eff. Jan. 1, 2024.

[77] Pen. Code, § 4904; see also Evid. Code, § 115.

A. Innocence

Here, Howard's claim falls within the mandatory approval provision of subdivision (d) of Penal Code section 1485.55. Specifically, the court granted Howard's motion for relief after concluding that the prosecution had failed to demonstrate Howard's guilt by clear and convincing evidence. In addition, Howard timely submitted a claim to CalVCB for compensation in accordance with Penal Code sections 4900 and 4901. Consequently, CalVCB is required by subdivision (d) of section 1485.55 to approve compensation for the injury sustained by Howard if sufficient funds are available, upon appropriation by the Legislature.[78] No finding is made by CalVCB as to the weight of inculpating and exculpating evidence contained in the administrative record. Nor is any presumption drawn from the denial of Howard's motion for a finding of factual innocence.[79]

B. Injury

While both parties agree that Howard was incarcerated for a total of 9,620 days, they disagree on the extent of his injury. As explained below, Howard's demonstrated injury for his erroneous convictions amounts to 8,890 of his 9,620 days of incarceration, after excluding the remaining 730 days for the two-year sentence that was consecutively imposed for his unrelated conviction in 2014 for possessing a controlled substance while in prison.

1. Statutory Definition

By statute, the amount of compensation to be approved for a claimant's injury "shall be a sum equivalent to one hundred forty dollars ($140) per day of incarceration served, and shall include any time spent in custody, including a county jail, that is considered to be part of the term of incarceration."[80] This compensation is "for the purpose of indemnifying the claimant for the injury" sustained "through their erroneous conviction and imprisonment…."[81] The term "injury" is twice referenced in Penal Code section 4904 as a requisite condition for compensation. Effective 2016, the

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

[79] Pen. Code, § 1485.55, subd. (f) ("A presumption does not exist" for failing to obtain a finding of factual innocence).

[80] Pen. Code, § 4904.

[81] Pen. Code, § 4904.

legislature removed language requiring "pecuniary injury" as "an unfortunate and unsound description of the unique harm suffered when factually innocent persons are imprisoned…."[82] Though no specific definition was provided, the legislative history reflects that the term "injury" was intended to refer to "whatever harm is suffered by a person who is wrongly imprisoned…."[83] Thus, the requisite injury contemplated by section 4904 is "each day … spent illegally behind bars, away from society," solely as a result of the erroneous conviction.[84]

To summarize, injury within the meaning of Penal Code section 4904 "may be established by showing that, but for the erroneous conviction, the claimant would not have been in custody."[85] In other words, injury is lacking for any portion of a claimant's incarceration for an erroneous conviction that may be simultaneously attributable to a valid conviction. For example, injury is lacking if the claimant was imprisoned for an erroneous conviction while simultaneously serving an equivalent sentence for another valid conviction. Similarly, injury is limited to each day of the claimant's actual confinement, even if the claimant was simultaneously serving multiple, concurrent sentences for convictions that were all erroneous.

Here, Howard's incarceration for his erroneous convictions in case YA026865 commenced with his arrest on May 10, 1995, and concluded 9,620 days later with his release on September 9, 2021. But in 2013, Howard committed a new and unrelated crime when he possessed a controlled substance while in prison, for which he was convicted in case 13CM7742B and sentenced in 2014 to two years imprisonment. The AOJ reflects that the two-year sentence for case 13CM7742B was imposed as a "consecutive full term," with specific instructions to "run consecutive with indeterminate case in Los Angeles County case #YA026865.[86] As such, Howard's sentences for these two different cases effectively merged pursuant to Penal Code section 1170.1 to become a single, "aggregate" term of

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[82] Senate Floor Analysis of Sen. Bill No. 635 (2015-2016), as amended Sep. 3, 2015, at p. 4.

[83] Senate Floor Analysis of Sen. Bill No. 635, as amended Sep. 3, 2015, at pp. 4-5.

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

[85] Cal. Code of Regs., tit. 2, § 640, subd. (f).

