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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 Claim of:

Proposed Decision

12 **Ricky Nelson**

(Penal Code § 4900 et seq.)

13 **Introduction**

14 On June 1, 2011, Ricky Nelson filed his claim for compensation as an erroneously convicted
15 person. On March 12, 2013, a telephonic and in-person hearing on Nelson's claim was conducted.¹
16 Kyle Hedum was assigned to hear this matter by the Executive Officer of the California Victim
17 Compensation and Government Claims Board (Board). Nelson testified via telephone and was
18 represented by attorney Eric Larson, who appeared personally. The California Department of Justice,
19 Office of the Attorney General (AG), was represented by Ivan Marrs and Galen Farris who also
20 personally appeared.

21 After considering all the evidence, it is determined that Nelson has not proven by a
22 preponderance of the evidence that the crime with which he was charged was not committed by him

23 ¹ On December 1, 2011, after being released from prison and after filing his claim for compensation as
24 an erroneously convicted person, Nelson and a friend who was a gang member approached a man
25 pumping gas at a filling station. According to the probation report, Nelson's friend demanded money and
26 when the man refused, the gas nozzle was knocked out of the man's hand. The man retreated into the
27 gas station store, but Nelson and his friend followed the man inside the store where they repeatedly
28 punched and kicked him. Nelson then picked up a metal food rack and violently struck the man while
he was lying on the floor. Nelson pled guilty to assault with a deadly weapon and was sentenced to
four years in state prison. Nelson's Penal Code section 4900 hearing was delayed until he was
released from prison.

1 and that he did not, by any act or omission on his part, intentionally contribute to the bringing about of
2 his arrest or conviction for the crime with which he was charged. Therefore, it is recommended that
3 Nelson's claim for compensation pursuant to Penal Code section 4900 et seq. be denied.

4 **Background²**

5 On the evening of Sunday, December 31, 2006, Nelson and his girlfriend Brittany B. went to the
6 Time Out Tavern (Tavern) with some friends, including co-defendant Kelley and his girlfriend Shannon
7 F. Brittany B. drove the women in her white Saturn and one of Nelson's male friends drove the men in
8 a red Corolla. Kelley was wearing khaki pants and a white long-sleeve jacket. Nelson had on a jacket,
9 a brown Angels baseball cap, khaki pants, and wore a grill.³

10 The group met at the Tavern, where 13 security personnel (bouncers) were on duty. Herbert H.
11 was working as a bouncer that night. He was approached by Nelson outside who asked him if he
12 wanted to join the Army. Nelson told Herbert H. that he was an Army recruiter. Herbert H. said he did
13 not and that he wanted to finish school instead. Herbert H. called over to Nicholas M., another
14 bouncer, who was a Marine because he thought it would be funny. The conversation between Nelson
15 and Nicholas M. got heated with Nelson stating that Marines are "pussies." Nicholas M. walked back
16 inside the Tavern and Kelley went out onto the patio and apologized to Herbert H. for Nelson's conduct.
17 Herbert H. said that Kelley was very cordial and they shook hands.

18 Brandon W., the eventual murder victim, was working as a bouncer that night. Stephen C., who
19 was Brandon's best friend, arrived at the Tavern at approximately 1:00 a.m. to get Brandon W.'s keys
20 because he was going to spend the night at Brandon W.'s apartment. Stephen C. went out onto the
21 patio where Nelson approached him and began talking about the Army. Nelson asked Stephen C. what

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23 ² In support of his claim for compensation, Nelson submitted the following: claim form; brief and
24 supporting documents; unpublished appellate decision; Exhibit A (remittitur); and Exhibit B
25 (employment records). The AG submitted the following: opposition brief, response brief, portions of a
26 2005 Saturn owner's manual; compact disk; Del Monte Blocc Crips street gang information; probation
27 information; California Department of Corrections and Rehabilitation information; Garden Grove Police
28 Department narrative; Orange County Sheriff's Department report; Anaheim Police Department report;
photo line-up; Nelson interrogation; clerk's transcript; and reporter's transcript on appeal.

³ A grill is a decorative mouthpiece worn over a person's teeth.

1 he was doing with his life. At first Nelson was easygoing and Nelson suggested that Stephen C. enlist
2 and let the Army pay for his college. Stephen C. said that he had a 3.86 grade point average and did
3 not need the Army to pay for college, an answer that did not make Nelson "very happy."

4 Stephen C. went back inside the Tavern. Brandon W. was cleaning up a glass that broke on the
5 floor. Brandon W. had his cell phone and other possessions in his hand, and he asked Stephen C. to
6 hold them for him. Stephen C. agreed, and he said goodbye to a few people and left. He was driving
7 home when he realized that he had Brandon W.'s cell phone, so he headed back to the Tavern and he
8 gave Brandon W. his cell phone.

9 Gerardo S., head of security for the Tavern, testified that Nelson was eventually asked to leave
10 the bar by bouncers, and that Nelson and another person left the bar. Gerardo S. testified at trial that
11 Kelley was escorted out as well due to an incident on the patio. According to Gerardo S., Nelson and
12 Kelley were aggressive with bouncers stationed on the dance floor, shouting and "making aggressive
13 gestures with their hands."

