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6 **BEFORE THE VICTIM COMPENSATION BOARD**
7 **OF THE STATE OF CALIFORNIA**
8

9 In the Matter of:

10 **Charles Heard**

11 Claim No. 23-ECO-51

Amended Proposed Decision

(Penal Code §§ 1485.55, 4900 et seq.)

12 **I. Introduction**

13 On October 31, 2023, Charles Heard (Heard) submitted an application for compensation to the
14 California Victim Compensation Board (CalVCB) as an erroneously convicted person pursuant to
15 Penal Code section 4900, which was supplemented on November 20, 2023.¹ As supplemented, this
16 claim seeks compensation for 1,642 days of erroneous imprisonment based on the order vacating
17 Heard's 2010 conviction for first-degree murder and attempted robbery by writ of habeas corpus with a
18 finding of factual innocence.² Heard is now serving a life term for unrelated federal murder and
19 conspiracy convictions.³ He is represented by Mark Vermeulen. The Attorney General's Office is
20 represented by Dina Petrushenko. The matter was assigned to CalVCB Senior Attorney Caitlin
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22 ¹ Heard's Application (App.) includes: An Erroneously Convicted Person Claim Form; the email
23 accompanying Heard's Application; a Memorandum of Points and Authorities in Support of the
24 Erroneously Convicted Person Claim Form; and the Appendices in Support of the Erroneously
25 Convicted Person Claim Form: the San Francisco County Superior Court's February 19, 2019, order,
26 the First District Court of Appeal's Opinion, Reversing the Denial of Heard's Motion for a Finding of
27 Factual Innocence, the San Francisco County Superior Court's March 3, 2023, order granting Heard's
28 Motion for a Finding of Factual Innocence, and the San Francisco County Superior Court's May 2,
2023, order Determining the Period of Heard's Imprisonment.

² App. at p. 3; Attorney General's Clarification, submitted via email on November 14, 2023; Heard's
Clarification, submitted via email on November 20, 2023.

³ App. at p. 45.

1 Christian. As mandated by Penal Code section 1485.55, it is recommended that CalVCB approve
2 Heard's claim in the amount of \$229,880 as indemnification for the injury he sustained as a result of
3 this erroneous conviction, if sufficient funds are available upon appropriation by the Legislature.⁴

4 **II. Procedural Background**

5 **A. Heard's State and Federal Convictions**

6 On July 16, 2009, Heard was arrested for, and, in San Francisco County Superior Court case
7 number 210246 [2429070], charged with murder, attempted robbery, being a felon in possession of a
8 firearm, and participation in a criminal street gang, with enhancements for the personal use of a
9 firearm and committing these offenses for the benefit of a criminal street gang. After deliberating for
10 over a week, the jury found Heard guilty of murder and attempted robbery.⁵ The jury was either unable
11 to reach a verdict or found untrue all of the remaining charges and enhancements, and Heard was
12 sentenced to 25 years to life in prison. The Court of Appeal affirmed Heard's convictions in an
13 unpublished decision on October 29, 2012.⁶

14 On January 9, 2014, a federal grand jury indicted Heard and several other defendants charged
15 under the Racketeer Influenced and Corrupt Organizations Act in United States (U.S.) District Court
16 case number 13CR00764.⁷ On January 13, 2014, after 1,642 days⁸ of incarceration for his California
17 state convictions, a federal judge granted the U.S. Attorney's petition for a writ of habeas corpus *ad*
18 *prosequendum*, directing Heard be transferred to federal custody pending resolution of the charges
19 against him.⁹ The charges included two murders with the use of a firearm unrelated to Heard's state
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22 ⁴ Pen. Code, §§ 1485.55, subds. (b)-(c), 4904.

23 ⁵ *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 1, 26; Cal. Code Regs., tit.
24 2, § 617.8, subd. (b) [CalVCB has authority to take official notice of documents listed in Evidence Code
section 452]; Evid. Code § 452, subd. (d) [authorizing judicial notice of court records].)

25 ⁶ *Id.* at p. 1.

26 ⁷ App. at pp. 37, 45.

27 ⁸ The number of days were calculated using the online "Days Calculator" located at <<<https://www.timeanddate.com/date/duration.html>>>

28 ⁹ Order Granting Petition for Writ of Habeas Corpus *Ad Prosequendum*, submitted in conjunction with
Heard's Clarification via email on November 20, 2023.

1 court convictions and conspiring to engage in racketeering.¹⁰ On March 15, 2018, a jury found Heard
2 guilty of all charges, and, on June 8, 2018, he was sentenced to four concurrent life sentences to be
3 served in a federal prison after completion of his state sentence.¹¹ On June 11, 2018, the federal court
4 ordered Heard be returned to state custody.¹² On June 15, 2018, Heard returned to state prison.¹³

5 **B. Heard's Habeas Petition and Motion for a Finding of Factual Innocence**

6 In November of 2018, Heard filed a petition for writ of habeas corpus in San Francisco County
7 Superior Court case number 210246 based on new evidence, obtained during the federal trial,
8 establishing the prosecution failed to disclose exculpatory evidence in accord with *Brady v. Maryland*
9 (1963) 373 U.S. 83.¹⁴ On March 23, 2020, after an evidentiary hearing, the court granted the petition
10 and vacated Heard's California state conviction and the resulting sentence but stayed the order until
11 March 23, 2020, when it dismissed the case entirely.¹⁵ On March 27, 2020, Heard was returned to
12 federal custody, where he continues to serve the concurrent life sentences imposed for his federal
13 convictions.¹⁶

14 In the interim, Heard filed a motion for a finding of factual innocence pursuant to Penal Code
15 section 1485.55 based on the evidence introduced in support of his habeas petition.¹⁷ In August of
16 2020, after reviewing additional briefing and hearing the parties' arguments, the court denied Heard's
17 motion. Heard appealed.¹⁸

18 On September 28, 2022, in a unanimous, unpublished decision, the First District Court of
19 Appeal reversed the trial court's order and remanded the case with directions the court grant Heard's
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21 ¹⁰ App. at pp. 14-15.