[86] AGBI Ex. B.

imprisonment.[87] Once Howard's convictions in case YA026865 were vacated in 2021, two of the preceding years of his confinement for his "aggregate" imprisonment became solely attributable to the outstanding sentence for his 2014 conviction in case 13CM7742B. Accordingly, for those two years, Howard was not "illegally behind bars" or "wrongly imprisoned" for a crime he did not commit.[88] But for his erroneous convictions, Howard nevertheless remained lawfully in custody for two of his 26 years of incarceration. Consequently, Howard did not sustain any injury during those 730 days within the meaning of Penal Code section 4904.[89]

Howard insists otherwise. He maintains that, regardless of whether the two-year sentence was consecutively imposed, it was served "*defacto* concurrent" and, therefore, "[n]o deduction should be made …. because it would be impossible to sever the in-prison conviction from the injury suffered from the predominate, ongoing wrongful conviction."[90] But injury for purposes of Penal Code section 4904 cannot be shown for any period of time during which the claimant is incarcerated pursuant to a valid conviction, even if the claimant is simultaneously incarcerated pursuant to an erroneous conviction. As confirmed by the statutory language, legislative history, and case law, the injury to be compensated by section 4904 is not the erroneous conviction itself, but rather the resulting wrongful imprisonment for a crime that the claimant did not commit.[91] Because Howard did commit the in-prison crime of possessing a controlled substance, no injury was sustained during his two-year imprisonment for that

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[87] Pen. Code, § 1170.1, subds. (a) & (c). Given the AOJ's explicit directive for both cases to run consecutively, Howard's assertion that "no aggregation of terms occurred" is not persuasive. (Howard IR at p. 2.)

[88] *Holmes, supra,* 239 Cal.App.4th at p. 1405; Senate Floor Analysis of Sen. Bill No. 635, as amended Sep. 3, 2015, at pp. 4-5.

[89] Howard does not suggest, and this hearing officer declines to speculate, whether any portion of his two-year sentence may have been reduced by conduct credit. (See, e.g., Pen. Code, § 4904 (claimant's burden to prove injury); Code of Regs., tit. 15, § 3371.1, subd. (c)(3)(A) (confirming that inmate's "Earliest Possible Release Date is a fluid date as credit may be earned and forfeited throughout the person's incarceration").)

[90] Howard IR at p. 2.

[91] Pen. Code, § 4900; Senate Floor Analysis of Sen. Bill No. 635, as amended Sep. 3, 2015, at pp. 4-5; *Holmes, supra,* 239 Cal.App.4th at p. 1405.

offense, regardless of whether Howard was simultaneously imprisoned for his other erroneous convictions.

2. Presentence Credits Analogy

This interpretation of the requisite injury for compensation under Penal Code section 4904 is bolstered by Penal Code section 2900.5, which limits the availability of presentence custody credits for convicted defendants who were detained for multiple crimes.[92] Section 2900.5 expressly provides that presentence credit "shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed."[93] As confirmed by the California Supreme Court in *People v. Bruner* (1995) 4 Cal.4th 1167, when a person's presentence custody "stems from multiple, related incidents of misconduct," custodial credit applies under section 2900.5 only if the prisoner shows "the term to be credited was also a 'but-for' cause of the earlier restraint."[94] Just as "a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for the loss of liberty during the presentence period,"[95] compensation under Penal Code section 4904 is strictly limited to the period of imprisonment that solely resulted from the erroneous conviction.

Howard maintains that *Bruner* is factually distinguishable because it involved double counting presentence credits, whereas he "is not claiming duplicate credit."[96] Not quite. Howard is claiming compensation for all 9,620 days that he was incarcerated before and after sentence was imposed for his erroneous convictions, even though Howard additionally claims that 730 of those days also satisfied the two-year sentence that was separately imposed for his unrelated conviction. Even assuming, as urged by Howard,[97] that those 730 days started to accrue only after sentence was imposed in 2014 for his unrelated conviction, he nevertheless seeks to double count those days

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[92] AGBI at p. 2 (quoting Pen. Code, § 2900.5, subd. (b).)

[93] Pen. Code, § 2900.5, subd. (b).

[94] *People v. Bruner* (1995) 9 Cal.4th 1178, 1191-1194.

[95] *Ibid*.

[96] Howard IR at pp. 2-3.