14 Nicholas M., Gerardo S., Brandon W., and Rob C., another bouncer, walked Kelley and Nelson
15 out of the Tavern. Nicholas M. testified before the grand jury that Nelson and Kelley were "waving,
16 doing stuff with their fingers. I don't know any of it, what it means."⁴

17 Bryan L., a Navy Corpsman who was working as a bouncer that night, testified that he heard
18 Nelson on the dance floor say, "F*** Marines." Nelson was combative, so Bryan L. put his hand on
19 Nelson's back and told Nelson it was time to leave. Nelson swung his arm and told Bryan L. not to
20 touch him. Nelson continued to insult the Marines while also telling people that he was an Army
21 recruiter.

22 Bryan L. said that Kelley was not an issue until they all got outside. Gerardo S. and four
23 bouncers stood in front of the Tavern and Gerardo S. told Nelson that he was finished for the night and
24 to leave the premises. Nelson was very loud and said that they had no right to kick him out. He swore
25 at the bouncers, called them a bunch of "pussies," and said he would "kick all your ass [sic]." Nelson
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27 ⁴ Clerk's Transcript, volume 1, page 154.
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1 was thumping his chest, challenging the bouncers to fight while continuing to call them "pussies" and
2 swearing at them. Kelley was behind Nelson, pacing back and forth, and "pretty much shouting the
3 same type of words." Gerardo S. said that Kelley and Nelson were about four-to-five feet apart while
4 they were challenging the bouncers to fight and that from time to time Kelley and Nelson spoke to each
5 other.

6 Nelson continued to get more belligerent and Kelley became more agitated. Nelson took off his
7 jacket and outer shirt, leaving him in a white tank top on his upper body. He was about four or five feet
8 in front of the bouncers at the time. Nelson appeared to be "drunk and very mad and angry." Nelson
9 continued thumping his chest, swearing at the bouncers, and threatened to "kick all your asses." Kelley
10 also took off his jacket, leaving him in a white tank top. Once Kelley took off his jacket, he also started
11 thumping his chest, yelling, pointing at the bouncers, and calling them "pussies," and threatening "to
12 kick all your guy's asses."

13 Gerardo S. told his bouncers to maintain their distance and to keep repeating to Nelson that he
14 would not be allowed back in and that he should leave. Gerardo S. offered several times to call Nelson
15 a cab and continued telling Nelson to calm down. Up to this point, none of the bouncers had any
16 physical contact with Nelson or Kelley.

17 Herbert H., one of the bouncers, walked outside and saw a large number of bouncers on the
18 sidewalk. Nelson and Kelley were very hostile and were shouting threats. Kelley shouted that he was
19 "going to come back here with a bunch of friends" and kill them. Nelson continued to challenge people
20 to fight. Each time Kelley and Nelson moved back, deeper into the parking lot, the bouncers, working in
21 a line, moved up. Herbert H. testified before the grand jury that Nelson and Kelley were "jumping
22 around, screaming, cussing, saying that they were going to come back and kill us."⁵

23 According to Shannon F., Kelley's girlfriend, the bouncers were talking loudly, but not yelling, at
24 Nelson and Kelley. She said that Kelley was mad and ready to fight, screaming and challenging the
25 bouncers. Nelson also screamed and swore at the bouncers and challenged them to fight. She urged
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27 ⁵ Clerk's Transcript, volume 1, page 126.
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1 Kelley to leave, but he walked away from her and continued to challenge and scream at the bouncers.
2 Shannon F. said that Brittany B. attempted to get Nelson to leave, but Nelson told Brittany B., "If you
3 don't get out of my way, I am going to punch you."

4 Gerardo S. said that he saw a woman from Nelson and Kelley's group throw her arms around
5 Kelley in an attempt to stop him, but Kelley threw or pushed her off. Stephen C. said that he saw a
6 female attempt to get Kelley and Nelson to leave, physically holding them back and telling them to get
7 in the car and leave. Kelley and Nelson continued "to push through, push forward, and just continue
8 what they were doing."

9 Bryan L. had been sent back into the Tavern to watch the dance floor shortly after Nelson and
10 Kelley left the bar. He stayed inside for about 15 minutes before going back outside. By this time, all
11 the bouncers were out front and Kelley and Nelson had been pushed "a little bit further back" from the
12 Tavern and deeper into the parking lot. Bryan L. saw Kelley run to the trunk of a white car and retrieve
13 something from within the trunk and put it behind his back. Gerardo S. said that Kelley ran to a white
14 four-door automobile and retrieved an item from the trunk, put it behind his back, and started to return.
15 Stephen C. saw Kelley go to the car and retrieve something from the back seat area of the car.

16 Gerardo S. immediately called the police and told dispatch that one of the men had a weapon.
17 He said that he didn't see the weapon, but it looked like a "knife or something." Gerardo S. advised his
18 bouncers over their radios of the existence of a possible weapon. The bouncers pulled back because
19 they did not know what Kelley had obtained from the car.

20 At the time Kelley went to the white car, Nelson became involved in an altercation with an active
21 duty Marine with a prosthetic leg. While on his second tour of duty in Iraq, Isaiah R. was hit by a rocket
22 propelled grenade and had to have his right leg amputated. He has a prosthetic right leg, and he still
23 wore a brace on his left leg and had a slight limp. He was leaving the Tavern with his cousin,
24 Frankie R. and he noticed that the bouncers had formed a line in front of the Tavern. It appeared that
25 three men were "trying to start a fight with them." Two of the men wore khaki pants and white shirts.
26 One had a grill in his mouth. Isaiah R. testified before the grand jury that Nelson and Kelley were
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1 "waving their arms around like they are doing, I don't know, some gang, looked like those signs..."⁶

2 Isaiah R. also testified at Nelson's trial that Nelson and Kelley "looked pretty riled up. They were
3 making hand gestures and cussing at the vicinity of the bouncers."⁷

4 Upon seeing the confrontation, Isaiah R. told his cousin to keep his head down, not say
5 anything, and keep heading for the car. On their way to their car, Nelson said to Frankie R., "Bitch,
6 what are you looking at?" Nelson then rushed Frankie R. and tried to hit him, but Frankie R. stepped
7 back and was only grazed. Frankie R. testified before the grand jury that Nelson kept yelling "U.S.
8 Army, cuz, U.S. Army." Nelson also kept saying that "Marines are pussies." Isaiah R. told Nelson that
9 he was a Marine, had lost his leg in Iraq, and that if Nelson was really in the Army he would not say
10 "those things."

