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8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
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11 In the matter of the Application of:

12 **Mark Wilson**

13 Application No. G570604

Proposed Decision

(Penal Code § 4900 et seq.)

14 **Introduction**

15 A hearing on this claim for compensation as an erroneously convicted felon was conducted on
16 June 12, 2009, by Kyle Hedum, the Hearing Officer assigned to hear this matter by the Executive
17 Officer of the Victim Compensation and Government Claims Board. Claimant Mark Wilson appeared
18 and testified at the hearing and was represented by attorney Dwight Ritter. Deputy Attorney General
19 (AG) Clifford Zall, represented the California Department of Justice, Office of the Attorney General.

20 Due to issues regarding notice, the AG did not appear at the hearing. Therefore, the record
21 remained open to allow both parties the opportunity to submit post-hearing summaries. The AG was
22 also given the option to re-open the hearing to provide evidence or to cross-examine the claimant.
23 On June 22, 2009, the AG submitted a two page summary, and on July 6, 2009, claimant's attorney
24 submitted a four page summary.¹ Additional documents were subsequently received that offered
25 information on the notice provided to Mark Wilson by the court prior to the entry of the guilty pleas
26 which form the basis for this request for compensation². The record was then closed.

27 _____
28 ¹ Claimant and AG Summaries attached.

² Plea Forms Dated December 17, 1997, and February 15, 2002, are attached.

1 After considering all the evidence, it is determined that Mark Wilson has not proven by a
2 preponderance of the evidence that he did not, by any act or omission on his part, either intentionally
3 or negligently contribute to the bringing about of his arrest or conviction for the crimes for which he
4 was imprisoned. It is therefore recommended that the Board deny Mark Wilson's claim for
5 compensation pursuant to Penal Code section 4900 et seq.

6 **Background**³

7 On June 14, 1991, Mark Wilson pled guilty to the crime of felony oral copulation with a person
8 under the age of 18⁴ and he was sentenced to two years in state prison. At the time of the offense,
9 Mark Wilson was 22 years old and the victim was 16 years old. In 1992, Mark Wilson was released
10 from prison after serving 15 months. Thereafter, he registered as a sex offender with law
11 enforcement every year. However, in 1997, Mark Wilson decided to stop registering, and was
12 arrested.

13 On December 20, 1997, Mark Wilson pled guilty to failing to register and he was sentenced to
14 16 months in state prison.⁵ He was released from prison after serving 10 months and 20 days.

15 Mark Wilson was again arrested for failing to register, and in February 2002, he pled guilty to
16 failing to register. Although he was sentenced to 16 months in state prison, he was released after
17 serving 12 months.

18 Mark Wilson returned to prison on five additional occasions for violating the conditions of his
19 parole relating to his previous convictions for failure to register as a sex offender and for new criminal
20 offenses which included open container, petty theft, disturbing the peace, and forgery of an official
21 document.

22 On August 7, 2006, the Orange County Superior Court granted Mark Wilson's request for a
23 writ of habeas corpus and found that Mark Wilson should be immediately released from prison, where
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26 ³ The background is based on a published appellate opinion, hearing testimony, and claim-related
27 documents provided by the claimant and the AG.

28 ⁴ Penal Code § 288a(b)(1).

⁵ Mark Wilson's 16 month sentence was the low-term for this offense. Mid-term was 2 years, and
upper-term was 3 years.

1 he was incarcerated for a parole violation relating to his earlier conviction for failure to register as a
2 sex offender.

3 In support of its' ruling, the Orange County Superior Court cited *People v. Hofsheier* (2006) 37
4 Cal. 4th 1185, wherein the California Supreme Court, on March 6, 2006, determined that it was a
5 violation of equal protection to require mandatory sex registration for defendants convicted of oral
6 copulation with a person under the age of 18 while defendants convicted of having sexual intercourse
7 with a person under the age of 18 were subject only to discretionary or permissive rather than
8 mandatory registration.