22 ¹¹ App. at p. 45.

23 ¹² App. at p. 16.

24 ¹³ App. at p. 75.

25 ¹⁴ App. at pp. 17, 45.

26 ¹⁵ App. at p. 18.

27 ¹⁶ App. at p. 75.

28 ¹⁷ App. at pp. 18-19.

¹⁸ App. at p. 19.

1 motion for a finding of factual innocence and determine “what period of unlawful
2 imprisonment [Heard] was subjected to,” in accordance with *People v. Etheridge* (2015) 241
3 Cal.App.4th 800, 810.¹⁹

4 On March 3, 2023, the trial court granted Heard’s motion for a finding of factual innocence and,
5 in accord with the Appellate Court’s order, on May 2, 2023, issued an order finding Heard’s period of
6 “unlawful imprisonment” included all 2,307 days he spent in county jails and California state prisons
7 both before and after his federal conviction.²⁰ Specifically, the court’s calculation included the time
8 from Heard’s arrest on July 16, 2009, through execution of the federal writ of habeas corpus *ad*
9 *prosequendum* on January 27, 2014 (e.g., 1,656 days), and then from June 15, 2018, when Heard was
10 returned to state custody, through March 27, 2020, (e.g., 651 days), when Heard was returned to
11 federal custody.²¹

12 C. Heard’s Erroneously Convicted Person Claim

13 On October 31, 2023, Heard submitted an Erroneously Convicted Person Claim Form with
14 supporting documentation.²² Heard initially requested \$322,980 in compensation based on the
15 superior court’s determination he spent 2,307 days in county jails and California state prisons.²³ On
16 November 7, 2023, CalVCB notified the parties clarification was needed on the issue of injury.
17 Specifically, CalVCB asked whether Heard’s injury included only the 1,639 days preceding his January
18 9, 2014, indictment in federal court.

19 The Attorney General timely responded on November 14, 2023, urging Heard’s injury be
20 calculated to include 1,642 days, beginning with Heard’s July 16, 2009, arrest and ending on January
21 12, 2014, the day before issuance of the federal writ of habeas corpus *ad prosequendum*.²⁴ Later that
22 same day, at the request of claimant’s counsel, the time to provide clarification was extended to

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24 ¹⁹ App. at p. 69.

25 ²⁰ App. at pp. 72, 74-75.

26 ²¹ App. at p. 75.

27 ²² App. at pp. 2, 8.

28 ²³ App. at p. 3.

²⁴ Attorney General’s Clarification, submitted via email on November 14, 2023.

November 27.²⁵ Heard timely provided clarification on November 20, 2023. Notably, Heard requested injury be calculated in accordance with the Attorney General's suggestion to include 1,642 days of imprisonment for a total of \$229,880 in compensation.²⁶ On November 28, CalVCB notified the parties that Heard's claim was filed, and the administrative record closed. A proposed decision issued on December 8, 2023, which was amended following Heard's rebuttal argument on December 13, 2023.

III. Factual Background

A. Evidence Presented at the Original Trial

1. The Attempted Robbery and Murder of Richard Barrett

Shortly after midnight on November 25, 2008, two African American men wearing black hoods approached Richard Barrett on the sidewalk, near a San Francisco bar.²⁷ The men pushed Barrett against a wall and clawed at his chest and neck area.²⁸ Barrett wrestled free and took off around a corner. The men, one of whom was armed with a gun, pursued Barrett.²⁹ Moments later, two shots were fired, and the two men ran back around the corner and down the street.³⁰ Duane R. saw the men attack Barrett, heard the gunshots, and, moments later, the men rushed by him. Duane followed the men down the street and watched as they disappeared into a car and sped off. Duane quickly flagged down a police officer and described the getaway car as a dark-colored sedan with possible front-end damage.³¹ He also said Barrett was wearing a diamond-encrusted pendant on a chain outside his clothing at the time of the attack.³²

By the time the police arrived, Barrett, who had been shot twice in the back, was dead.³³

²⁵ Heard's Request for an Extension of Time, submitted via email on November 14, 2023.

²⁶ Heard's Clarification, submitted via email on November 20, 2023.

²⁷ *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 2-3.

²⁸ *Id.* at p. 3.

²⁹ *Id.* at pp. 3, 8.

³⁰ *Id.* at pp. 2-3, 8.

³¹ *Id.* at p. 3; *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 4-5.

³² *Id.* at p. 2.

³³ *Id.* at pp. 4-5.

1 Although the chain for his pendant was missing, police concluded no property was taken because
2 Barrett had a diamond ring, Rolex watch, cash, and a bag of cocaine.³⁴ Later that night, two police
3 officers pursued a car matching Duane's description of the getaway car.³⁵ The high-speed chase
4 weaved through San Francisco city streets, but police eventually lost the car when it drove onto the
5 freeway. Four days later, a gray Nissan Maxima with front-end damage was towed. The car was later
6 identified as the sedan police pursued the night of the shooting. At trial, Duane confirmed the Maxima
7 resembled the getaway car he saw. Heard was detained while in possession of the Maxima six days
8 before the shooting.³⁶

9 **2. Identification Evidence**

10 The police obtained a surveillance video from the street, which showed two men walking
11 towards where Barrett was attacked moments before the attempted robbery and then fleeing the scene
12 moments after the shooting.³⁷ Duane and Francis S., who were standing outside a nearby bar when
13 Barrett was attacked, confirmed the men in the video were the men who attacked Barrett, but only
14 Francis suggested Heard was depicted in the video.³⁸ Duane consistently said he did not see the
15 assailant's faces, the gun, or the shooting. Duane said only that one man was taller than the other,
16 and, when presented with a photo lineup, that Heard maybe resembled, or just looked like the "type" of
17 guy he saw.³⁹

18 Mike R. and David S. were on the sidewalk with Francis before the shooting.⁴⁰ Francis, Mike,
19 and David all saw Barrett's attack and Barrett, along with his assailants, ran towards them when Barrett
20 attempted to escape his attackers.⁴¹ Mike and David retreated into the bar when they realized one of
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22 ³⁴ *Id.* at p. 5.

