

1
2
3
4
5
6
7
8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the matter of the Claim of:

12 **Kenneth Foley**

13 Claim No. G569845

Proposed Decision

(Penal Code §§ 4900 et seq.)

14 **Introduction**

15 A hearing on this claim for compensation as an erroneously convicted person was conducted
16 on November 9, 2009, by Kyle Hedum, the Hearing Officer assigned to hear this matter by the
17 Executive Officer of the California Victim Compensation and Government Claims Board. Attorney
18 Noah Rosenthal represented Kenneth Foley, who appeared and testified at the hearing. Deputy
19 Attorney General Sharon Loughner represented the California Department of Justice, Office of the
20 Attorney General.

21 The record remained open to allow the parties the opportunity to submit post-hearing briefs.
22 On November 30, 2009, Foley submitted his brief. On December 18, 2009, the Attorney General
23 responded with their brief, and on January 6, 2010, Foley provided his closing brief. The record was
24 then closed.

25 After considering all the evidence, it is determined that Kenneth Foley has not proven by a
26 preponderance of the evidence that (1) he is innocent of the crime for which he was convicted and
27 incarcerated, and (2) he did not by any act or omission on his part, intentionally contribute to the
28

1 bringing about of the arrest or conviction for the crime. It is recommended that the Board deny
2 Foley's claim for compensation.

3 **Background**

4 On September 26, 1995, following an earlier mistrial,¹ a jury found Foley guilty of
5 burglarizing² a truck that belonged to Robert Buck. The jury also determined that because Foley
6 committed the second-degree burglary while his co-defendant, Machel Bullington, was armed with a
7 handgun, he was subject to a sentencing enhancement.³ The jury also determined that Foley had
8 two prior serious felony convictions.

9 On January 24, 1996, the Santa Clara Superior Court denied Foley's motion for a new trial.
10 On February 15, 1996, Foley was sentenced to twenty-five years-to-life pursuant to California's three-
11 strikes law.⁴ Bullington was also found guilty and she was sentenced to four years and four months in
12 state prison.

13 On July 9, 1998, The California Court of Appeal, Sixth Appellate District, affirmed Foley's
14 conviction. The California Supreme Court denied Foley's petition for review on October 21, 1998.
15 Foley subsequently filed five additional petitions for writ of habeas corpus with the state and federal
16 courts between 1999 and 2001. All five petitions were denied.

17 Following a series of articles in a local newspaper about erroneous convictions, the Santa
18 Clara District Attorney's Office decided to review Foley's conviction. Prosecutor David Angel and
19 district attorney investigator Dave Hendrickson interviewed multiple witnesses in 2006. Angel
20 subsequently determined that the jury was mistaken as to the presence of a gun. Angel also
21 determined that there was a strong possibility that Foley had not committed the crime. Angel then

22
23 ¹ Foley's first trial resulted in a mistrial because a prosecution witness referred to Foley's past criminal
24 history.

25 ² Penal Code, §§ 459/460(b).

26 ³ Penal Code, § 12022(a)(1).

27 ⁴ Penal Code sections 667 & 667.5 provide that if a defendant has two or more prior serious felony
28 convictions, the third felony conviction will result in a term of imprisonment ranging from twenty-five
years to life.

1 filed a motion to dismiss Foley's prior convictions, and the court dismissed all but one of the prior
2 convictions. With his sentence reduced, Foley was released on his own recognizance while
3 additional investigation was conducted by the district attorney's office.

4 On January 9, 2007, Foley filed another petition for writ of habeas corpus. The district
5 attorney's office did not oppose the petition. On April 5, 2007, the superior court granted the petition
6 and overturned Foley's conviction based upon newly discovered evidence that pointed to his
7 innocence and newly discovered evidence that false testimony may have played a part in Foley's
8 conviction. Foley's claim for compensation as an erroneously convicted person was then timely filed
9 with the Board on September 10, 2007.

10 **Evidence and Testimony⁵**

11 During the early morning hours of January 17, 1995, a truck was broken into in the parking
12 lot of Kelly's Pool Service, a company owned and operated by Buck. Buck awoke to a noise outside
13 his office,⁶ looked out a window, and saw a person in the cab of his truck and another person in the
14 driver's seat of a white Pontiac Trans Am parked nearby. Buck armed himself with an unregistered
15 .22 caliber pistol and confronted the woman who was sitting in the driver's seat of the Trans Am. The
16 woman had a large caliber pistol in her hand and the pistol was aimed in Buck's direction. Buck
17 briefly pointed his pistol at the woman, and then his attention shifted to the person that was in his
18 truck.