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10 On April 25, 2007, the court vacated Mark Wilson's prior guilty pleas and convictions for failing
11 to register as a sex offender, and held that his prior state prison sentences were entered in error and
12 dismissed the case. Mark Wilson timely filed an application for compensation as an erroneously
13 convicted felon with the Victim Compensation and Government Claims Board.

14 **Summary of *Hofsheir***

15 In *Hofsheir*, the California Supreme Court evaluated the contrasting treatment of persons
16 convicted of oral copulation with minors⁶ and those convicted of unlawful sexual intercourse with
17 minors.⁷ Penal Code section 290 imposes mandatory sex registration on defendants convicted of
18 oral copulation with a person under the age of 18, while defendants convicted of having sexual
19 intercourse with a person under the age of 18 were instead subject only to discretionary registration.
20 Discretionary registration applies if the court determines that the offense was (1) committed as a
21 result of sexual compulsion or for purposes of sexual gratification, and states the reasons for those
22 findings, and (2) the court states the reasons for requiring lifetime registration as a sex offender.⁸

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24 The Court explained that it has a choice of remedies when a statutory classification violates the
25 constitutional guarantee of equal protection of the laws. In choosing the proper remedy, the court's
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27 ⁶ Penal Code § 288a(b)(1).

28 ⁷ Penal Code § 261.5.

⁸ Penal Code § 290 has mandatory and discretionary sexual offender registration provisions.

1 primary concern is to ascertain which alternative the Legislature would prefer. For example, in the case
2 of benefits afforded welfare recipients, the court may either withdraw benefits of the welfare statute
3 from the favored class or extend those benefits to the excluded class. In another example, the court
4 can either invalidate a rape statute or expand it to include spousal rape
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6 The Court rejected the option of invalidating as a whole the mandatory lifetime registration
7 provisions. The Court found that the provisions serve an important and vital public purpose by
8 compelling registration of serious and violent sex offenders who require continued public surveillance,
9 and total invalidation would be unacceptable to the Legislature. The court further found that the
10 Legislature would probably prefer elimination of the mandatory lifetime registration requirement for
11 persons convicted of oral copulation with 16- or 17-year-old minors rather than imposing a mandatory
12 lifetime registration requirement for persons convicted of unlawful intercourse with minors 16 to 17
13 years old. The Supreme Court held that discretionary registration could apply even if the defendant
14 was not convicted of a sexual offense provided that the crime for which the defendant was convicted
15 had a sexual purpose.
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17 **I. Mark Wilson's PC 4900 Hearing Testimony and Argument**

18 Mark Wilson testified to the following information at the hearing before the Board. He was 22
19 years old at the time he was charged with the crime of oral copulation with a female who was 16 years
20 old. When Mark Wilson entered his guilty plea and before he was sentenced to prison, his defense
21 attorney, the district attorney, and the court agreed that Mark Wilson was not required to register as a
22 sex offender. According to Mark Wilson's testimony, the original plea form indicated this same
23 disposition.⁹ Mark Wilson was released on parole after serving 15 months in state prison.

24 Prior to being released from prison in 1992, Mark Wilson was told by staff at the California
25 Department of Corrections that he was required to register as a sex offender. Mark Wilson protested
26 the registration requirement and told the staff that sex registration was not part of his plea and

27 ⁹ Mark Wilson was given additional time to submit proof that sex registration was not part of his plea,
28 but no additional documents were received. However, there is no reason to doubt his memory of the
event because his knowledge that he was not required to register as a sex offender actually hinders his
ability to prevail on this claim.

1 sentence. Mark Wilson was told that if he did not sign a form acknowledging his duty to register, he
2 would not be released from prison. Mark Wilson acknowledged the registration requirement and he
3 was released from prison. Mark Wilson registered as a sex offender for the next five years, but he
4 stopped registering in 1997 because he was concerned that he would be stigmatized because it was
5 about that time that Megan's law came into effect.¹⁰ Multiple incarcerations in prison followed, some for
6 violations of parole, and some for new crimes.