[97] Howard IR at p. 3.

towards both compensation for his erroneous convictions and satisfaction of the sentence for his unrelated conviction.[98] Such double use is not permitted by Penal Code section 4904.

Were Howard to be compensated for all 9,620 days of his incarceration for case number YA026865, then none of those days could be dually applied to satisfy his consecutively imposed two-year sentence for in-prison possession of a controlled substance in case number 13CM7742B. In that scenario, Howard's two-year sentence would remain outstanding and unserved. But neither Howard nor the Attorney General suggests that Howard may be returned to prison to complete his two-year sentence. Indeed, such a scenario appears foreclosed given Howard's ongoing release since 2021, despite the absence of a resentencing order by the Kings County Superior Court to officially declare his two-year sentence satisfied.[99] Presumably, the California Department of Corrections and Rehabilitation (CDCR) properly considered and calculated Howard's release date for case number 13CM7742B after receipt of the court orders that reversed his convictions and dismissed the charges in case number YA026865 by applying the excess credits from the latter to the former.[100]

Case law confirms this result. In *In re Marquez* (2003) 30 Cal.4th 14, the California Supreme Court held that the defendant's presentence credit for his Santa Cruz County conviction must be applied to his unrelated conviction in Monterey County after the Santa Cruz County conviction was reversed on appeal and the charges in Monterey County had been filed first. The *Marquez* court

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[98] In that case, Howard's two-year sentence concluded on October 15, 2016, 730 days after the sentencing hearing on October 16, 2014, according to the online "Days Calculator" located at https://www.timeanddate.com/date/dateadded.html.

[99] See *People v. Clancey* (2013) 56 Cal.4th 562, 587 (assuming that an inmate, who was prematurely released from prison due to a credit miscalculation, may not be returned to custody when it would be "fundamentally unfair" after release for a "prolonged period of time"); *People v. Buckhalter* (2001) 26 Cal.4th 20, 29, ("when a prison term already in progress is modified…, the sentencing court must recalculate and credit against the modified sentence all actual time the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody"); see also Pen. Code, § 2900.1 (requiring credit for any portion served pursuant to a judgment that is subsequently modified or declared invalid to "be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts").

[100] Cal. Code of Regs., tit. 15, § 3371.1, subds. (a), & (c) (mandating CDCR staff calculate term of incarceration with applicable credits upon receipt of court records and mandating inmate's release within five days of receipt of an amended AOJ or other court record upon a determination that the inmate is immediately eligible for release); see also Evid. Code, § 664 ("It is presumed that official duty has been regularly performed").

explained that, once the Santa Cruz County conviction was vacated, all time spent in that local jail was "properly characterized as 'attributable to' [the Monterey] proceedings" within the plain meaning of Penal Code section 2900.5.[101] The court acknowledged the requirement of "strict causation" when determining presentence credits to prevent "the possibility of duplicative credit that might create a windfall for the defendant."[102] But the court found no such risk was present where the "choice is [ ] between granting [defendant] credit *once*…, or granting him *no credit at all* for this period of local custody."[103] To avoid "'dead time,' that is, time spent in custody for which [the defendant] receives no benefit," the court concluded that the Santa Cruz credits properly applied to the Monterey conviction.[104]

A similar result involving consecutively imposed sentences occurred in *People v. Torres* (2012) 212 Cal.App.4th 440. While serving the first of two consecutive sentences for different cases, the defendant's first sentence was reduced, and the resulting excess credits for that sentence were properly applied to the defendant's second sentence.[105] Likewise in *People v. Shropshire* (2021) 70 Cal.App.5th 938, the defendant was serving a prison sentence for one case while awaiting sentence on another when the conviction for the first case was reduced to a misdemeanor. Relying upon the reasoning in *Marquez* and *Torres*, the *Shropshire* court concluded that the excess credit from the first case was properly applied to the second.[106]

Consistent with credit calculations under Penal Code section 2900.5, Howard fails to demonstrate injury within the meaning of Penal Code section 4904 for 730 of the 9,620 days that he was incarcerated for his erroneous convictions. Instead, those 730 days are properly attributed, a single time, to satisfy his consecutive, two-year sentence for his unrelated conviction.

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[101] *In re Marquez* (2003) 30 Cal.4th 14, 20.