11 Gerardo S. got in between Nelson and Isaiah R. Nelson continued his aggressive stance,
12 pounding his chest, and trying to reach over Gerardo S. to throw a punch. Gerardo S. repeatedly told
13 Nelson to leave and that the police had been called. He had to physically restrain Nelson from
14 attacking Isaiah R. and Frankie R. Gerardo S. pushed Nelson in the chest, backing Nelson up to the
15 white car until Nelson, with one foot already inside the car, was almost seated. Gerardo S. then heard
16 that someone had been stabbed.

17 Stephen C. saw a mass of people pushing and shoving and fighting. He grabbed Kelley, who
18 turned around and struck Stephen C. on the left side of the neck. Stephen C. said that it did not feel
19 like a normal punch. Stephen C. then took Kelley to the ground.

20 Herbert H. heard Brandon W. say, "blood, blood." He said that Brandon W. sounded nervous,
21 but Herbert H. did not see any blood at that point. Brandon W. then said that somebody had a knife.
22 Brandon W. then grabbed his throat with both hands, and Herbert H. saw "a lot of blood" coming
23 through Brandon W.'s hands. Brandon W. went to his knees and fell over.

24 Herbert H. saw that Kelley was face down and that Stephen C. was on top of him, holding

26 ⁶ Clerk's Transcript, volume 1, page 154.

27 ⁷ Reporter's Transcript, volume 3, page 547.

1 Kelley's wrist. Kelley had a knife in his left hand. Herbert H. attempted to take the knife from Kelley.
2 However, the next thing he knew he was on the ground with Kelley standing over him. Herbert H. could
3 feel his grip on Kelley's wrist slipping. Kelley then closed the knife on Herbert H.'s finger, cutting him.

4 When Stephen C. heard Brandon W. yell "blood," he let go of Kelley and went to Brandon W.
5 He put his hand over Brandon W.'s wound but the wound gushed blood with every beat of Brandon
6 W.'s heart. Bryan L. ran to his car for his first aid kit. He also saw Kelley run to the red Corolla he
7 arrived in and saw the car leave.

8 As Gerardo S. ran toward Brandon W., Nelson got out of the white car and headed in the same
9 direction. Thinking that Nelson was going to intercede, Gerardo S. cut him off. Nelson took a swing at
10 Gerardo S., and after some fighting, Gerardo S. physically controlled Nelson by putting him into a
11 headlock.

12 Brandon W. died due to the stab wound to his neck that pierced his jugular vein and severed the
13 right superior thyroid artery. When paramedics arrived, they also discovered that Stephen C. had been
14 stabbed in the neck. Once he was at the hospital, Stephen C. noticed that he had also been stabbed in
15 the chest and cut on the bridge of his nose.

16 Nelson was interviewed by law enforcement on January 1, 2007. He denied any knowledge of
17 or involvement in the stabbings of Brandon W. and Stephen C. Nelson was held for five days and then
18 released by law enforcement.

19 Nelson was interviewed again by law enforcement on February 26, 2007. Nelson again denied
20 any involvement in the murder at the Tavern. He claimed that he was merely engaged in an argument
21 with a Marine or Marines about differences between the two branches of service. Nelson claimed that
22 the Marines were the aggressors and that when he fought with the Marines he was doing so in
23 self-defense. This interview was conducted by telephone.

24 Following a grand jury indictment, Nelson was arrested and interrogated by law enforcement on
25 March 9, 2007. Nelson admitted that he and Kelley had formed the Del Monte Blocc Gangsta Crips
26 gang in 1993 or 1994. Nelson's moniker or gang name was "Slick Rick." Nelson told the investigator
27 that he was no longer an active gang member because he was tired of living that life and because he
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1 was going to join the military.⁸ Nelson again denied any responsibility for the stabbing death of
2 Brandon W. and the stabbing injury to Stephen C. Nelson blamed the bouncers and the Marines for
3 causing the fight. He told the investigator that he was fighting with the bouncers, some of whom were
4 Marines, "cause I've been disrespected. I'm talking about 'superiorily (*sic*) disrespected."⁹

5 On December 17, 2008, a jury convicted Nelson for the murder of Brandon W. and for the
6 attempted murder of Stephen C. based on the theory of aiding and abetting Kelley. Nelson was
7 sentenced to 25-years-to-life for the murder charge and a consecutive life term for the attempted
8 murder charge. Kelley was also convicted.¹⁰

9 On December 10, 2010, the Court of Appeal reversed Nelson's convictions. The Court of
10 Appeal determined that the prosecution had presented insufficient evidence to support a finding that
11 Nelson was guilty of the charged crimes under the theory that he aided and abetted the crimes of
12 murder, attempted murder, and felony assault with a deadly weapon. Nelson was released from
13 prison on February 9, 2011, after serving 784 days in custody. On June 1, 2011, Nelson filed this
14 compensation claim under Penal Code section 4900 et seq.