19 Buck approached this person and asked him what he was doing. The man told Buck that
20 he was just attempting to steal the radio from the truck. After exchanging words, Buck allowed the
21 man and woman to leave in the Trans Am. After returning to his office, Buck wrote down the Trans
22 Am's license plate number. Buck then went to a local gym for approximately an hour before returning
23 to his office, at which time he called the police to report the burglary.

24
25
26 ⁵ Compiled from Foley's criminal trial, writ of habeas corpus, Penal Code section 4900 hearing, and
27 other claim-related information.

28 ⁶ Buck testified at the criminal trial that he sometimes slept on a cot in his office.

1 Buck did not inform the police department dispatcher that one of the suspects had a gun.
2 However, Buck told the responding officer that he had confronted a man and a woman in his parking
3 lot who were attempting to steal his truck's radio,⁷ and that the woman was armed with a pistol. Buck
4 told this officer that he was able to clearly see the two suspects because the parking lot was lit with
5 security lighting in addition to the light provided by a full moon. Buck was uncertain if he could
6 identify the woman that was sitting in the front seat of the Trans Am, but he was certain that he would
7 be able to identify the male suspect. He told the police that the white male suspect had a scraggly
8 beard, a moustache, collar-length hair, and that the suspect was wearing dark clothes and a knit cap
9 or ski cap. He did not tell the police that the suspect was wearing gloves, and in fact, the police
10 attempted to lift fingerprints from a "slim jim"⁸ that was used by the suspect to break into the truck.
11 This "slim jim" was left at the scene when Buck ordered the suspect to drop it on the ground and
12 leave.

13 On that same afternoon or early evening, Foley was stopped by the police for a traffic
14 infraction. Foley had recently gotten off work, and his wife picked him up in a Trans Am. Foley's wife
15 was not feeling well, so Foley drove the car as they headed towards their home. Foley's wife told him
16 that the Trans Am belonged to Machel Bullington. Bullington and Foley's wife had switched cars
17 earlier that day because Bullington wanted to visit her boyfriend, but was afraid that her boyfriend's
18 ex-girlfriend would see her car in the vicinity of her boyfriend's home and cause trouble. By using
19 Foley's car to visit her boyfriend, the ex-girlfriend would not know that Bullington was in the
20 neighborhood.

21 After being pulled over, the police determined that the Trans Am was not properly
22 registered, so the vehicle was impounded. Bullington arrived at the scene driving Foley's vehicle, and
23 she gave Foley and his wife a ride to their home. Police later suspected that Foley might have been
24 involved in the burglary at Kelly's Pool Service because Buck had reported that the burglars drove a

26 ⁷ Buck later discovered that his truck's ignition had been drilled out, indicating that the suspect intended
27 to steal his truck.

28 ⁸ A slim jim is a metal tool that is used to open doors on cars, by 'pulling up' the lock within the door.

1 Trans Am. Buck identified Foley and Bullington, in separate photo lineups, as the two people he had
2 confronted in his parking lot the morning of January 17, 1995.

3 When the police went to Foley's home to arrest him for the burglary, Foley ran into his
4 bathroom and barricaded the door. It took police several minutes to force open the bathroom door.
5 After Foley was arrested, the police found methamphetamine just outside the bathroom door.

6 Foley and Bullington were subsequently charged with the Kelly's Pool Service burglary.
7 During the 1995 criminal trial, Buck again identified Foley and Bullington as the suspects he
8 confronted on the morning of January 17, 1995. Buck also confirmed that Bullington was armed with
9 a pistol. Buck testified that the male suspect's hair came to the collar or neck area and that the
10 suspect wore a knit cap, similar to a ski cap. Buck was certain that the suspect did not have longer
11 hair stuffed into the cap to disguise its' length. Buck also testified that the suspect was not wearing
12 gloves at the time of the crime.