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

[103] *Id*. at p. 23, italics in original.

[104] *In re Marquez* (2003) 30 Cal.4th 14, 20; see also Cal. Code Regs., tit. 15, § 3371.1, subd. (c)(2) (defining dead time).

[105] *People v. Torres* (2012) 212 Cal.App.4th 440, 444-447.

[106] *People v. Shropshire* (2021) 70 Cal.App.5th 938, 947-949.

3. In-Prison Offense

Howard alternatively argues that injury must be presumed for the duration of his two-year sentence because, had he not been erroneously imprisoned, he could not have committed the underlying offense of possessing a controlled substance while in prison. As the Attorney General persuasively counters, Howard's "argument misreads [Penal Code] section 4904 and runs counter to a genuine public policy concern for punishing criminal activity."[107]

Even if Howard could not, as a matter of law, have committed the felony offense of in-prison possession of a controlled substance but-for his erroneous convictions, this is not the relevant inquiry for purposes of injury under Penal Code section 4904. Rather, the relevant inquiry is whether Howard would have been free from custody.[108] In other words, compensation under section 4904 is authorized solely for the period of Howard's incarceration that solely resulted from his erroneous convictions. Howard cannot satisfy this inquiry for all 26 years of his incarceration because two of those years were properly based upon his unrelated and still valid conviction for in-prison possession of a controlled substance.

Howard's in-prison conviction was not an inevitable result from his erroneous convictions. Rather, Howard affirmatively chose to possess a controlled substance while in prison. But once Howard was imprisoned, even erroneously, his conduct remained subject to all laws governing prisoners. This includes Penal Code section 4573.6, which criminalizes a defendant's in-prison possession of a controlled substance as a felony punishable by imprisonment for two, three, or four years. Because of the unique harm caused by in-prison felonies, whether for possession of methamphetamine or marijuana, a sentence under section 4573.6 may be imposed fully consecutive to the defendant's original sentence.[109] Moreover, section 4573.6 remains in effect to punish and deter anyone inside a prison who possesses marijuana, even though simple possession of marijuana

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[107] AGBI at p. 3.

[108] Pen. Code, § 4904; Cal. Code of Regs., tit. 2, § 640, subd. (f).

[109] Pen. Code, § 1170.1, subd. (c); *People v. White* (1988) 202 Cal.App.3d 862, 869 ("Legislature wanted in-prison crimes to be punished more severely than crimes committed 'on the outside'").

elsewhere is generally no longer a criminal offense.[110] Accordingly, Howard's insistence that he possessed only a "minuscule amount of marijuana" that would have been punishable as an infraction had it occurred elsewhere, even if an accurate description of his underlying conduct, fails to demonstrate the requisite injury under Penal Code section 4904.[111] Compensation is therefore barred for any portion of Howard's incarceration attributable to the two-year sentence for his in-prison possession conviction.

As urged by the Attorney General, any other conclusion would lead to absurd results.[112] For example, an erroneously imprisoned claimant, who was subsequently convicted of assaulting his cellmate or battering a correctional officer, would nevertheless "obtain compensation for his entire period of incarceration, as if the in-prison violent crime had never occurred at all."[113] This outcome would "effectively reward[ ] the inmate for their criminal acts while in prison," contrary to the "Legislature's intent to punish more severely inmates who commit crimes in prison…."[114] Howard attempts to distinguish any "alarmist hypothetical" by emphasizing that "[t]here were no victims in claimant's marijuana violation."[115] But even if this is an accurate description of Howard's underlying conduct, Penal Code section 4904 does not permit "a crime-by-crime evaluation of the seriousness of crimes committed while in prison" when determining whether compensation is warranted.[116] Instead, as explained above, the only relevant inquiry is whether the claimant would have been free from custody but for the erroneous conviction. Howard can only satisfy this standard for 8,890 of the 9,620

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[110] Pen. Code, § 4573.6; Health & Safe. Code, § 11362.1, subd. (a); see also *People v. Raybon* (2021) 11 Cal.5th 1056, 1066 (affirming validity of felony offense for in-prison possession of marijuana under Pen. Code, § 4573.6 notwithstanding Proposition 64's decriminalization of simple possession of less than one ounce of cannabis).