15 Nelson's Testimony at the Penal Code Section 4900 Hearing

16 Nelson testified at his hearing to the following information. He and Kelley formed the Del
17 Monte Blocc Gangsta Crips gang when both were about 15 years old. The gang was based in
18 Anaheim, California. After Nelson was shot in 2000, he moved to Big Bear, California, in 2001. In
19 2004, Nelson joined the United States Army National Guard. He was released prior to completion of
20 basic training because he had gang tattoos on his body that were inconsistent with being a soldier in
21 the Army National Guard. He covered or modified the tattoos in 2005. However, he was discharged
22 from the Army in October 2005. He explained that he was discharged because he owed some fines

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24 ⁸ Clerk's Transcript, volume 3, pages 589, 590.

25 ⁹ Clerk's Transcript, volume 3, page 610.

26 ¹⁰ Kelley was sentenced to 50 years to life on the murder (25 years to life doubled based upon a prior
27 strike), plus a five-year enhancement for a prior serious felony conviction and an additional year for use
28 of a deadly weapon in committing the murder.

1 as a result of a conviction for driving under the influence of alcohol or drugs.¹¹ He testified that he
2 received a "General Discharge."¹² He did not provide any documentary proof regarding his discharge.

3 On December 31, 2006, Nelson was with some friends at the Tavern to celebrate New Year's
4 Eve. He testified that he was drinking alcohol that night, but he was not intoxicated. Later that
5 evening, he became involved in an argument with a Marine. He deemed the argument to be a conflict
6 between two branches of the military. Nelson explained at the hearing that even though he was not a
7 soldier in the United States Army, he was acting as an assistant for an active duty Army recruiter. If
8 Nelson got someone to enlist in the Army or National Guard, he and the recruiter would split the
9 \$2,000.00 signing bonus that was given to recruiters who successfully recruited soldiers.

10 Near closing time, Nelson and Kelley were told that they needed to leave the Tavern by
11 bouncers. As he and Kelly were escorted from the Tavern, Nelson said that he became upset at being
12 told to leave. Once outside, Kelley and Nelson began to argue with the bouncers. After a few minutes
13 of arguing and blustering, the argument turned physical. The two men began to fight with the
14 bouncers and some customers. Then, Kelley took a knife from his pocket and he stabbed two of the
15 bouncers. Nelson said that this act was totally unexpected. Nelson admitted that he and Kelley have
16 engaged in prior fights with other people, but neither has ever used a weapon while fighting. Nelson
17 testified that he preferred using his fists when fighting. Kelley fled the area immediately after the
18 altercation while Nelson was held by security until the arrival of law enforcement. Nelson was arrested
19 that morning and he was released five days later. Nelson subsequently learned that he had been
20 indicted by a grand jury so he surrendered to law enforcement on March 9, 2007, to face charges of
21 murder and attempted murder.

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23 ¹¹ However, Nelson told an investigator that he had been discharged from the military because he had
24 been charged with resisting arrest. He claimed that he had been assaulted by Garden Grove Police
25 officers who were investigating a robbery. He told the investigator that the charges were dismissed.

26 ¹² According to uscg.mil, there are five categories of discharges: "Honorable," "General" (less than
27 honorable after completing service), "Other than Honorable" (civilian court issues involved), "Bad
28 Conduct" (for minor criminal activity while in the military), and "Dishonorable" (for major criminal activity
while in the military). Based on the fact that he never completed his military service, Nelson likely
received an "Other than Honorable" rather than a "General" discharge.

1 Nelson denied that he was an active gang member at the time of Brandon W.'s murder and
2 that this altercation was gang-related. He testified that he left the Del Monte Blocc Gangsta Crips
3 years earlier and that he also covered up or altered his gang tattoos in order to enlist in the United
4 States Army. Nelson denied telling law enforcement that he got into the fight with the bouncers
5 because he felt "superiorly (*sic*) disrespected." Nelson also denied using his hands to make gang
6 signs prior to and while engaging in the physical altercation with the bouncers. He stated that if he
7 was making any gestures with his hands it was because he sometimes "spoke" with his hands.

8 Nelson also minimized his responsibility for the gas station assault that occurred after his
9 release from prison for the murder conviction. Nelson claimed that on December 1, 2011, he was with
10 a friend who was a member of an undisclosed gang. This friend was involved in an altercation with a
11 customer at the gas station. When his friend and the customer started to fight, Nelson testified that he
12 asked the customer to release his friend. When the customer did not comply with Nelson's request,
13 Nelson punched the customer twice. Nelson denied picking up a metal food rack and smashing it on
14 the customer as he lay on the floor of the store. Nelson admitted that he pled guilty to assault with a
15 deadly weapon and was sentenced to four years in state prison. Nelson explained that even though he
16 was innocent, he pled guilty in order to "help" his friend. However, his friend either pled to or was found
17 guilty of assault by means of force likely to cause great bodily injury (four years in state prison) and for
18 dissuading a witness (two years in state prison to be served concurrent to the four-year sentence).

19 **Evidence Presented by the AG at the Penal Code Section 4900 Hearing**

20 The AG presented the following evidence and arguments in opposition to Nelson's claim for
21 compensation. Ryan Kileen is a gang expert with the Anaheim Police Department. He testified at
22 Nelson's hearing that he is familiar with the Del Monte Blocc Gangsta Crips gang. He has made
23 multiple arrests of the gang's membership. However, he has never arrested or had personal contact
24 with Nelson. Kileen also testified that he had no information that there was any contact between law
25 enforcement and Nelson between the years of 2000 through 2006.