13 On May 31, 2006, Buck was interviewed by Santa Clara District Attorney Investigator
14 Hendrickson and Deputy District Attorney Angel.⁹ When Hendrickson told Buck that he had
15 information that the lights in Kelly's Pool Service parking lot weren't working the night of the
16 burglary,¹⁰ Buck said that he could not remember. Hendrickson also told Buck that based on his 28
17 years of experience as a police officer, he felt it was odd that a woman would have a handgun in a
18 car in which her infant child or children were seated and that generally women are not armed.¹¹
19 During the two-hour interview, Buck reiterated at least six times that the woman in the car had a
20 handgun. After Hendrickson and Angel raised the suspicion that the original prosecuting attorney and
21

22 ⁹ This interview took place after investigator Hendrickson contacted Buck's insurance agent to
23 investigate allegations that Buck might have committed insurance fraud. It appears that Buck
24 apparently showed up at the interview on the assumption that he was going to be questioned about
25 some prior insurance claims. At the interview, Prosecutor Angel told Buck that he had no "concern
26 about insuring stuff" prior to entering into a discussion about the 1995 burglary.

27 ¹⁰ This statement appears to be premised upon information obtained from Buck's former bookkeeper,
28 Pamela Wise, who was not even employed at Kelly's Pool Service when the crime was committed.

¹¹ There is conflicting information in Foley's criminal case as to whether Bullington had one or more
young children with her when she and Foley committed the burglary.

1 the police officers who were involved in Foley's trial in 1995 might have given Buck misleading
2 information to ensure that Foley and Bullington were convicted of the burglary, Buck began to
3 question his memory. When Buck expressed distress that Bullington was still imprisoned and unable
4 to care for her children, Hendricks and Angel did not tell Buck that Bullington had been released from
5 prison years ago, having been sentenced to only four years and four months in state prison.
6 Hendrickson also told Buck that the pistol used in court was not the actual weapon because no
7 weapon had been recovered, again implying that there was misrepresentation at Foley's trial in 1995.
8 Buck expressed concern, believing that the pistol he saw in court was the pistol held by Bullington.¹²
9 Finally, after a three-minute unrecorded break, Buck came back on record and stated that there was
10 a strong possibility that Bullington did not have a gun and that she only pointed her finger at him.

11 During the trial, Buck was shown a photo of Luke Gaumond, who the defense asserted was
12 the person who committed the burglary with Bullington. However, Buck testified that Gaumond was
13 not the man he confronted in his parking lot. In addition, Buck identified Foley by voice, after Foley
14 and Gaumond both spoke at the direction of the trial judge.

15 Gaumond initially denied any responsibility for the burglary. However, he subsequently
16 testified at Foley's criminal trial that he was the person responsible for the burglary at Kelly's Pool
17 Service. He also testified to the same at Foley's compensation hearing. Gaumond explained at the
18 criminal trial and at the compensation hearing that he happened to be incarcerated, in the same jail
19 and at the same time, where Foley was held pending his trial. While in jail, Gaumond received a note
20 that told him to take responsibility for the burglary. He believed that the note was delivered by a
21 person who had received the note from Foley. At the compensation hearing, Gaumond testified that
22 he did not consider the note to be a threat. However, at the criminal trial, he testified that he did view
23 the note as a threat.

24 After receiving this note, Gaumond explored various options on how he could help Foley
25 without actually admitting that he was responsible for the burglary. Although Gaumond was not

26 ¹² The pistol shown to Buck at Foley's trial was for exemplary purposes only, and the trial transcript
27 reflects no deception because Buck was asked by the prosecutor "Is this .38 similar to the gun you
28 saw?"

1 facing life imprisonment, due to his less-egregious criminal past, he clearly did not want to spend any
2 additional time in custody. Gaumond spoke with Foley's attorney and inquired as to what sentence
3 he would receive if the gun allegation was dismissed. Gaumond also asked Foley's attorney if he
4 could appear at Foley's trial and then invoke his Fifth Amendment right to not incriminate himself,
5 thus giving the jury the suggestion that Foley was not guilty of the crime. Gaumond also wanted to
6 know how reliable Buck's identification was of Foley.¹³ Gaumond discussed placement in a live-in
7 drug treatment program if he admitted to committing the burglary, rather than being sentenced to jail
8 or prison. Additionally, Gaumond questioned whether he could later admit to the burglary during
9 Foley's appeal, should Foley be convicted.

10 During Foley's criminal trial, the judge listened to Gaumond's alleged confession. The
11 judge also read various transcripts that described Gaumond's efforts to absolve Foley of any
12 responsibility for the burglary while at the same time not placing himself in a position to be punished.
13 The judge subsequently determined that Gaumond's statements to defense investigators and others
14 was "dripping with unreliability." After Foley filed a motion for a new trial, the judge stated that "the
15 Court seriously questions and indeed, disregards the testimony of defense witness Gaumond as
16 being untrustworthy."