[111] Howard IR at p. 3.

[112] AGBI at p. 4.

[113] AGBI at p. 4; see also Pen. Code, §§ 4501 (in-prison assault), 4501.5 (in-prison battery upon non-confined person).

[114] AGBI at p. 4, italics omitted; see also Pen. Code, § 1170.1, subd. (c) (authorizing full consecutive sentence for in-prison offense).

[115] Howard IR at p. 3.

[116] AGBI at p. 4.

days of his incarceration, after subtracting 730 days for the two-year sentence imposed for in-prison possession of a controlled substance.

4. Unclean Hands

Howard finally suggests that the Attorney General, acting on behalf of the State of California, is barred by the equitable doctrine of "unclean hands" from seeking to benefit from a reduction in the amount of compensation it otherwise owes Howard "for more than 26 years of wrongful imprisonment."[117] Not so. At the threshold, the record fails to show that the State "acted unconscionably, in bad faith, or inequitably" as required for this doctrine to apply.[118] Indeed, as the appellate court concluded when denying Howard's motion for a finding of factual innocence, Howard failed to meet his burden "to show no reasonable cause exists to believe he committed the offense and that 'the state should never have subjected [him] to the compulsion of the criminal law.'"[119] Moreover, the burden rests upon Howard to demonstrate injury in this administrative proceeding and, therefore, the Attorney General's position on this limited issue is not determinative.[120] It is ultimately CalVCB's obligation to determine the extent of injury demonstrated by the claimant, regardless of any argument that the Attorney General may or may not present. Finally, the amount of compensation owed to Howard under Penal Code section 4904, if sufficient funds are available, is limited to his demonstrated injury. As detailed above, his injury excludes any portion of his incarceration for his erroneous convictions that may also be attributed to the two-year sentence for his unrelated conviction.

After careful consideration of the record in this matter, Howard's demonstrated injury amounts to $1,244,600, representing $140 per day of his 8,890 days imprisonment that solely resulted from his erroneous convictions in case number YA026865. Howard fails to demonstrate injury for the remaining 730 days of his confinement that satisfied the two-year sentence for his unrelated conviction in case

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[117] Howard IR at p. 1.

[118] *Salas v. Sierra Chemical Co*. (2014) 59 Cal.4th 407, 432 ("Generally, the equitable doctrine of unclean hands applies when a plaintiff has acted unconscionably, in bad faith, or inequitably in the matter in which the plaintiff seeks relief").

[119] *In re K.H., supra*, at p. 27.

[120] Pen. Code, § 4900, 4904; Evid. Code, § 115.

number 13CM7742B. But-for his erroneous convictions for murder, attempted murder, and shooting at an occupied vehicle, Howard would have been free for 8,890 of his 9,620 days of incarceration.

V. Conclusion

As mandated by subdivision (d) of Penal Code section 1485.55, the undersigned hearing officer recommends that CalVCB grant Howard's claim and approve payment in the amount of $1,244,600, if sufficient funds are available, upon appropriation by the Legislature, as indemnification for the injury sustained by his 8,890 days of imprisonment solely as a result of his vacated convictions for murder, attempted murder, and shooting at an occupied vehicle in case number YA026865. No compensation is recommended for the additional 730 days requested by Howard that satisfied his two-year sentence for an unrelated conviction in case number 13CM7742B for in-prison possession of a controlled substance.

Date: November 14, 2024

Laura Simpton
Hearing Officer
California Victim Compensation Board

Attorney General's
Rebuttal Received

ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

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November 13, 2024

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

RE: *In the Matter of the Claim of: Kenji A. Howard*
Claim: 22-ECO-07

Dear Ms. Simpton:

On October 22, 2024, the Hearing Officer issued her Proposed Decision concerning the Penal Code[1] section 4900 claim filed by claimant Kenji A. Howard (hereinafter "claimant"), recommending that the California Victim Compensation Board (hereinafter "the Board") grant claimant's claim and approve payment in the amount of $1,244,600. In advance of the November 21, 2024, hearing, the parties were invited to submit written argument concerning whether the Board should adopt the Proposed Decision. The Attorney General asks the Board to adopt the Hearing Officer's ultimate recommendation, but respectfully challenges one statement of fact raised in the Proposed Decision, namely, that claimant's in-prison felony conviction for possession of a controlled substance arose from his possession of marijuana. Claimant's in-prison conviction actually arose from his possession of methamphetamine.