23 ³⁵ *People v. Charles Heard, supra*, at pp. 4-5.

24 ³⁶ *People v. Charles Heard* (October 29, 2012, A130983) [*nonpub. opn.*], p. 5.

25 ³⁷ *Ibid.*; App. at p. 13.

26 ³⁸ *People v. Charles Heard* (October 29, 2012, A130983) [*nonpub. opn.*], pp. 3-4.

27 ³⁹ *Id.* at pp. 2-3; App. at pp. 47-48.

28 ⁴⁰ *Id.* at pp. 3-4, 8.

⁴¹ *Id.* at pp. 3-4, 8; App. at p. 46.

1 the assailants was armed with a gun.⁴² Mike did not see the assailants' faces, but David and Francis
2 did.⁴³ When David heard the gunshots, he ran back outside to find Francis crouched down in a
3 doorway.⁴⁴ After he joined her, David and Francis both looked up and saw the shooter, who grinned at
4 them before running off. However, when David was shown a photographic lineup containing Heard's
5 photo, he denied seeing the shooter. At trial, David said Heard was "absolutely not" the shooter.⁴⁵

6 The night of the shooting, Francis told police the shooter was slightly taller than Barrett and the
7 other assailant and might have a gold tooth.⁴⁶ Over a month later, Francis was shown two lineups and
8 asked to point to whoever she recognized.⁴⁷ Francis identified Heard, but said she was only 95 percent
9 sure he was one of the assailants. She could not be certain without seeing his teeth.⁴⁸ At some point,
10 the officer mentioned Heard had gold "teeth."⁴⁹ Ten months later, at the preliminary hearing, Heard
11 opened his mouth to reveal a gold grill or crowns. Francis testified that, in light of this, she was 100
12 percent certain Heard was the shooter, even though she saw his face for only a few seconds, or a brief
13 moment.⁵⁰

14 The defense called Psychologist Geoffrey Loftus, an expert in human perception and memory,
15 and Doctor Benham Bavarian, a biometrics consultant.⁵¹ Dr. Bavarian, an expert in measuring facial
16 features, testified there were significant differences between Heard's face and the faces of the two men
17 shown in the surveillance videos.⁵² In support of this testimony, Heard attempted to introduce photos of
18 two other individuals, Dennis A. and Gregory W. The court denied his request, finding the photos were

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20 ⁴² *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 8.

21 ⁴³ App. at pp. 47, 50; *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 3-4, 8.

22 ⁴⁴ *Id.* at p. 8; App. at p. 54.

23 ⁴⁵ App. at p. 50; *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 8.

24 ⁴⁶ App. at pp. 47, 50; *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 3-4, 8.

25 ⁴⁷ *People v. Charles Heard, supra*, at p. 4; App. at pp. 47, 55.

26 ⁴⁸ App. at p. 51.

27 ⁴⁹ App. at p. 55.

28 ⁵⁰ App. at pp. 47, 13.

⁵¹ App. at p. 50.

⁵² App. at pp. 50-51.

1 inadmissible evidence of third-party culpability since there was no evidence linking those two
2 individuals to the attempted robbery and murder of Barret.⁵³ The prosecution's rebuttal witness, a
3 photographic technologist for the FBI and an expert in forensic video and imaging analysis, claimed Dr.
4 Bavarian's methodology and conclusions were unreliable.⁵⁴

5 **3. Evidence of Other Criminal Conduct**

6 At trial, the prosecution introduced evidence Heard had a history of armed robbery and
7 belonged to a gang known for armed robbery.⁵⁵ Specifically, the gang expert testified that both Hughes
8 and Heard were active members of the Central Divisidero Players (CDP), a San Francisco street gang
9 known for committing robberies, selling narcotics, and possessing illegal firearms, and Heard had
10 participated in several gang-related crimes between 2003 and 2008.⁵⁶

11 The jury also heard the recording of a phone call from July 16, 2008, five months before
12 Barrett's death. During this call, Heard discussed armed robberies, narcotics sales, and buying and
13 selling jewelry. He mentioned a chain, medallion, watch, and ring he sold for \$15,000. He also
14 suggested the caller steal jewelry at a Sacramento club where Heard previously stole a medallion worth
15 \$25,000.⁵⁷

16 On August 26, 2008, Heard sold a gold cross and chain, and a gold pendant and chain to a San
17 Francisco pawnbroker named Benjamin Shemano for \$2,525. Shemano further testified he purchased
18 jewelry from Heard at 5:06 p.m. on November 25, 2008, seventeen hours after Barrett's death. Cell
19 phone records confirmed Heard was in the vicinity of Shemano's pawnshop, which was also near
20 where Barrett was shot, at that time.⁵⁸

21 Reginald T. testified Heard robbed him a few weeks after Barrett's death. Reginald left a club
22 wearing a white gold chain and a \$22,000 pendant outside of his clothing when Heard and two other
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24 ⁵³ *Id.* at pp. 18-21; App. at p. 37.

25 ⁵⁴ App. at p. 51.

26 ⁵⁵ *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], pp. 2, 6-7.

27 ⁵⁶ *Id.* at p. 7.