17 Gaumond also testified at Foley's compensation hearing that when he committed the
18 burglary, he wore his long hair in a ponytail that was tucked into a baseball cap. This is contradicted
19 by Buck's statement to the police that the suspect had shorter hair and was wearing a ski cap or
20 stocking cap. Gaumond also claimed that he was wearing gloves, a claim that was again disputed in
21 Buck's statement to the police that he did not notice any gloves.

22 Although Foley chose not to testify in his criminal trial, at the recommendation of his
23 attorney, he did testify at his compensation hearing. He testified that he had never been to Kelly's
24 Pool Service, and that he did not commit the burglary on January 17, 1995. His alibi was that he
25 went to bed with his wife on the evening of January sixteenth, and he did not leave home anytime
26 during that evening or during the early morning hours of January seventeenth. His wife drove him to

27 ¹³ Gaumond was subsequently not able to identify Buck as the person who confronted him on January
28 17, 1995.

1 work on the morning of the seventeenth, and she picked him up, in the Trans Am, at about 3:30 p.m.
2 on that same afternoon.

3 Foley testified that he did not know Gaumond prior to Gaumond testifying at trial that he,
4 and not Foley, had committed the burglary. While in jail prior to his trial, Foley learned that another
5 inmate named "Poet" had sent a letter to Gaumond urging Gaumond to take responsibility for the
6 burglary. Foley testified that he did not ask for anyone's assistance, and that he had no part in
7 encouraging Gaumond to take responsibility for the crime.

8 Foley explained that he barricaded himself in his bathroom when the police came to arrest
9 him for the burglary because he was afraid of the police. Foley believed that he was arrested for the
10 burglary because the police "had it out for him" as a result of his past use and possession of illegal
11 drugs. Foley also believed that the police coerced Buck into identifying him as the perpetrator due to
12 Foley's history and reputation with the police.

13 When Machelie Bullington was arrested by the police, she denied all knowledge of the
14 burglary at Kelly's Pool Service. At her and Foley's trial, Bullington testified that she was with
15 Gaumond as he committed the burglary at Kelly's Pool Service. According to Bullington's trial
16 testimony, she and one of her young daughters accompanied Gaumond as he drove around looking
17 for things to recycle. Bullington said that they left her house at about 11:00 p.m. on January 16,
18 1995. However, she testified that she did not know what Gaumond was doing and that she
19 accompanied Gaumond while he attempted to raise money by finding and selling recyclable materials
20 because she did not trust him with her car. She testified that she was asleep in the driver's seat in
21 the Trans Am when Buck confronted her at about 3:30 a.m. on January 17, 1995. She denied Buck's
22 claim that she was armed with a pistol. Bullington did not testify at Foley's compensation hearing.

23 Pamela Wise was not a witness at Foley's criminal trial, but she was interviewed by
24 Hendrickson on March 13, 2006. Wise disclosed the following information. She began working as a
25 bookkeeper for Buck in October of 1995. Buck had just finished testifying in Foley's trial, and he told
26 her about the case and how his testimony helped to convict Foley. She did not like Buck, describing
27 him as dishonest, cowardly, a drug and alcohol abuser, and prone to exaggeration. She believed that
28

1 Buck identified Foley as the man he confronted in his parking lot because the police only showed him
2 a single photograph.

3 Wise described Kelly's Pool Service parking lot as very dark with little visibility, and she
4 asserted that Buck could not have been able to identify Foley as the perpetrator. She told
5 Hendrickson that she feels that God sent her to work for Buck so that she could help free Foley. She
6 also claimed that Buck had told her that the suspect in this case had a ponytail.

7 Wise based her opinion that Buck used illegal drugs after looking through his briefcase that
8 contained his divorce papers. Wise told Hendrickson and Angel that she knew about Buck's drug use
9 because Buck left his briefcase in the office, and that she "read everything cause you know, right, it
10 was right there." Wise stated that Buck's soon-to-be ex-wife alleged, in the papers that were in
11 Buck's briefcase, that Buck's drug use was one of the reasons for the divorce.