The Proposed Decision indicates on page 3 that claimant's 2014 conviction in Kings County case number 13CM7742B for felony possession of a controlled substance (§ 4573.6) "arose from the discovery of .33 grams of marijuana inside [claimant's] prison cell." The Proposed Decision then references claimant's possession of marijuana in its injury analysis to reject claimant's arguments, including that his possession of marijuana was a victimless crime and that he possessed only a "miniscule" amount of marijuana. (Proposed Decision, pp. 21-22.) The Proposed Decision relies on claimant's September 27, 2024, reply at page 2, and an attached Rules Violation Report signed and dated on November 26, 2013, for the facts underlying claimant's in-prison conviction. The referenced Rules Violation Report was indeed prepared in response to the seizure of .33 grams of marijuana from claimant's cell on February 5, 2012. However, as explained below, this is not the same incident that led to the filing of charges in the

[1] Further undesignated statutory references are to the Penal Code.

felony case for which claimant was ultimately convicted in 2014 and for which he was sentenced to two years.

The incident for which claimant was ultimately convicted stemmed not from the possession of .33 grams of marijuana, but rather from the possession of 10.9 grams of methamphetamine.

On December 23, 2013, the Kings County District Attorney filed a felony complaint in case number 13CM7742B, alleging that "[o]n or about December 22, 2013," claimant "did unlawfully and knowingly possess methamphetamine while in Corcoran State Prison." (See Attachment A.) In an Administrative Segregation Unit Placement Notice signed and dated on March 5, 2014, prison officials noted that claimant was placed in Administrative Segregation on December 22, 2013, because he had been "identified as a suspect in an investigation" into the "introduction and distribution of a controlled substance into a correctional facility" due to the discovery of "a large amount of suspected Methamphetamine (10.9 Grams)" under claimant's control. (See Attachment B.) Prison officials believed "it [was] clear" due to the large amount of methamphetamine found under claimant's control that claimant's "intent was for distribution." (*Ibid*.) Claimant was thereafter convicted, in case number 13CM7742B, of possession of a controlled substance while in prison and sentenced to two years. (AGBI Ex. B.)

Based on the fact that the felony complaint alleged that claimant unlawfully and knowingly possessed methamphetamine on or about December 22, 2013, and that the prison report indicated that claimant was placed in Administrative Segregation on that same date due to the discovery of a "large amount" of methamphetamine under his control, it is clear that the possession of methamphetamine on said date, not the possession of marijuana in February 2012, formed the basis of claimant's 2014 conviction for possession of a controlled substance in prison and his two-year sentence.

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CONCLUSION

The Attorney General submits this letter and supporting documentation only to ensure the record is complete and accurate. This clarification does not alter the Hearing Officer's conclusion: whatever the underlying facts, claimant is not entitled to compensation for incarceration attributable to the two-year sentence for his in-prison possession conviction. Claimant remains entitled to compensation in the amount of $1,244,600, as stated in the Proposed Decision. The Attorney General requests that the Proposed Decision be amended to reflect the true basis for claimant's 2014 conviction in Kings County case number 13CM7742B. In all other respects, the Attorney General recommends that the Board adopt the Proposed Decision.

Sincerely,

/s/ *Jonathan M. Krauss*

JONATHAN M. KRAUSS
Deputy Attorney General

For ROB BONTA
Attorney General

JMK: JMK
SA2022300968

cc: Carol A. Watson

EXHIBIT A

[Complaint, 12/23/2023]

GREGORY E. STRICKLAND
District Attorney, County of Kings
Kings County Government Center
1400 West Lacey Boulevard
Hanford, California 93230
Telephone (559) 582-0326
D.A. # F-2013-6267

Attorney for Plaintiff

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KINGS
CORCORAN DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

vs.