7 Mark Wilson's attorney argued at the hearing that Mark Wilson should never have been
8 imprisoned for failing to register as a sex offender because the California Supreme Court determined in
9 *Hofsheir* that the registration requirement for persons convicted of violating Penal Code section
10 288a(b)(1) was unconstitutional. Mark Wilson's attorney also argued that Mark Wilson did not
11 contribute to his arrests or convictions by twice pleading guilty to violations of the sexual registration
12 requirement. The two pleas entered by Mark Wilson on December 20, 1997,¹¹ and in February 2002,¹²
13 were made under duress and undue coercion because Mark Wilson was told that if he was found guilty
14 he might be sentenced to more than 16 months in state prison.

15 According to correspondence and other sources, it appears that Mark Wilson has filed a
16 concurrent civil suit against unidentified parties whom he alleges are responsible for his incarceration.

17 **II. AG's Argument at the PC 4900 Hearing**

18 The AG presented the following argument at the hearing. First, contrary to Mark Wilson's
19 assertions, section 290 of the California Penal Code was not determined to be unconstitutional by the
20 California Supreme Court in *Hofsheir*. The California Supreme Court held that although the mandatory
21 registration requirements were a violation of equal protection and thus not constitutional, the trial court
22 could still impose lifetime registration requirements on a defendant if it exercised its discretion and
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26 ¹⁰ The law is named for seven-year-old Megan Kanka, who was kidnapped, raped, and murdered by
27 Jesse Timmendequas, a repeat violent sexual offender. Megan's home state of New Jersey passed
the first so-called "Megan's Law" in 1994.

28 ¹¹ December 17, 1997, plea agreement is attached.

¹² February 15, 2002, plea agreement is attached.

1 found that registration was appropriate.¹³ The AG argued that since Mark Wilson could have been
2 subject to discretionary registration, Mark Wilson had not met his burden of proving by a
3 preponderance of evidence that he did not commit the crimes for which he was imprisoned.

4 Second, the AG maintained that Mark Wilson is not eligible for compensation because he
5 clearly contributed to his arrests and convictions by failing to register and then twice pleading guilty to
6 violations of Penal Code section 290.

7 Finally, the AG argued that even if it was determined that Mark Wilson proved that his conviction
8 was erroneous and that he did not contribute to his arrests and convictions, he would not be eligible for
9 compensation for the time he served in jail or in prison for parole violations or other separate and
10 distinct violations of the law. Penal Code sections 4900 et seq. offers compensation only for
11 erroneously convicted felons who serve prison time as a result of the conviction. Had the Legislature
12 intended to offer compensation to persons who were incarcerated in jail prior to being convicted or for
13 persons whose parole was erroneously revoked, it would have specifically done so.

14 Findings

15 A preponderance of the evidence supports the following findings:

- 16 1. When Mark Wilson was sentenced in 1991 as a result of pleading guilty for violating
17 Penal Code section 288a(b)(1), he was not required to register as a sex offender.
- 18 2. Mark Wilson knew, at all relevant times, that he was not required to register
19 as a sex offender.
- 20 3. The duty to register as a sex offender was imposed on Mark Wilson by staff at the
21 California Department of Corrections.
- 22 4. Mark Wilson twice knowingly and voluntarily pled guilty to violating section 290 of the
23 Penal Code.
- 24 5. Mark Wilson served 22 months and 20 days in prison as a result of two Penal Code
25 section 290 convictions.

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¹³ No evidence was presented at the hearing to show that the trial court that dismissed Mark Wilson's case considered whether or not Mark Wilson should be subject to discretionary registration.

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Determination of Issues

I. Penal Code Sections 4900 et seq.

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

- (1) that the crime with which he was charged was either not committed at all, or, if committed, was not committed by him;
- (2) that he did not by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of the arrest or conviction for the crime; and
- (3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.¹⁴

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

In reaching its determination of the merits of the claim, the Board may consider the claimant's mere denial of commission of the crime for which he was convicted, reversal of the judgment of conviction on appeal, acquittal of the claimant on retrial, or the failure of the prosecuting authority to retry claimant for the crime. However, those factors will not be deemed sufficient evidence to warrant the Board's recommendation that a claimant be indemnified in the absence of substantial independent corroborating evidence that the claimant is innocent of the crime charged.¹⁷ The Board may also consider as substantive evidence testimony of witnesses the claimant had an opportunity to cross-examine, and evidence to which the claimant had an opportunity to object, admitted in prior

¹⁴ Pen. Code, § 4903, *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and Government Claims Board* (2006) 152 Cal. App. 4th 1164.