12 At Foley's hearing for compensation, Wise testified that Buck told her that the male suspect
13 was the person holding the pistol and not the female sitting in the car. Wise described Kelly's Pool
14 Service parking lot to be poorly lit and she stated that Buck would have been unable to see much of
15 anything due to the poor lighting. Wise admitted that she had no personal knowledge as to the
16 lighting in the parking lot at the time of the crime, since she began working at Kelly's Pool Service
17 about ten months after the crime.

18 In describing her lack of respect for Buck, Wise testified that Buck tried to sell her an
19 unsafe vehicle and that he lied and told people that he and Wise had a sexual relationship. Wise
20 provided an example of Buck's dishonesty. Buck would sometimes tell a homeowner's insurance
21 company that the damage to a client's pool was not covered by insurance, and then he would do the
22 work for the homeowner and receive more money than he would have had if an insurance company
23 had been involved. When questioned why she, as a bookkeeper, never alerted the homeowner or
24 insurance company to this alleged fraud, Wise responded that she didn't tell anyone because she
25 needed the job. Wise also admitted that she had no personal knowledge of any of the facts regarding
26 the burglary that had occurred prior to her employment at Kelly's Pool Service. She also testified that
27 "God sent her to work for Buck" so that she could assist Foley in his claim for compensation.
28

1 Brooke Kilpatrick, Foley's ex-wife, testified at his criminal trial that she and Foley went to
2 sleep together the night of January 16, 1995, and that she took Foley to work the next morning at
3 about 6:00 a.m. She testified at his trial that Foley did not leave their home that night or at any time
4 the next morning prior to leaving for work.

5 The Attorney General interviewed Kilpatrick on October 6, 2009. Kilpatrick admitted that at
6 or about the time of the burglary, she and Foley both abused drugs and alcohol, and that sometimes
7 Foley would be gone for up to three days when he was abusing methamphetamine. Although
8 Kilpatrick had difficulty remembering the incident that led to her husband's arrest, she believes that
9 Foley did not commit the crime with Bullington.

10 Jim Grenard provided a declaration for Foley's compensation hearing stating that he saw
11 Bullington and Gaumond together at about 7:00 a.m. to 7:30 a.m. on January 17, 1995, which was
12 about two-and-a-half to three-and-a-half hours after the burglary.

13 Linda Starr is the director of the Northern California Innocence Project, and she was
14 involved in the events that led to Foley's release from custody. Starr testified at Foley's
15 compensation hearing that she was present at a meeting prior to the filing of Foley's petition for writ of
16 habeas. Also at this meeting were district attorney and public defender representatives, Foley,
17 Bullington, and Gaumond. Starr observed the interaction between Gaumond and Bullington, and
18 after questioning all the parties, Starr left the meeting with the belief that Foley was innocent.

19 Dr. Martin Blinder is a recognized expert in the field of eyewitness identification whose
20 opinion has been of assistance to defense attorneys, prosecutors, and judges. Dr. Blinder was
21 retained by Foley to offer expert testimony at Foley's compensation hearing regarding the complex
22 area of eyewitness identification. Dr. Blinder's opinion was based on a fact pattern provided by Foley.
23 Specifically, Dr. Blinder was told prior to the hearing of the nature of the criminal offense, that another
24 person took responsibility for the crime, that the victim was wrong about the use of a gun and about
25 the lighting at the scene of the crime, and that the victim of the crime recanted his eyewitness
26 testimony.

27 Essentially, Dr. Blinder's expert opinion is that memories degrade over time and that
28 memories can be altered or modified depending on the circumstances. However, the more recent a

1 memory is recalled, the better the memory. But, even recent memories can be affected by external
2 influences. These external factors include, but are not limited to, the nature of the event and the
3 emotional state of the person. Oftentimes, a third person who witnesses a traumatic event without
4 being emotionally or physically involved in the event has a better and more reliable memory of what
5 transpired than does the person who is actually involved in the event. And, it is often the case that
6 the more information a witness has about a certain event, the likelier that the memory of the witness
7 can be adulterated.

8 The presence of a weapon also can impact a person's identification because it is likely that
9 the victim is focusing on the weapon rather than on the perpetrator holding the weapon. Also, a
10 witness whose initial eye-witness identification was shaky or uncertain can, over the passage of time,
11 become more confident that his or her memory of the event is correct. This may occur when the
12 witness makes identifications on more than one occasion, such as what often occurs in criminal
13 proceedings. In many instances, a photographic or in-person line-up is shown to a witness prior to or
14 at the time of an arrest, followed by additional identifications in and out of court. By the time a
15 witness testifies in front of a jury, the initial identification has become more certain and sure. This
16 does not mean that the initial and subsequent identifications are valid.