26 Based on his training and experience, Kileen testified that gang member's flash or exhibit hand
27 signs to demonstrate loyalty to the gang and to claim responsibility for an act or actions of a gang or its
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1 members. Also, if a gang member is involved in a fight with another person or persons, fellow gang
2 members are expected to jump into the fray to assist or back up the gang member.

3 Kileen testified that respect, or lack of respect, is very important to a gang member. If a gang
4 member feels that he has been disrespected, a fight or other aggressive action may result against the
5 offending party. Kileen also testified that gang members are known to utilize knives and firearms in
6 confronting a perceived lack of respect.

7 Kileen acknowledged that moving away from a gang's territory or neighborhood can be
8 indicative of a gang member who wishes to leave or sever his ties with a gang. Also, removing or
9 covering gang-related tattoos can be an indicator that a gang member has left or is intending to leave a
10 gang. Kileen noted, however, that simply leaving the neighborhood or territory of the gang or covering
11 gang tattoos does not, by itself, prove that a gang member has relinquished his membership in or
12 loyalty to his gang.

13 The AG also presented evidence that Nelson had not severed his ties to the gang that he and
14 Kelley formed. Many of the witnesses at the Tavern testified that they saw Nelson and Kelley doing
15 things with their hands as they argued with the bouncers and other people. Isaiah R. testified before
16 the grand jury that Nelson was "doing stuff with his hands, I don't know if he was throwing up gang
17 signs or something." Nicholas M. testified before the grand jury that Nelson and Kelley were "waving,
18 doing stuff with their fingers. I don't know any of it, what it means." According to Gerardo S., Nelson
19 and Kelley were aggressive with bouncers stationed on the dance floor, shouting and "making
20 aggressive gestures with their hands."

21 **Determination of Issues**

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

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

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

3 (3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.¹³

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

8 Because the purpose of this administrative hearing is to determine whether the claimant has
9 met his burden of proving that he is innocent of the crime for which he was convicted and
10 incarcerated, all relevant evidence is admissible if it is the sort of evidence on which reasonable
11 persons are accustomed to rely in the conduct of serious affairs.¹⁶ Such evidence may be admitted
12 even though there is a common law or statutory rule which might make its admission improper over
13 objection in any other proceeding.¹⁷ The Board may also consider any other information that it deems
14 relevant to the issue before it.¹⁸ The formal hearing provisions of the Administrative Procedure Act
15 (Gov. Code, §§ 11500-11529) do not apply.¹⁹

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20 ¹³ Pen. Code, § 4903, *Tennison v. Victim Compensation and Government Claims Board*, supra, 152
21 Cal. App. 4th 1164.

22 ¹⁴ *People v. Miller* (1916) 171 Cal. 649, 652; *Diola v. State Board of Control* (1982) 135 Cal.App.3d
23 580, 588 fn. 7.

24 ¹⁵ Pen. Code, § 4904.

25 ¹⁶ Cal. Code Regs., tit. 2, § 641(c).

26 ¹⁷ Cal. Code Regs., tit. 2, § 641(d).

27 ¹⁸ Cal. Code Regs., tit. 2, § 641(f).

28 ¹⁹ Cal. Code Regs., tit. 2, § 615.1.

1 The Board may consider the claimant's denial of commission of the crime; reversal of the
2 judgment of conviction; acquittal of the claimant on retrial; or the decision of the prosecuting authority
3 not to retry claimant for the crime. However, those factors will not be deemed sufficient evidence to
4 warrant the Board's recommendation that a claimant be indemnified in the absence of substantial
5 independent corroborating evidence that the claimant is innocent of the crime charged.²⁰

6 The Board may also consider as substantive evidence the prior testimony of witnesses the
7 claimant had an opportunity to cross-examine, and evidence admitted in prior proceedings for which
8 the claimant had an opportunity to object.²¹ The formal hearing rules of the Administrative Procedures
9 Act are not applicable.²²

10 In a Penal Code section 4900 hearing, the claimant bears the burden of proving by a
11 preponderance of the evidence that he is innocent. Conversely, at a jury or court trial in a criminal
12 case, the prosecutor has the burden of proving that a defendant is guilty "beyond a reasonable doubt."
13 These are very different burdens and the ultimate issues being litigated are very different.

14 The claimant Nelson makes two arguments in his application for compensation for wrongful
15 incarceration. First, Nelson claims that collateral estoppel precludes the Attorney General from making
16 the claim that he is not innocent of the murder and attempted murder charges. Second, Nelson argues
17 that even if collateral estoppel does not apply, there is sufficient evidence in the record to prove that he
18 did not commit the crimes for which he was incarcerated.

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25 ²⁰ Cal. Code Regs., tit. 2, § 641(a); *Tennison v. Victim Compensation and Government Claims Board*,
supra, 152 Cal. App. 4th 1164.

26 ²¹ Cal. Code Regs., tit. 2, § 641.

27 ²² Cal. Code Regs., tit. 2, § 615.1.