27 ⁵⁷ *Id.* at p. 2.

28 ⁵⁸ *Ibid.*

1 men wearing black hoodies approached him. Heard was either armed with a gun or simulated a gun
2 and demanded Reginald turn over his money and jewelry. Reginald handed over his pendant, chain,
3 watch, cell phone, and cash. When a friend who was standing nearby saw what was happening and
4 yelled for Reginald, the three men fled. A few days later, Heard was arrested after being found with
5 Reginald's pendant and chain.⁵⁹

6 **B. Exculpating Evidence was Obtained During the Federal Trial**

7 Sergeant Jackson (Jackson), a member of the San Francisco Police Department's gang task
8 force, testified at the federal trial as an expert on gangs in the Western Addition neighborhood.
9 Jackson had daily contact with gang members in Western Addition gangs, including the CDP, since
10 2003, when he began working as a patrol officer in the neighborhood. He had assisted with hundreds
11 of gang-related investigations and knew everything that could be known about gangs in the Western
12 Addition.⁶⁰ He routinely watched surveillance videos to corroborate information, including which gang
13 members were associating with each other and who was committing crimes on behalf of the
14 neighborhood gangs. Jackson had contacted every alleged or validated gang member in the Western
15 Addition and had daily contact with most of these individuals as the result of arrests, detentions,
16 consensual contacts, and custodial interviews.⁶¹

17 When asked about the murder of Barrett, Jackson disclosed that, at some point before the
18 preliminary hearing on the murder and attempted robbery of Barrett, he and three or four other
19 members of the San Francisco gang task force were invited to the District Attorney's Office to view the
20 surveillance video. After huddling around a computer monitor to watch the video, the officers told the
21 prosecuting attorney the men in the video were two of three people: Heard, Dennis A., or Gregory W.⁶²
22 The District Attorney's Office did not disclose the gang task force's identification of the men in the
23 video.⁶³ Jackson was included on the prosecution's witness list but never called to testify.⁶⁴ Instead,

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25 ⁵⁹ *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 6.

26 ⁶⁰ App. at p. 52.

27 ⁶¹ App. at pp. 52-53.

28 ⁶² App. at p. 57.

⁶³ App. at pp. 13, 18.

1 another officer was called to testify as a gang expert.⁶⁵

2 Jackson was then shown the surveillance video. Noting the screen was larger and resolution
3 improved, Jackson identified the two men in the video as Gregory W. and Dennis A.⁶⁶ Jackson had
4 known Heard, Dennis A., and Gregory W. since 2004 or 2005 and had regular contact with them since
5 then. He was very familiar with all three men, all of whom were gang members in the Western Addition.
6 Jackson saw them on videos and in photos during investigations and was confident Heard was not
7 present in the video. The prosecution did not rebut this testimony.⁶⁷

8 **C. Evidence Presented During the State Habeas Proceedings**

9 **1. Testimony Casting Doubt on Francis' Identification**

10 Doctor Kathy Pezdek, a cognitive scientist, testified as an expert in memory and eyewitness
11 identification.⁶⁸ She cited several psychology principles that cast doubt on the accuracy of Francis'
12 identification. Specifically, studies suggested Francis' identification was not likely accurate given 1) the
13 nature of the event, 2) Francis' mental state at the time of the event, 3) the circumstances surrounding
14 her identification of Heard, and 4) the characteristics of the assailants themselves. Dr. Pezdek
15 explained that, with each of these factors, the likelihood of a misidentification increases – and the
16 reliability of an identification decreases – especially for Francis, who was asked to make a cross-racial
17 identification in a suggestive setting more than one month after a crime involving a gun that was
18 committed by multiple assailants in a highly stressful environment.⁶⁹

19 The prosecution was unable to rebut much of Dr. Pezdek's testimony and relied only on
20 circumstantial evidence to bolster Francis' identification.⁷⁰

23 ⁶⁴ App. at pp. 41, 52.

24 ⁶⁵ App. at p. 50; *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 7.

25 ⁶⁶ App. at pp. 52-53.

26 ⁶⁷ App. at p. 53.

27 ⁶⁸ App. at p. 53.

27 ⁶⁹ App. at pp. 53-56.

28 ⁷⁰ App. at pp. 61-62, 69.

1 **2. Sergeant Jackson Testified Gregory W. and Dennis A., Not Heard, Attacked Barrett.**

2 Jackson again testified to the nature of his work and his exposure to Heard, Gregory W., Dennis
3 A., and other members and associates of Western Addition gangs.⁷¹ Jackson reiterated he met Heard
4 in 2004 or 2005 and encountered Heard many times between their meeting and Heard's 2008 arrest for
5 the robbery of Reginald.⁷² He and Heard spoke during consensual encounters on the street, criminal
6 investigations, arrests, and searches. Jackson viewed Heard in photographs and video footage and
7 characterized himself as "very" familiar with Heard.⁷³

8 Jackson was also "very familiar" with Gregory W. and Dennis A. Jackson met Gregory W. and
9 Dennis A. in 2005. Jackson routinely interacted with both men after that time and "absolutely" knew
10 them well enough to identify them in the surveillance video. Jackson again identified the men in the
11 surveillance video as Gregory W. and Dennis A.⁷⁴ Jackson was one hundred percent certain the men
12 in the video were Gregory W. and Dennis A. Jackson did not know why he was unable to identify them
13 when they were huddled around the computer screen. He was not sure if the issue was the resolution
14 on the computer monitor, but the video shown at the federal trial appeared to be of better quality and
15 clearly depicted Gregory W. and Dennis A., not Heard.⁷⁵

16 **3. The Courts' Observations**

17 The superior court made credibility determinations before ruling on Heard's petition for writ of
18 habeas corpus. The trial court expressly found Jackson's identification of Gregory W. and Dennis A.
19 "very, very convincing and credible," noting Jackson's extensive history with Western Addition gangs
20 and individual gang members.⁷⁶ The court found his testimony was, itself, sufficient grounds for
21 granting Heard's habeas petition. It noted that, although Francis' identification was "powerful" evidence,
22 science cast doubt on her identification and the original trial, and the science on the veracity of
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24 ⁷¹ App. at pp. 56-57.