17 Finally, Dr. Blinder offered his opinion that notwithstanding the complexities associated with
18 memory retention, reliable identifications can and do occur. However, in his opinion and based on
19 law enforcement studies, approximately eighty-five percent of eyewitness identifications are
20 determined to be incorrect.

21 Louis DiPino was interviewed by Hendrickson on March 16, 2006. DiPino stated that at the
22 time of the burglary, he had worked for Buck for about five years and lived on the premises in a
23 trailer. Although his memory was vague as to the events of the burglary, he believes that Buck told
24 him that the male suspect had a gun and that the gun was pointed in his direction. DiPino also
25 described Buck as a moderate drinker, and he stated that he never saw Buck use any illegal drugs.

26 Additionally, the Attorney General provided documentary evidence about Foley's criminal
27 history. Prior to the burglary at Kelly's Pool Service, Foley sustained three felony convictions for first
28 degree burglary, one felony conviction for receiving stolen property, and one felony conviction for

1 vehicle theft. After serving four years in prison for those offenses, Foley remained free for less than
2 two years before returning to prison for 16 months on another felony conviction. Once released,
3 Foley returned to prison only 10 months later on a parole violation. On January 17, 1995, only six
4 weeks after his release, he committed the armed burglary at Kelly's Pool Service. Then, after serving
5 11 years for the burglary, Foley sustained yet another felony conviction in 2008.

6 According to the Attorney General, Foley's parole officer was assigned on November 27,
7 1993. This parole officer reported that Foley was using cocaine on or about August 10, 1994. Foley
8 was also a suspect in a vehicle vandalism case in Mountain View that occurred on or about
9 September 1, 1994. Foley's parole officer also had several discussions with Foley's wife about the
10 possibility that Foley could be sentenced to life in prison if he did not straighten out his life. Foley's
11 parole was subsequently violated and Foley returned to prison and remained in custody until
12 December 5, 1994.

13 The Attorney General also submitted the results of Foley's polygraph examination, taken
14 with Foley's consent. The polygraph examination indicated deception on three questions that
15 pertained to the burglary. Foley answered "no" to the following questions. First, "Did you try to steal
16 anything from that vehicle at Kelly's Pool Service on January 17, 1995?" Second, "Was that you
17 inside of that truck at Kelly's Pool Service on the morning of January 17, 1995?" Third, "Did that man
18 take a "slim jim" from you at Kelly's Pool Service in Campbell, California, January 17, 1995?"

19 Findings

20 A preponderance of the evidence supports the following findings:

- 21 1. Gaumond's hearing testimony is not credible.
- 22 2. Buck recanted his testimony about the presence of a gun due to undue pressure and
23 inaccurate information from those tasked to investigate the matter.
- 24 3. Buck did not recant his identification of Foley.
- 25 4. Memory can be affected by external factors.
- 26 5. Memory degrades over time and is most reliable shortly after the event.
- 27 6. Kenneth Foley's hearing testimony is not credible.
- 28

1 7. The hearing testimony of Pamela Wise is determined to be not credible.

2 8. Kenneth Foley served 4,020 days in prison subsequent to his conviction of second
3 degree burglary with an arming enhancement.

4 **Determination of Issues**

5 Penal Code section 4903 establishes the requirements for persons who claim to have been
6 imprisoned as a result of an erroneous conviction. In order to be successful on such a claim, a
7 claimant must prove the following by a preponderance of the evidence.¹⁴

8 (1) that the crime with which he was charged was either not committed at all, or, if committed,
9 was not committed by him;

10 (2) that he did not by any act or omission on his part, intentionally contribute to the bringing
11 about of the arrest or conviction for the crime; and

12 (3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.

13 "Preponderance of the evidence" means evidence that has more convincing force than that
14 opposed to it.¹⁵ If a claimant meets his burden of proof, the Board shall recommend to the legislature
15 that an appropriation of \$100.00 be made for each day of incarceration in prison served subsequent
16 to the claimant's conviction.¹⁶

17 In reaching its determination of the merits of the claim, the Board may consider the claimant's
18 mere denial of commission of the crime for which he was convicted, reversal of the judgment of
19 conviction on appeal, acquittal of the claimant on retrial, or the failure of the prosecuting authority to
20 retry claimant for the crime. However, those factors will not be deemed sufficient evidence to warrant
21 the Board's recommendation that a claimant be indemnified in the absence of substantial
22 independent corroborating evidence that the claimant is innocent of the crime charged.¹⁷

23
24 ¹⁴ *Tennison v. Victim Compensation and Government Claims Board* (2006) 152 Cal. App. 4th 1164.