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1 **I. Is the Attorney General Barred By Principles Of Collateral Estoppel From Making**
2 **the Claim That Nelson Is Not Innocent of Murder And Attempted Murder?**

3 Nelson argues that, in general, collateral estoppel precludes a party to an action from
4 re-litigating in a second proceeding matters litigated and determined in a prior proceeding.²³ Once an
5 issue is litigated, it cannot be re-litigated even if the first trier of fact did not consider all the evidence,
6 or even if the state seeks to re-litigate in good faith.²⁴ The party asserting collateral estoppel bears the
7 burden of establishing these requirements.²⁵ Collateral estoppel applies to both judicial and
8 administrative law proceedings.²⁶ Traditionally, collateral estoppel is applied only if the following
9 threshold requirements are fulfilled:

- 10 1. The issue sought to be precluded from re-litigation must be identical to that decided in a
11 former proceeding.
- 12 2. The issue must have been actually litigated in the former proceeding.
- 13 3. The issue must have been necessarily decided in the former proceeding.
- 14 4. The decision in the former proceeding must be final and on the merits.
- 15 5. The party against whom preclusion is sought must be the same as, or in privity with, the party
16 to the former proceeding.

17 In *Tennison*,²⁷ the defendant's conviction was reversed by a Federal District Court Judge due
18 to a discovery mistake amounting to *Brady* error.²⁸ The California Attorney General then stipulated to
19 the defendant's release from custody on his own recognizance, and the San Francisco District

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21 ²³ *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 604.

22 ²⁴ *Harris v. Washington* (1971) 404 U.S. 55, 56-57 [92 S. Ct. 183, 30 L.Ed.2d 212].

23 ²⁵ *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.

24 ²⁶ *People v. Sims* (1982) 32 Cal.3d 468, 477.

25 ²⁷ *Tennison v. California Victim Compensation and Government Claims Bd.* (2007) 152 Cal.App.4th
26 1164.

27 ²⁸ *Brady v. Maryland* (1963) 373 U.S. 83.

1 Attorney's Office subsequently decided not to retry the defendant. A few months later, the defendant
2 filed a motion pursuant to Penal Code section 851.8 for an order declaring him factually innocent of
3 the crime and for the destruction of his arrest records. The District Attorney did not oppose the
4 motion, stating "the People concur that the defendant is factually innocent pursuant to Penal Code
5 section 851.8." The defendant subsequently filed a claim for compensation with the California Victim
6 Compensation and Government Claims Board pursuant to Penal Code section 4900 et seq.

7 The Court of Appeal observed: "Section 4900 provides relief when an erroneously convicted
8 defendant proves he did not commit the crime charged, and section 851.8 provides relief when an
9 erroneously arrested person proves he was 'factually innocent' of the crime in question." Both
10 proceedings concern the identical issue: whether the evidence proves the defendant did not, in fact,
11 commit a particular crime. The Court of Appeal rejected the Attorney General's contention that there
12 were different legal questions at issue, and instead emphasized that this requirement for application of
13 collateral estoppel was satisfied because both the section 851.8 and 4900 proceedings, taken in
14 context, ultimately decided the same factual question of whether the defendant committed a particular
15 crime.

16 Nelson argues, therefore, that *Tennison* demonstrated that a claim for relief under Penal Code
17 section 4900 involves the identical issue as a claim for relief under Penal Code section 851.8 for
18 purposes of the collateral estoppel doctrine because both proceedings concern the identical issue of
19 whether the evidence proves the defendant did not, in fact, commit a particular crime.

20 Nelson also cites *People v. McCann*.²⁹ In *McCann*, the defendant was convicted of a crime,
21 that conviction was reversed by the Court of Appeal due to insufficiency of the evidence, and the
22 defendant subsequently filed a Penal Code section 851.8 motion for a finding of factual innocence
23 which was denied by the trial court. On appeal, the Court of Appeal held the trial court erred in
24 denying his Penal Code section 851.8 motion in light of the Court of Appeal's prior reversal of his
25 conviction due to insufficient evidence, and remanded the case to the trial court with directions to grant

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27 ²⁹ *People v. McCann* (2006) 141 Cal. App. 4th 347, pp. 350-351.

1 the motion.³⁰ In so holding, the Court of Appeal observed that reversal for trial error is significantly
2 different than reversal for insufficiency of the evidence. As stated by the Court of Appeal, "[R]eversal
3 for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the
4 effect that the government has failed to prove its case. As such, it implies nothing with respect to the
5 guilt or innocence of the defendant. The same cannot be said when a defendant's conviction has
6 been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of
7 prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.
8 Moreover, *such an appellate reversal means that the government's case was so lacking that it should*
9 *not have even been submitted to the jury.*"³¹

10 The Court of Appeal further observed, "Section 851.8 is for the benefit of those defendants who
11 have not committed a crime. It permits those petitioners who can show that the state should never
12 have subjected them to the compulsion of the criminal law – because no objective factors justified
13 official action – to purge the official records of any reference to such action. . . . Hence, much more
14 than a failure of the prosecution to convict is required in order to justify the sealing and destruction of
15 records under section 851.8."³²

16 For example, a failed prosecution due to the suppression of illegally seized evidence does not
17 mandate relief under section 851.8.³³ "Establishing factual innocence [under section 851.8] ... entails
18 establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive
19 defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest
20 him in the first place."³⁴ Because the Court of Appeal's reversal of the defendant's conviction in
21 *McCann* was due to insufficient evidence, demonstrates his case should never have gone to the trier
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23 ³⁰ *People v. McCann, supra*, 141 Cal. App. 4th at pp. 352, 359.

24 ³¹ *Ibid.*, emphasis in original.

25 ³² *People v. Adair* (2003) 29 Cal.4th 895, 905; *People v. McCann, supra*, 141 Cal.App.4th at p. 357.