TELITHA MANNS
KENJI A HOWARD K77423
Defendant(s)

No. 13CM7742A/B

COMPLAINT

The undersigned, verifying upon information and belief, complains that in the County of Kings, State of California, the defendant(s) did commit the following crime(s):

COUNT 1

On or about December 22, 2013, said defendant(s), **KENJI A HOWARD K77423, TELITHA MANNS ,** did commit a **FELONY**, namely: a violation of Section 4573.6 of the Penal Code of the State of California, in that said defendant(s): did unlawfully and knowingly possess methamphetamine while in Corcoran State Prison, said defendant(s) not being then and there authorized to possess said methamphetamine by the rules of Corcoran State Prison, and said defendant(s) not being then and there specifically authorized by the jailer and other person in charge of said county jail to possess said methamphetamine.

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

Executed on December 23, 2013 at Hanford, California.

CORCORAN STATE PRISON

CJN:lmr

DISCOVERY REQUEST

Pursuant to Penal Code Section, 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by Penal Code Section 1054.3.

EXHIBIT B

[3/5/2014 Report]

STATE OF CALIFORNIA
ADMINISTRATIVE SEGREGATION UNIT PLACEMENT NOTICE
CDC 114-D (Rev 10/98)

DEPARTMENT OF CORRECTIONS AND REHABILITATIONS
3A03-122U

DISTRIBUTION:
WHITE CENTRAL FILE | CANARY WARDEN
BLUE INMATE (2ND COPY) | PINK HEALTH CARE MGR
GREEN ASU | GOLDENROD INMATE (1ST COPY)

INMATE'S NAME	CDC NUMBER
HOWARD	K77423

REASON(S) FOR PLACEMENT (*PART A*)

☒ PRESENTS AN IMMEDIATE THREAT TO THE SAFETY OF SELF OR OTHERS
☐ JEOPARDIZES INTEGRITY OF AN INVESTIGATION OF ALLEGED SERIOUS MISCONDUCT OR CRIMINAL ACTIVITY
☒ ENDANGERS INSTITUTION SECURITY ☐ UPON RELEASE FROM SEGREGATION, NO BED AVAILABLE IN GENERAL POPULATION

DESCRIPTION OF CIRCUMSTANCES WHICH SUPPORT THE REASON(S) FOR PLACEMENT

On Sunday, December 22, 2013, you Inmate **HOWARD** (K77423) were placed in Administrative Segregation (ASU). Specifically, you have been identified as a suspect in an investigation into **"INTRODUCTION AND DISTRIBUTION OF A CONTROLLED SUBSTANCE INTO A CORRECTIONAL FACILITY."** Due to the discovery of a large amount of suspected Methamphetamine (*10.9 Grams*) under your control in Facility 3B Visiting. Due to the large amount it is clear that the intent was for distribution Therefore you will remain in Ad-Seg pending Toxicology testing of this controlled substance. Should Toxicology results return positive for a controlled substance, you will receive a Serious RVR and be retained in Ad-Seg pending adjudication of this SHUable RVR. Retention in Ad-Seg is based on you presenting an immediate threat to the safety and security of the institution. Due to this placement, your work, privilege group, custody, and visiting status may be affected. Effective Communication was established by using simple English and having you explain in your own words the reason for ASU placement. Inmate **Howard** is a participant in the Mental Health Services Delivery System at the **EOP** level of care and has a recorded TABE score **above** 4.0 (**9.6**). Closure Chrono to be completed by Correctional Officer F. Flores.

☐ CONTINUED ON ATTACHED PAGE (CHECK IF ADDITIONAL) ☐ IF CONFIDENTIAL INFORMATION USED, DATE OF DISCLOSURE: / /

DATE OF ASU PLACEMENT	SEGREGATION AUTHORITY'S PRINTED NAME	SIGNATURE	TITLE
03/05/14	M. Godina	M. Godina	Lieutenant

DATE NOTICE SERVED	TIME SERVED	PRINTED NAME OF STAFF SERVING ASU PLACEMENT NOTICE	SIGNATURE	STAFF'S TITLE
3-5-14	1500	B. SIMONS		C/O

☐ INMATE REFUSED TO SIGN | INMATE SIGNATURE | CDC NUMBER K77423

ADMINISTRATIVE REVIEW (*PART B*)

The following to be completed during the initial administrative review by Captain or higher by the first working day following placement

STAFF ASSISTANT (SA)