¹⁵ *People v. Miller* (1916) 171 Cal. 649, 652.

¹⁶ Pen. Code, § 4904.

¹⁷ Cal. Code Regs., tit. 2, § 641.

1 proceedings relating to the claimant and the crime with which he was charged. Finally, the Board
2 may also consider any information that it may deem relevant to the issue before it.¹⁸

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4 **II. Did Mark Wilson Satisfy His Burden to Obtain Compensation?**

5 **A. Mark Wilson did not Commit the Subject Crimes:** On June 12, 2006, the Orange
6 County Superior Court granted Mark Wilson's habeas corpus request and found that he should be
7 immediately released from prison because he was not subject to mandatory sexual offender
8 registration based upon the *Hofsheier* decision. On April 25, 2007, the superior court vacated Mark
9 Wilson's prior guilty pleas and convictions and held that his prior state prison sentences were entered
10 in error and dismissed the cases. The record is silent as to whether the trial court considered using
11 its discretionary power to order Mark Wilson to register as a sex offender.

12 Because the Orange County Superior Court vacated Mark Wilson's prior guilty pleas and
13 convictions and held that his prior state prison sentences were entered in error and dismissed the
14 case, it is determined that Mark Wilson has proven by a preponderance of the evidence that he did
15 not commit the crimes for which he was incarcerated and which are the subject of this claim.

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17 **B. Mark Wilson Contributed to his Arrests and Convictions:** However, a successful
18 claimant must also prove by a preponderance of the evidence that he did not, by any act or omission
19 on his part, either intentionally or negligently contribute to the bringing about of his arrest or
20 conviction for the crime with which he was charged. Mark Wilson registered as a sex offender for five
21 years following his conviction in 1992 for the crime of oral copulation with a person who was 16. In
22 1997, Mark Wilson decided to stop registering. He was subsequently arrested in December 1997
23 and again on February 2002, both times for failing to register as a sex offender. Mark Wilson twice
24 entered guilty pleas for these failures to register. He argued at the hearing that he did not contribute
25 to his arrests or convictions because his pleas were involuntary and coerced because the registration
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¹⁸ Cal. Code Regs., tit. 2, § 641.

1 requirement was unconstitutional and also because he faced a stiffer sentence should he be
2 convicted after a trial.

3 Mark Wilson's argument is without merit. Although someone at the California Department of
4 Corrections and Rehabilitation appears to have coerced Mark Wilson into signing an
5 acknowledgment that he was required to register as a sex offender prior to being released from
6 prison, Mark Wilson's two subsequent guilty pleas were not coerced or involuntary. Acceptance of a
7 plea agreement is a tactical decision made by Mark Wilson with his attorney's input. Mark Wilson
8 testified at his Penal Code section 4900 hearing that he knew that he was not required to register as
9 a sex offender as a result of his Penal Code section 290 conviction. Instead of accepting a plea
10 bargain, Mark Wilson could and should have proceeded to trial, and he likely would have prevailed,
11 based on his testimony and a copy of his original sentencing attesting that sex offender registration
12 was never a condition of his original plea and sentence. Mark Wilson also had five years in which he
13 could have addressed the sex offender registration requirement issue by speaking with the court, his
14 defense attorney, or his parole officer. He should not have entered guilty pleas on two separate
15 occasions for violating a law that he knew did not apply to him.
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18 It is therefore determined that Mark Wilson has not proven, by a preponderance of the
19 evidence, that he did not by any act or omission on his part, either intentionally or negligently,
20 contribute to the bringing about of the arrest or conviction for the crime with which he was charged.

21 Mark Wilson's claim under Penal Code section 4900 et seq. is denied.

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23 Date: October 6, 2009

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25 Kyle Hedum
26 Hearing Officer
27 Victim Compensation and
28 Government Claims Board