25 ⁷² *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 6.

26 ⁷³ App. at p. 56.

27 ⁷⁴ App. at p. 56.

28 ⁷⁵ App. at p. 57.

⁷⁶ App. at pp. 57-58.

1 eyewitness testimony had only grown since that time.⁷⁷

2 Notwithstanding these findings, the superior court then heavily relied on Francis' identification to
3 deny Heard's motion for a finding of factual innocence. Specifically, the court found Heard had not
4 established his factual innocence by a preponderance of the evidence thanks to Francis' "unwavering"
5 identification and the corroborating evidence that established Heard was in the area.⁷⁸

6 Though not necessarily binding,⁷⁹ the Appellate Court considering Heard's motion for factual
7 innocence also found Jackson's testimony strongly persuasive.⁸⁰ The Court emphasized the
8 prosecution made no effort to challenge Jackson's identification during the federal or state habeas
9 proceedings. To the contrary, it just encouraged the Court to instead rely on Francis' identification.⁸¹
10 The Court further observed the prosecution was unable to rebut several of the factors reducing the
11 reliability of Francis' identification.⁸² Lastly, the court noted that, despite testimony Heard was wearing
12 the same brand of jeans as one of Barrett's assailants on December 18, 2008, just a few weeks after
13 Barrett's murder, the brand of clothing worn by Barrett's assailants was not actually visible in the
14 video.⁸³ The court therefore found Jackson's testimony was sufficient to overcome the testimony of
15 Francis and any evidence corroborating it.⁸⁴

20 ⁷⁷ App. at p. 58.

21 ⁷⁸ App. at pp. 58-59.

22 ⁷⁹ Pen. Code, §§ 1485.5, subd. (c); 4903, subd. (c); see also *Jack v. Ring LLC* (2023) 91 Cal.App.5th
23 1186, 1211-1212 ("Appellate courts do not make factual findings; we review 'the correctness of a
24 judgment [or order] as of the time of its rendition'"); *People v. Cervantes* (2020) 46 Cal.App.5th 213,
224 ("appellate courts are not equipped to accept new evidence and make factual findings").

25 ⁸⁰ App. at p. 61.

26 ⁸¹ App. at pp. 61-62.

27 ⁸² App. at p. 65.

28 ⁸³ *People v. Charles Heard* (October 29, 2012, A130983) [nonpub. opn.], p. 6; App. at p. 49-50, 67.

⁸⁴ App. at pp. 61, 69.

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.⁸⁵ Specifically, subdivision (a) of section 4900 provides:

Any person who, having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison or incarcerated in county jail pursuant to subdivision (h) of Section 1170 for that conviction, is granted a pardon by the Governor for the reason that the crime with which they were charged was either not committed at all or, if committed, was not committed by the person, or who, being innocent of the crime with which they were charged for either of those reasons, shall have served the term or any part thereof for which they were imprisoned in state prison or incarcerated in county jail, may, under the conditions provided under this chapter, present a claim against the state to the California Victim Compensation Board for *the injury sustained by the person through the erroneous conviction and imprisonment or incarceration.*⁸⁶

Plainly understood, section 4900 applies only to persons who were erroneously convicted and imprisoned for a felony offense that they did not commit and limits relief to the injury caused by their imprisonment or incarceration.

To prevail on a claim under subdivision (a) of Penal Code section 4900, claimants typically bear the burden to prove by a preponderance that (1) the crime with which they were convicted either did not occur or was not committed by them and (2) they suffered injury as a result of their erroneous conviction.⁸⁷ Once such a claim is received and filed, Penal Code section 4902 requires the Attorney General to submit a written response.⁸⁸ Thereafter, under Penal Code section 4903, a hearing before a hearing officer ensues, at which the claimant and Attorney General may present evidence concerning innocence and injury.⁸⁹ Upon the requisite showing of innocence and a finding of injury,

⁸⁵ Pen. Code, § 4900, subd. (a).

⁸⁶ Pen. Code, § 4900, subd. (a), emphasis added; see also Pen. Code, § 1170, subd. (h) (allowing prison term for specified felony convictions to be served in local county jail instead of state prison).

⁸⁷ Pen. Code, §§ 4900, subd. (a); 4903, subd. (a).

⁸⁸ Pen. Code, § 4902, subd. (a).

⁸⁹ Pen. Code, § 4903, subd. (a).

1 Penal Code section 4904 requires approval of the claim, at a rate of \$140 per day of incarceration, if
2 sufficient funds are available.⁹⁰

3 An exception to this process occurs when a claimant obtains a finding of factual innocence.
4 Under subdivision (b) of Penal Code section 1485.55, when a court has granted a writ of habeas
5 corpus, “the person may move for a finding of factual innocence by a preponderance of the evidence
6 that the crime with which they were charged was either not committed at all or, if committed, was not
7 committed by the petitioner.”⁹¹ If the court makes such a finding, then under subdivision (c) of section
8 1485.55, “the [CalVCB] board shall, without a hearing, recommend to the Legislature that an
9 appropriation be made and any claim filed shall be paid pursuant to Section 4904.”⁹²

10 Penal Code section 4904, in turn, provides that, upon a finding by the board “that the claimant
11 has sustained injury through their erroneous conviction and imprisonment,” the board “shall approve
12 payment for the purpose of indemnifying the claimant for the injury if sufficient funds are available,
13 upon appropriation by the Legislature.”⁹³ Section 4904 further provides that the “amount of the
14 payment shall be a sum equivalent to one hundred forty dollars (\$140) per day of incarceration served,
15 and shall include any time spent *in custody*, including a county jail, *that is considered to be part of the*
16 *term of incarceration*.”⁹⁴ Even with a finding of factual innocence, CalVCB is statutorily obligated to
17 determine the extent of injury caused by the erroneous conviction and incarceration and may request
18 additional documents and arguments as needed to complete this calculation.⁹⁵

19 A. Innocence

20 Pursuant to the court’s finding under Penal Code section 1485.55, CalVCB unequivocally
21

22 ⁹⁰ Pen. Code, § 4904.