26 ³³ *People v. Adair, supra*, 29 Cal.4th at p. 905, fn. 3.

27 ³⁴ *Ibid.*, at p. 905.
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1 of fact, the Court of Appeal concluded that the trial court necessarily erred by denying his motion for a
2 finding of factual innocence.³⁵

3 Nelson argues that taken together, *Tennison* and *McCann* demonstrate that the AG is barred
4 by principles of collateral estoppel from now contending in this Penal Code section 4900 proceeding
5 that Nelson did in fact commit the alleged murder and attempted murder. The reversal of Nelson's
6 convictions by the Court of Appeal due to insufficient evidence is a judgment on the merits he was not
7 guilty under any theory and the Attorney General is barred by principles of collateral estoppel from
8 now contending otherwise.

9 The AG argues that the offensive use of collateral estoppel is not appropriate in this case.
10 They argue that unlike this case, the claimant in *Tennison* successfully petitioned the trial court for a
11 declaration of innocence under section 851.8. Therefore, both the trial court and the Government
12 Claims Board were presented with the same issue of whether the claimant had established his
13 innocence.³⁶ But Nelson made no motion under section 851.8 and has not established his innocence
14 in any court. Accordingly, *Tennison* does not apply.

15 The AG also disagrees with Nelson's claim that *McCann* stands for the proposition that an
16 Appellate Court's reversal of a conviction for insufficient evidence should be considered an automatic
17 declaration of factual innocence. The AG argues *McCann* created no such rule. Instead, *McCann*
18 held that a defendant whose convictions were reversed for insufficient evidence *could* seek a
19 declaration of factual innocence under section 851.8.³⁷ Also, like *Tennison*, the defendant in *McCann*
20 assumed his burden and filed a section 851.8 motion. Further, *McCann* acknowledged taking an
21 additional step beyond an insufficiency of evidence finding and declaring it impossible for the
22 defendant to have committed the crimes for which he was convicted.³⁸ The court noted that in

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24 ³⁵ *People v. McCann, supra*, 141 Cal.App.4th at pp. 357-358.

25 ³⁶ *Id.* at pp. 1171, 1175.

26 ³⁷ *Id.* at p. 356.

27 ³⁸ The defendant was convicted of practicing medicine without a license, but he had a valid medical
28 license at all relevant times. (*Id.* at p. 351.)

1 reversing McCann's conviction, "his alleged conduct could not have violated Business and Professions
2 Code section 2053." That is, more than just finding there was insufficient evidence to sustain the
3 conviction, the Court found McCann could not possibly have committed the offense with which he was
4 charged.

5 In contrast, the AG argues that in the current case, the Court of Appeal did not determine that
6 Nelson did not commit murder and attempted murder. Instead, the appellate court found the evidence
7 insufficient to sustain the prosecution's burden of proof. Therefore, *McCann* does not convert the
8 Appellate Court's insufficiency of evidence ruling into a finding of innocence and the doctrine of
9 collateral estoppel should not be applied.³⁹

10 Here, the AG's argument against applying collateral estoppel is persuasive. An acquittal at a
11 jury trial (or a finding by an appellate court that the prosecutor had failed to meet his or her burden of
12 proof) means that a person has been found not guilty "beyond a reasonable doubt." A person who is
13 acquitted is not proven innocent of the criminal charges. Instead, the finding is "not guilty." In order to
14 obtain a finding of factual innocence, a person must seek relief under Penal Code section 851.6 or
15 851.8. This is consistent with both *Tennison* and *McCann*. Nelson failed to seek such relief in court.
16 The Appellate Court's decision to overturn Nelson's conviction based on insufficient evidence is not
17 the same issue as whether Nelson has proven himself innocent of the crimes by a preponderance of
18 the evidence. The Court of Appeal found the prosecutor did not prove Nelson guilty beyond a
19 reasonable doubt. They did not find Nelson factually innocent. The issue in the Court of Appeal
20 decision is not identical to the issue presented in Nelson's Penal Code section 4900 case. Therefore,
21 collateral estoppel is not appropriate to apply in this case.

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27 ³⁹ Particularly in light of the close scrutiny applied to the offensive use of the doctrine. (*Parklane*
28 *Hosiery Co. v. Shore, supra*, 439 U.S. 322, 329-331.)

1 **II. Has Nelson Proved By a Preponderance of the Evidence That He Did Not Commit the**
2 **Crimes For Which He Was Incarcerated?**

3 Nelson also argues that even without the use of the collateral estoppel doctrine, the evidence
4 presented in this case, as determined by the Court of Appeal, proves that Nelson did not commit the
5 crimes for which he was imprisoned. Since his conviction was overturned for insufficiency of the
6 evidence, Nelson argues he has met his burden of proving that he was innocent and that he did not
7 commit the crimes for which he was incarcerated.

8 The AG argues that there is sufficient evidence in the record showing Nelson aided and
9 abetted Kelley. The evidence showing Nelson and Kelley's gang affiliation and gang signals with their
10 hands during the crime show by a preponderance of the evidence that the crime was gang related and
11 therefore it was a natural and probable consequence that Nelson's friend would use a weapon during
12 the dispute.