STAFF ASSISTANT NAME	TITLE
PEREZ	C/O CCI

IS THIS INMATE:

LITERATE?	☒ YES	☐ NO
FLUENT IN ENGLISH?	☒ YES	☐ NO
ABLE TO COMPREHEND ISSUES?	☐ YES	☒ NO
FREE OF MENTAL HEALTH SERVICES DELIVERY SYSTEM NEEDS?	☐ YES	☒ NO
DECLINING FIRST STAFF ASSISTANT ASSIGNED?	☐ YES	☐ NO

Any "NO" requires SA assignment

☐ NOT ASSIGNED

INVESTIGATIVE EMPLOYEE (IE)

INVESTIGATIVE EMPLOYEES NAME	TITLE
N/A	N/A

EVIDENCE COLLECTION BY IE UNNECESSARY	☒ YES	☐ NO
DECLINED ANY INVESTIGATIVE EMPLOYEE	N/A ☐ YES	☐ NO
ASU PLACEMENT IS FOR DISCIPLINARY REASONS	☒ YES	☐ NO
DECLINED 1ST INVESTIGATIVE EMPLOYEE ASSIGNED	☐ YES	☐ NO

Any "NO" may require IE assignment

☒ NOT ASSIGNED

INMATE WAIVERS

☒ INMATE WAIVES OR DECLINES INTERVIEW WITH ADMINISTRATIVE REVIEWER ☒ INMATE WAIVES RIGHT TO 72 HOURS PREPARATION TIME
☐ NO WITNESSES REQUESTED BY INMATE | INMATE SIGNATURE | DATE 3/5/14

WITNESSES REQUESTED FOR HEARING

WITNESS' NAME	TITLE/CDC NUMBER	WITNESS' NAME	TITLE/CDC UMBER
WITNESS' NAME N/A	TITLE/CDC NUMBER N/A	WITNESS' NAME N/A	TITLE/CDC NUMBER N/A

DECISION: ☐ RELEASE TO UNIT/FACILITY_____ ☒ RETAIN PENDING ICC REVIEW ☒ DOUBLE CELL W/SAFETY ☐ SINGLE CELL PENDING ICC

REASON FOR DECISION:
RETAIN ASU PX COMPLETION OF INVESTIGATION (FOX.)
ENDANGERS INST. SECURITY.

ADMINISTRATIVE REVIEWER'S PRINTED NAME	TITLE	DATE OF REVIEW	TIME	ADMINISTRATIVE REVIEWER'S SIGNATURE
M. GAMBOA	CAPT	3/6/14	0950	

CORRECTIONAL ADMINISTRATOR'S PRINTED NAME	CORRECTIONAL ADMINISTRATOR'S CO-SIGNATURE	DATE OF REVIEW

See Chronological Classification Review document (CDC 128-G) for specific hearing information

Claimant's Request to Adopt Proposed Decision

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BEFORE THE CALIFORNIA VICTIM COMPENSATION BOARD

In the Matter of the Claim of KENJI A. HOWARD	CASE NO. 22-ECO-07 REQUEST FOR ADOPTION OF PROPOSED DECISION AND APPROVAL OF PAYMENT OF CLAIM PURSUANT TO PENAL CODE §1485.55 (d)(2)

TO: California Victim Compensation Board:

Claimant supports the proposed decision before the Board. The proposed decision is consistent with Penal Code Section 1485.55(d)(2) which provides that, if the court grants a claimant's motion under the statute, "the board shall, upon application by the person, without a hearing, approve payment to the claimant, pursuant to Section 4904, if sufficient funds are available, upon appropriation by the Legislature."

The proposed decision is also consistent with the Attorney General's position as to the amount of injury suffered by Claimant.

Claimant did not commit the crimes for which he was convicted. Having prevailed on his motion under the governing statute, Claimant requests the Board to adopt the proposed decision and approve payment in the amount of $1,244,600.00.

DATED: November 12, 2024

Respectfully submitted,

CAROL A. WATSON
TIMOTHY J. MIDGLEY
PAUL L. HOFFMAN
UCI SCHOOL OF LAW
CIVIL RIGHTS LITIGATION CLINIC

By _____
Carol A. Watson
Attorney for Claimant