23 ⁹¹ Pen. Code, § 1485.55, subd. (b).

24 ⁹² Pen. Code, § 1485.55, subd. (c).

25 ⁹³ Pen. Code, § 4904.

26 ⁹⁴ Pen. Code, § 4904, emphasis added.

27 ⁹⁵ Pen. Code, §4904 (authorizing payment only if “the [CalVCB] has found that the claimant has
28 sustained injury through their erroneous conviction and imprisonment”), see also Senate Bill 78 (2023-
2024 Reg. Sess.), as amended Pen. Code, § 4904 eff. Jan. 1, 2024 (authorizing CalVCB to “request
from both parties additional documents or arguments as needed to calculate compensation”).

1 accepts that Heard is factually innocent of the attempted robbery and murder of Barrett. The
2 exonerating evidence includes expert testimony identifying the two assailants in the video and casting
3 doubt on Francis' ability to accurately identify the shooter in light of the psychological limits of her brief
4 glance at the shooter.⁹⁶ Although Heard was in the area and committed a different robbery while
5 wearing a black hood on a different date, that evidence was sufficiently undermined by the highly
6 credible testimony establishing that Gregory W. and Dennis A., not Heard, attempted to rob and then
7 murdered Barrett.⁹⁷ As observed by the Appellate Court: "Jackson's powerful testimony exculpating
8 [Heard] was sufficient to overcome Francis' testimony and [the] evidence corroborating it," especially in
9 light of the science casting doubt on the accuracy of Francis' identification.⁹⁸ Accordingly, the
10 administrative record adequately demonstrates Heard's innocence for purposes of compensation
11 under Penal Code section 4900 as an erroneously convicted offender.

12 **B. Injury**

13 By statute, the amount of compensation "shall be a sum equivalent to one hundred forty dollars
14 (\$140) per day of incarceration served and shall include any time spent in custody, including a county
15 jail, that is considered to be part of the term of incarceration."⁹⁹ This compensation is "for the purpose
16 of indemnifying the claimant for the injury" sustained "through their erroneous conviction and
17 imprisonment...."¹⁰⁰ Though the legislature has not provided a specific definition, the legislative history
18 reflects that the term "injury" refers to "whatever harm is suffered by a person who is wrongly
19 imprisoned...."¹⁰¹ As recently clarified by regulation, the requisite injury "may be established by
20 showing that, but for the erroneous conviction, the claimant would not have been in custody."¹⁰² Thus,
21 the injury contemplated includes only those days "spent illegally behind bars, away from society,"
22

23 ⁹⁶ App. at pp. 53-58.

24 ⁹⁷ App. at pp. 56-57, 58, 69.

25 ⁹⁸ App. at p. 69.

26 ⁹⁹ Pen. Code, § 4904.

27 ¹⁰⁰ Pen. Code, § 4904.

28 ¹⁰¹ Senate Floor Analysis of Sen. Bill No. 635 (2015-2016), as amended Sept. 3, 2015, at pp. 4-5

¹⁰² Cal. Code of Regs., tit. 2, § 640, subd. (f).

1 solely as a result of the erroneous conviction.¹⁰³ Consequently, the injury to be found by CalVCB for
2 purposes of compensation under Penal Code section 4904 is not merely the number of days for which
3 a claimant was actually incarcerated for an erroneous conviction.

4 As agreed by the parties, applying these provisions here means Heard's injury amounts to only
5 1,642 of the 2,307 days the superior court determined Heard spent in county jails and California state
6 prisons.¹⁰⁴ Although the factual findings and credibility determinations that served as the basis for
7 habeas relief and the finding of factual innocence are binding on CalVCB, as is the finding of factual
8 innocence itself, CalVCB is not bound by the superior court's determination that Heard's injury includes
9 all 2,307 days Heard spent in county jails and California state prisons for case number 210246.¹⁰⁵ To
10 the contrary, CalVCB is required to independently determine the scope of the claimant's injury in a
11 manner consistent with the statutes and regulations governing this proceeding.¹⁰⁶

12 In this claim, CalVCB agrees with the parties that Heard's injury for his erroneous California
13 state conviction commenced with Heard's July 16, 2009, arrest, and that, contrary to the superior
14 court's order, concluded on January 12, 2014, the day before the writ of habeas corpus *ad*
15 *prosequendum* was issued.¹⁰⁷ At that point, Heard no longer would have been free from custody but
16 for his erroneous conviction, as he was properly incarcerated pending federal charges, and
17 compensation is, therefore, not warranted for any days of incarceration on or after January 13, 2014.
18 The record demonstrates, and the parties agree, Heard would have been confined in federal custody
19 for his still valid federal convictions regardless of his erroneous California conviction on January 13,
20 2014, and for any period of incarceration since that time.¹⁰⁸

21 In fact, the record shows Heard would not have been free from custody at any point following
22 his placement in federal custody, as he remains incarcerated for his still-valid federal convictions and
23

24 ¹⁰³ *Holmes v. Calif. Victim Comp. & Gov't Claims Board* (2015) 239 Cal.App.4th 1400, 1405.