13 The AG cites *People v. Medina*.⁴⁰ In *Medina*, the fact that a former gang member feared
14 somebody might be killed as a result of a "where are you from?" challenge and directed the men to
15 "take that into the streets," further supported the inference that a homicide was a natural and probable
16 consequence of the challenge. Respect (fear) is emphasized in the gang culture and "gang members
17 consider death as a means to maintain respect in some circumstances."⁴¹

18 The AG argues that there was sufficient evidence of gang involvement to conclude that Nelson
19 was guilty of murder and attempted murder under the natural and probable consequences doctrine of
20 aiding and abetting. Under California law, "a person who aids and abets a confederate in the
21 commission of a criminal act is liable not only for that crime (the target crime), but also for any other
22 offense (non-target crime) committed by the confederate as a 'natural and probable consequence' of
23 the crime originally aided and abetted."⁴² Therefore, a defendant that promotes, encourages, or
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25 ⁴⁰ *People v. Medina* (2009) 46 Cal. 4th 913.

26 ⁴¹ *Id.* at p. 923.

27 ⁴² *People v. Prettyman* (1996) 14 Cal.4th 248, 254.
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1 facilitates the commission of a target crime can also be liable for any crime committed by his
2 confederate that was the "natural and probable consequence" of the target crime, even if the defendant
3 had no intent to commit the additional crime. "Liability under the natural and probable consequences
4 doctrine 'is measured by whether a reasonable person in the defendant's position would have or should
5 have known that the charged offense was a reasonably foreseeable consequence of the act aided and
6 abetted."

7 In *Medina*,⁴³ the California Supreme Court addressed the application of the natural and
8 probable consequence doctrine to a gang fight resulting in death. The case involved a verbal
9 challenge by the defendants (members of a criminal street gang) that resulted in a fistfight between
10 the defendants and the victim.⁴⁴ "After the fistfight ended, one of the defendants shot and killed the
11 victim as he was driving away from the scene of the fight with his friend." The shooter was convicted
12 of murder and attempted murder and three of his fellow gang members who were involved in the
13 fistfight were convicted of the same crimes under the natural and probable consequences doctrine. In
14 affirming the convictions, the Court noted that neither knowledge that a fellow gang member was
15 armed nor the existence of a prior gang rivalry was required to find murder a natural and probable
16 consequence of simple assault in a gang context.⁴⁵ Instead, "[t]he issue is, whether, under all of the
17 circumstances presented, a reasonable person in the defendants position would have or should have
18 known that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by
19 the defendant."⁴⁶ Because the defendant was involved in the gang culture, which "emphasizes
20 respect, fear and retaliatory violence in the face of disrespectful behavior," it was or should have been
21 reasonably foreseeable to him that retaliation would occur and escalate to a deadly level.⁴⁷

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23 ⁴³ *People v. Medina*, supra, 46 Cal. 4th at p. 920, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518,
24 535.

25 ⁴⁴ *Id.* at p. 916.

26 ⁴⁵ *Id.* at p. 921.

27 ⁴⁶ *Id.* at p. 927.

28 ⁴⁷ *Ibid.*

1 The AG notes that Kelley initially acted as a peacemaker when he went out onto the patio and
2 apologized to Herbert H. for Nelson's conduct earlier in the evening. Herbert H. said that Kelley was
3 very cordial and they shook hands. However, once Nelson started arguing with bouncers and
4 customers outside the Tavern, he and Kelly began exhibiting or throwing gang signs with their hands.
5 When Nelson began throwing punches at customers and bouncers, Kelley immediately came to
6 Nelson's assistance. The AG admits there is no evidence that Nelson was armed during this incident,
7 but when Kelley pulled out his knife, either from his pocket or from the vehicle's trunk and stabbed
8 Brandon W. and Stephen C., they argue Kelley's actions cannot be deemed to be unexpected or
9 surprising. In fact, his conduct and course of action mirrors that of the defendant in *Medina*.⁴⁸

10 There was sufficient evidence produced at Nelson's Penal Code section 4900 hearing to
11 warrant a finding that Nelson and Kelley were engaged in gang activity when both men fought staff
12 and patrons of the Tavern. Gang signs were exhibited by Nelson and Kelley during the altercation.
13 Nelson told investigators that he was upset because he was disrespected by the bouncers and the
14 Marines. Kelley was initially the peacemaker, but when Nelson became embroiled in his argument
15 with the bouncers and patrons of the Tavern, Kelley came to Nelson's aid. Although the Appellate
16 Court did not consider any evidence that Nelson was an active gang member, the above-listed actions
17 weigh against Nelson's argument that he is innocent by a preponderance of the evidence of murder
18 and attempted murder in this hearing pursuant to Penal Code section 4900.

19 Conclusion

20 Based on the totality of the evidence, Nelson has failed to meet his burden of showing by a
21 preponderance of the evidence that he is innocent of the crimes of aiding and abetting murder and
22 attempted murder.

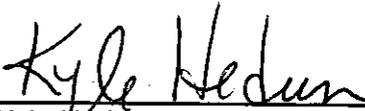
23 Nelson is also not eligible for compensation because there is a preponderance of the evidence
24 that he intentionally contributed to his arrest. Nelson instigated a fight with bouncers and customers of
25 the Tavern because he felt disrespected. His intentional actions resulted in his arrest and conviction

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27 ⁴⁸ *People v. Medina, supra*, 46 Cal. 4th 913.
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1 for the death of Brandon W. and for the injuries to Stephen C. If not for Nelson's intentional conduct
2 the evening of December 31, 2006, Stephen C. would not have been stabbed; Brandon W. would still
3 be alive; and Nelson would have spent no time in state prison.

4 Nelson's claim is denied.

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6 Date: July 18, 2013

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8 Kyle Hedum
9 Hearing Officer
10 California Victim Compensation and
11 Government Claims Board
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