25 ¹⁵ *People v. Miller* (1916) 171 Cal. 649, 652; *Tennison v. Victim Compensation and Government
26 Claims Board* (2006) 152 Cal. App. 4th 1164.

27 ¹⁶ Pen. Code, § 4904.

28 ¹⁷ Cal. Code Regs., tit. 2, § 641.

1. The Board may also consider as substantive evidence testimony of witnesses the claimant
2 had an opportunity to cross-examine, and evidence to which the claimant had an opportunity to
3 object, admitted in prior proceedings relating to the claimant and the crime with which he was
4 charged. Finally, the Board may also consider any information that it may deem relevant to the issue
5 before it.¹⁸

6 Foley argued that the Attorney General had presented no evidence to support their theory
7 that Gaumont, Bullington, and Kilpatrick agreed to help him avoid a three-strike sentence by falsely
8 testifying that Gaumont committed the burglary. However, as the Attorney General pointed out in the
9 hearing, the Attorney General does not have to produce any evidence in this hearing. Rather, Foley
10 must prove, by a preponderance of the evidence, that he did not commit the burglary and that he did
11 not contribute to his arrest or conviction. There is ample evidence that both Foley and his wife knew
12 that if he was convicted of another felony, that felony could be his third strike and he could face a
13 potential life sentence.¹⁹ In fact, when the police came to arrest Foley for the burglary, he barricaded
14 himself inside his bathroom and held the door closed against the officers as he attempted to dispose
15 of drugs in the toilet, some of which were found outside the bathroom door. This act demonstrates
16 Foley's knowledge that another criminal conviction likely would result in a life-time sentence.

17 Following his arrest, Foley was desperate to find someone to take responsibility for the
18 burglary. While incarcerated in the same jail as Foley, Gaumont received a note that instructed him
19 to take responsibility for the burglary. At the criminal trial, Gaumont testified that he took the note to
20 be a threat, but at the hearing for compensation, Gaumont changed his story and testified that he
21 didn't feel threatened by the note.

22 Because they were housed in the same facility, Foley and Bullington had ample opportunity
23 to communicate with Gaumont and provide him with details of the crime. Gaumont learned
24 information about the crime from investigators assigned to Foley's case. Gaumont testified at
25 Foley's compensation hearing that a common friend named Angela often passed information between

26 ¹⁸ Cal. Code Regs., tit. 2, § 641.

27 ¹⁹ After being convicted of two serious felonies as enumerated in the Penal Code, a defendant who is
28 convicted of a third felony can be sentenced to 25-years-to-life.

1 himself and Bullington, and that he and Bullington spoke about the case after she testified during the
2 time they were housed in adjoining jail cells. This information helps to explain Gaumond's knowledge
3 of the events of January 17, 1995.

4 After Gaumond was read portions of the police report, he explored with Foley's attorney
5 various options for taking responsibility for the burglary without actually admitting that he had
6 committed the crime. Gaumond's legal maneuvering concerned the trial judge, who stated on the
7 record during discussions outside the jury's presence that based on everything the judge had read
8 and heard, Gaumond's statements to investigators and others regarding his responsibility for the
9 burglary was "dripping with unreliability." The jury also found Gaumond to be not believable because
10 it found Foley guilty of second degree burglary with the arming enhancement.

11 Based on the record, it is determined that Gaumond's testimony, in its' entirety, is not
12 credible. He was not believed by the judge or jury in Foley's criminal case, and he is not believed
13 today. Gaumond was unable to explain his inability to identify Buck as the victim of his crime, other
14 than to say that he was looking at Buck's gun and not at Buck's face. Gaumond's testimony also
15 offered no explanation as to why Buck picked Foley out of a line-up instead of Gaumond. The fact
16 that Buck was accurate in his identification of Bullington, who was seated in a car supports the
17 conclusion that Buck accurately identified Foley. It was only after Buck was subjected to undue
18 pressure and misleading information from a deputy district attorney and a district attorney investigator
19 that Buck expressed doubt about the presence of a gun.