25 ¹⁰⁴ Heard's Clarification submitted via email on November 20, 2023.

26 ¹⁰⁵ Pen. Code, § 1485.5, subd. (c), 1485.55, 4903, subd. (c).

27 ¹⁰⁶ Pen. Code, § 4904.

28 ¹⁰⁷ Attorney General's Clarification submitted via email on November 14, 2023.

¹⁰⁸ App. at p. 45, 75.

1 is presently serving four concurrent life sentences in a federal prison.¹⁰⁹ Despite Heard's federal
2 convictions and continued incarceration, the law mandates CalVCB approve compensation for Heard's
3 erroneous California state conviction.¹¹⁰ By statute, an otherwise eligible claim may only be denied "if
4 the board finds by a preponderance of the evidence that a claimant pled guilty with the specific intent
5 to protect another from prosecution for the underlying conviction for which the claimant is seeking
6 compensation."¹¹¹ As this narrow basis for denial does not apply, Heard's claim must be approved in
7 accord with the mandatory provisions for compensation of individuals who have obtained a finding of
8 factual innocence.¹¹²

9 CalVCB therefore agrees with the parties' agreed upon calculation that Heard is entitled to
10 compensation for only the 1,642 days of incarceration solely attributable to his erroneous California
11 state court conviction.¹¹³ Given the statutory rate of \$140 per day, Heard is therefore entitled to
12 indemnification in the amount of \$229,880, if sufficient funds are available upon appropriation by the
13 Legislature.¹¹⁴

14 **V. Conclusion**

15 As mandated by Penal Code section 1485.55, the undersigned hearing officer recommends
16 CalVCB approve payment to Heard in the amount of \$229,880 for his claim as an erroneously
17 convicted offender under Penal Code section 4900 as indemnification for the injury sustained for 1,642
18 days of imprisonment as a result of his vacated convictions if sufficient funds are available upon
19 appropriation by the Legislature. No compensation is recommended for the remaining 665 days of
20
21

22
23 ¹⁰⁹ App. at p. 45.

24 ¹¹⁰ Cal. Code Regs., tit. 2, § 640, subd. (c); Pen. Code, §§ 1485.55, subds. (a) & (c), 4901, subds. (a)-
(b).

25 ¹¹¹ Pen. Code, § 4903, subd. (e)

26 ¹¹² Pen. Code, § 1485.55, subd. (b).

27 ¹¹³ Holmes v. California Victim Compensation & Government Claims Bd. (2015) 239 Cal.App.4th 1400,
1405.

28 ¹¹⁴ Pen. Code, § 4904, subd. (a).

1 Heard's incarceration, as he would not likely have been free given his still valid federal convictions for
2 which he remains imprisoned for life.

3 Date: December 14, 2023

Caitlin Christian

Caitlin Christian
Hearing Officer
California Victim Compensation Board

RESPONSE RECEIVED

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December 13, 2023

Via Email: board.meeting@victims.ca.gov

California Victim Compensation Board
PO Box 3036
Sacramento, CA 95812

Re: Penal Code § 4900 Claim of Charles Heard (23-ECO-51)
Board Meeting scheduled for December 20, 2023

To the Board:

This will respond to the letter/email from CalVCB Board Liaison Andrea Burrell dated December 8, 2023, inviting argument/comment on the Proposed Decision. We are in agreement as to the appropriateness of compensation for 1,642 days of unlawful imprisonment with indemnification in the amount of \$229,880 for purposes of this proceeding. Below I set forth certain textual modifications that should be made to the Proposed Decision for the sake of accuracy and completeness, with proposed deletions of text appearing in ~~strikeout~~ and proposed additions of text appearing in *italics*.

Proposed Decision at p. 1:19: A correction is needed to reflect my actual name:
“He is represented by ~~Michael~~ *Mark* Vermeulen.”

Proposed Decision at p. 3:1-3: This references App. at p. 45, which contains the following text from the Court of Appeal’s 2022 unpublished opinion from Mr. Heard’s appeal of the Superior Court’s denial of his motion for a finding of factual innocence (hereinafter sometimes “2022 Court of Appeal unpub’d opn.”): “The federal district court sentenced Appellant to four life terms in prison, to be served concurrently with each other and his state sentence.” The Proposed Decision’s reference to the sentencing should be modified as follows:

On March 15, 2018, a jury found Heard guilty of all charges, and, on June 8, 2018, he was sentenced to four concurrent life sentences to be served ~~in a federal prison after completion of~~ *concurrently with* his state sentence.

Proposed Decision at p. 7:4-5: This is a discussion of what witnesses David and Francis saw and said regarding the shooting. This particular reference asserts that David was shown a photographic lineup and denied seeing the shooter. While there is reference in the materials to a male witness being shown a photographic lineup (see App. at p. 50 (2022 Court of Appeal unpub’d opn. at p. 7)), that reference is to witness Mike R., as follows: “When police showed him a photo lineup that included Appellant's photo, Mike R. did not identify anyone.” There is

no similar reference to David being shown a photographic lineup. (See App. at p. 50 (2022 Court of Appeal unpub'd opn. at p. 7) (paragraph immediately following the paragraph re: Mike R.).) There is, however, clarity that "David S. said Appellant [Mr. Heard] was not the person who chased Barrett. ... David S. said the shooter was 'absolutely not' Appellant [Mr. Heard]," as also noted in the Proposed Decision. (See App. at p. 50; see also *People v. Charles Heard* (2012) 2012 Cal. App. Unpub. LEXIS 7871, *13 (hereinafter "2012 Court of Appeal unpub'd opn.") ("[David] Stribble said the shooter was 'absolutely not' appellant.")) The Proposed Decision should be modified as follows:

~~However, when David was shown a photographic lineup containing Heard's photo, he denied seeing the shooter. In David's statements to the police, he said Heard was not the person who chased Barrett, and At~~ at trial, David said Heard was "absolutely not" the shooter.