20 Dr. Blinder's testimony was illuminating and informative. Dr. Blinder succinctly presented
21 his expert opinion that eyewitness identification is usually not accurate, and that the passage of time
22 only degrades a persons memory. However, in preparing for his testimony, Dr. Blinder was provided
23 inaccurate information about the eye-witness identification. Dr. Blinder was informed that Buck
24 recanted his testimony about the gun. But, Dr. Blinder was not told why Buck changed his mind.
25 This information may or may not have impacted Dr. Blinder's testimony, but he should have been
26 apprised of the fact that Buck's recantation took place only after the questionable interview tactics
27 used by Hendrickson and Angel.
28

1 Foley argues that Buck's testimony at his trial should be given little if any weight because
2 Buck's testimony was not credible. Foley cites the occasion when Buck changed his testimony about
3 the presence of a gun after being interviewed by the district attorney investigator and deputy district
4 attorney. However, contrary to Foley's assertion that Buck's trial testimony was not credible because
5 he recanted about the gun, the evidence supports the conclusion that Buck's 2006 recantation about
6 the gun was an emotional reaction to extreme pressure from the prosecutor, rather than a falsehood
7 by the victim.

8 Angel and Hendrickson were tasked with investigating Foley's claim of innocence in 2006. They
9 told the victim that (1) a gun was never retrieved from the crime scene, leading Buck to believe that he
10 was tricked when a gun was shown at Foley's trial, (2) there was new evidence that a gun was not used
11 in the crime, (3) he would not get in trouble if he changed his story about the gun, (4) Foley was not a
12 "big time criminal," and (5) because of his testimony about the gun, Buck was led to believe that
13 Bullington had been separated for years from her young children while she was in prison. Hendrickson
14 and Angel also allowed Buck to believe that Bullington was still in prison when in fact she had been
15 released years earlier. Buck repeatedly expressed guilt and sadness that he was the reason Bullington
16 had been separated from her children for so many years. A transcript of the two-hour interview reveals
17 that near the end of the interview, the recording of the interview stopped, three minutes passed, and
18 when the recording resumed, Buck suddenly stated that there was "a strong possibility that the women
19 pointed a finger at him." Buck had never waivered about the presence of a gun until subjected to this
20 pressure. And, he has not recanted or expressed any concerns that he did not accurately identify
21 Foley.

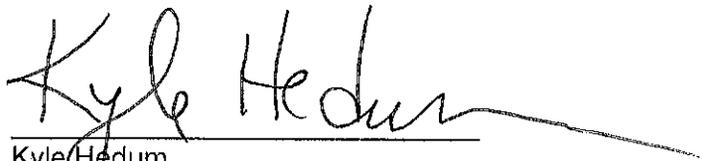
22 Given the fact that Buck was correct in his identification of Bullington, who was armed with a
23 pistol and seated in a car in Kelly's Pool Service parking lot, it is determined that Buck accurately
24 identified Foley as the man he confronted in his parking lot during the early morning hours of January
25 17, 1995. Buck first identified Foley in a photo line-up and then again in court. Buck also listened to
26 Foley's voice in court, and he again confirmed that Foley was the man he spoke with during the early
27 morning hours of January 17, 1995. In court, Buck also denied that Gaumond was the man he
28 confronted the morning of January 17, 1995. Furthermore, because Gaumond was unable to identify

1 Buck as the person who confronted and spoke to him in Kelly's Pool Service parking lot on January 17,
2 1995, Buck's identification of Foley is enhanced even more.

3 Grenard's written statement that he saw his daughter and Gaumond together the morning of
4 January 17, 1995, does not prove that Foley did not commit the crime because Foley had sufficient
5 time to commit the burglary before going to work. Moreover, Grenard's declaration that he saw
6 Bullington and Gaumond together several hours after the incident does not refute the victim's
7 identification of Foley.

8 It is therefore determined that Kenneth Foley has not proven, by a preponderance of the
9 evidence, that he was not properly arrested, convicted and incarcerated. Kenneth Foley's claim
10 under Penal Code sections 4900 et seq. is denied. Because Kenneth Foley has not met his burden,
11 it is not necessary to address the issue of pecuniary loss.

12
13
14 Date: February 18, 2010



Kyle Hedum
Hearing Officer
California Victim Compensation and
Government Claims Board