Proposed Decision at p. 8:12-16: This is a discussion of some of the evidence at 2008 jury trial regarding a phone call and talk of chains and items being sold, with a footnote (fn. 57) citing to *People v. Charles Heard* (September 28, 2022, A161599) [nonpub. opn.]. The discussion referenced in the Proposed Decision appears at p. 6 of the Court of Appeal opinion, rather than p. 2. The footnote citation should be corrected as follows:

⁵⁷ *Id.* at p. 26.

Proposed Decision at p. 8:17-21: This paragraph discusses the selling of a chain to a pawn broker (Benjamin Shemano), and cell phone records. The footnote reference (fn. 58) similarly cites to the 2022 Court of Appeal unpub'd opn. at p. 2 (stating "⁵⁸ *Ibid.*"). There is no discussion of this in the 2022 Court of Appeal unpub'd opn. The text appears to paraphrase a couple of disparate paragraphs from the 2012 Court of Appeal unpublished opinion from Mr. Heard's direct appeal. While I might quibble with the paraphrasing, that's not critical. I suggest, though, that the footnote citation be corrected, as follows:

...the vicinity of Shemano's pawnshop, which was also near where Barrett was shot, at that time.⁵⁸

⁵⁸ ~~*Ibid.*~~ 2012 Court of Appeal unpublished opinion at pp. *3, *11.

Proposed Decision at p. 11:8-10: Sgt. Jackson testified at the federal trial as an expert on gangs in the Western Addition, but Mr. Barrett was not shot in the Western Addition; he was shot in the North Beach neighborhood, a different area of San Francisco. The Proposed Decision should be modified as follows:

Sergeant Jackson (Jackson), a member of the San Francisco Police Department's gang task force, testified at the federal trial as an expert on gangs in the Western Addition neighborhood, ~~where Barrett was shot.~~

Proposed Decision at p. 9:18-21: The timing of the viewing of the surveillance video by Sgt. Jackson in connection with the 2008/2009 investigation of the Barrett homicide, and the nature of the state court charges, should be corrected as follows, to comport with Sgt. Jackson's testimony in the state habeas corpus proceeding:

When asked about the murder of Barrett, Jackson disclosed that, at some point ~~before the~~

~~preliminary hearing on~~ during the investigation of the attempted murder and attempted robbery of Barrett, in 2008 he and three or four other members of the San Francisco gang task force were invited to the District Attorney's Office to view the surveillance video.^{fn}

^{fn} *In re Charles Heard on Habeas Corpus*, SF Superior Ct. Writ No. 7298, Reporter's Transcript, 03/11/2020, at pp. 55-56, 63, 65-66, 71-72.

Proposed Decision at p. 11:4-5: While the Barrett homicide occurred in November 2008, Mr. Heard was not arrested until July 16, 2009. The Proposed Decision should be modified as follows:

Jackson reiterated he met Heard in 2004 or 2005 and encountered Heard many times between their meeting and Heard's 2008 2009 arrest regarding the November 2008 homicide.

Proposed Decision at p. 12:7: To balance the authority cited in fn. 78, it would be appropriate to reference the authority cited by the Court of Appeal in its 2022 unpublished opinion directing that the motion for a finding of factual innocence be granted, as follows:

Though not necessarily binding,⁷⁸ the Appellate Court ..."

⁷⁸ Pen. Code, §§ 1485.5, subd. (c); 4903, subd. (c); see also *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1211-1212 ("Appellate courts do not make factual findings; we review 'the correctness of a judgment [or order] as of the time of its rendition'"); *People v. Cervantes* (2020) 46 Cal.App.5th 213, 224 ("appellate courts are not equipped to accept new evidence and make factual findings"); but see *App. at p. 60* ("We review the denial of Appellant's factual innocence motion de novo. (*People v. Caldwell* (2018) 29 Cal.App.5th 180, 182.) In doing so, we "'make[] an original appraisal of all the evidence to decide whether or not [we] believe[]' the outcome should have been different." (*In re George T.* (2004) 33 Cal.4th 620, 634.)) (Footnote omitted.)

Proposed Decision at p. 16:6-11:

While I do not agree with the legal analysis stated as to the principles set forth in the Proposed Decision at lines 6-11 and the related authority cited in footnotes 104 and 105 (vis-à-vis the binding effect of a Superior Court's orders concerning a compensation claim when issued upon reversal, remand and directive by the Court of Appeal, as occurred in the present habeas corpus proceedings (see App. at pp. 20-23)), Mr. Heard does not wish to continue to contest this analysis in the Proposed Decision in this proceeding, as noted in my November 20, 2023 email to the Board.

Relatedly, in the Memorandum submitted with the Claim, I presented authority and analysis concerning the doctrine of collateral estoppel / issue preclusion. (See App. at pp. 24-27.) That issue has not been addressed in the Proposed Decision, nor was it addressed by the Attorney General. Nevertheless, similar to the issue concerning the binding effect of the Superior Court's orders, given that we're arriving at a mutually agreed resolution of the matter, this issue need not be addressed now, as it is moot.

With these clarifications, I have no objections or proposed edits to the content at p. 16:6-11 of the Proposed Decision.

Conclusion: We respectfully request that the Proposed Decision be modified as noted above, and that with those modifications, the Board accept and adopt the Proposed Decision.

Thank you for the opportunity to respond.

Sincerely,

Mark R. Vermeulen

Mark R. Vermeulen

cc: Dina Petrushenko (via email: dina.petrushenko@doj.ca.gov)
Jessica Leal (via email: jessica.leal@doj.ca.gov)