BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Claim of: **Daniel Larsen** PC 4900 Claim No. 14-ECO-01	**Proposed Decision Post-*Madrigal*** **(Penal Code § 4900 et seq.)**

I.
INTRODUCTION

Daniel Larsen (Larsen) submitted his application for compensation as an erroneously convicted person on September 8, 2014. The hearing was held on September 14, 2016. Larsen did not personally appear, but he was represented by Katherine Bonaguidi and Alexander Simpson of the California Innocence Project. The California Department of Justice, Office of the Attorney General (AG), was represented by Heather Gimle and Carlos Martinez. No witnesses were called by either party. The hearing was conducted by Senior Attorney Mary Lundeen of the California Victim Compensation Board (CalVCB), who subsequently issued a proposed decision on October 24, 2017, recommending denial of Larsen's application for failing to demonstrate actual innocence.

Before the proposed decision was submitted for consideration by CalVCB Board Members, the Second District Court of Appeal published *Madrigal v. California Victim Comp. & Government Claims Bd.* (2016) 6 Cal. App. 5th 1108 (*Madrigal*). Construing the statutory text of Penal Code section 4903, *Madrigal* announced that CalVCB is bound by a federal court's factual findings when granting a federal habeas petition, even if those findings do not establish actual innocence. As a result, both parties submitted supplemental briefing concerning the impact of *Madrigal* upon Larsen's application. Senior Attorney Laura Simpton of CalVCB was assigned to review this matter. After

considering all of the evidence in the record, along with the federal court's binding factual findings, the application is recommended for denial because Petitioner has failed to prove by a preponderance of the evidence that he is innocent of the crime of which he was convicted.

II.

PROCEDURAL BACKGROUND

A. State Court Proceedings

On June 6, 1998, Larsen was arrested and subsequently charged as a felon with unlawful possession of a dirk or dagger.[1] It was further alleged that Larsen had three prior felony convictions within the meaning of the Three Strikes law and had served three prior prison terms.[2]

1. Trial Evidence[3]

Los Angeles Police Officers Michael Rex and Thomas Townsend both testified as eyewitnesses for the prosecution. Around 1:00 a.m. on June 6, 1998, Officer Townsend was driving a patrol car, with Officer Rex as his passenger, when they were dispatched to the Gold Apple bar for a reported assault with "shots fired." Five men were involved in the altercation, but a description was available for only one. According to the dispatcher, the suspect was a white male, wearing a green flannel shirt with his hair in a long ponytail, and he was armed with a handgun. As Officer Townsend approached the back side of the bar's parking lot through an entrance for an adjacent business, he turned off the patrol car's flashing lights and siren to avoid detection. Officer Townsend parked diagonally against a chain link fence that enclosed the parking lot for the bar. After coming to a stop, Officer Townsend turned on the patrol car's overhead flood lights and side spotlights. The area was flooded with light from the patrol car, as well as overhead lamps inside the parking lot and nearby business signs, and eventually a police helicopter.

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[1] Former Pen. Code, § 12020, subd. (a), repealed and replaced by Pen. Code, § 21310 (Stats. 2010, ch. 711, § 6 (SB 1080).

[2] Pen. Code, §§ 667, subd. (b)-(i), 1170.12, subds. (a)-(b); Pen. Code, § 667.5, subd. (b).

[3] A detailed summary of the trial evidence is included because it directly bears upon the credibility of Larsen's innocence claim.

Officers Townsend and Rex immediately focused on Larsen, who was standing in the parking lot facing towards them, because Larsen was wearing a green flannel shirt that matched the armed suspect, although Larsen's hair was short. Larsen was standing about 20 to 22 feet away from the officers. Two males were standing to the right of Larsen, about five to 10 feet away.[4] A pickup truck was parked in front of Larsen, a couple feet to his left. Smaller groups of people, totaling 10 to 20 overall, were standing in the parking lot between 10 to 30 feet from Larsen.

Fearing Larsen may have a gun, the officers closely watched his hands with "tunnel vision." Looking through the windshield of the patrol car, both officers clearly observed Larsen reach under his untucked shirt with his right hand, crouch, and pull out a linear, metal object that was about five inches long. Larsen tossed the object forward, in an underhand motion, towards the pickup truck on his left. The object came to rest in front of the truck's front right tire, approximately 10 feet from the officers' patrol car. The chain link fence separating the officers and Larsen did not obstruct their view of these events.

Immediately thereafter, both officers exited the patrol car, announced their presence, and directed everyone to hold their hands up and get on their knees. Officer Townsend walked into the parking lot and started handcuffing people. He was soon assisted by other responding officers. Meanwhile, Officer Rex remained standing in front of the patrol car, with a raised shotgun, to provide cover for Officer Townsend. Officer Rex also maintained visual contact with the object beneath the truck. No one came near it.

Once the scene was secured, Officer Townsend looked beneath the truck and retrieved the object thrown by Larsen. It was a double bladed knife with a weighted handle and finger guard. The blade was over five inches long and extremely sharp. Officer Townsend seized the knife and returned to the patrol car, where he locked the knife inside the glove compartment. Officer Townsend also retrieved the shotgun from Officer Rex, unloaded it, and secured it inside the patrol car.

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[4] Officer Townsend noted on cross-examination that the last name of one of these two men was Lloyd, and he could not recall if the other was Hewitt, but field identification cards were completed for both. (Larsen Ex. K at p. 126, lines 9-10.)

While walking back to the parking lot, Officer Townsend spotted a four-inch solid copper bar, wrapped with cloth tape, lying on a weed next to the chain link fence. The cooper bar was located about 10 to 30 feet to the right of where Larsen had been standing, in the opposite direction of the knife. The copper bar would have been closer to the other two men on Larsen's right, but neither officer saw anyone throw it. The officers were positive that Larsen threw the knife and not the copper bar.

Larsen was arrested at the scene for possession of the knife. He falsely identified himself and was booked in the county jail under that false name. Only later did one of the detectives discover Larsen's true identity when compiling the case file for the District Attorney. A sheath was not discovered in Larsen's possession, and Larsen's clothing did not appear to have any tears from the sharp knife. A gun was not located that evening.

No defense witnesses were presented at trial. Instead, defense counsel attempted to impeach Officer Townsend with seemingly inconsistent statements. Specifically, Officer Townsend's written report did not expressly state that the knife had been concealed under Larsen's clothing before he threw it. Also, Officer Townsend was not asked and, therefore, did not testify that the knife had been concealed at the first preliminary hearing, which resulted in a dismissal of the case. After speaking with the prosecutor, Officer Townsend first mentioned that the knife had been concealed when testifying at the second preliminary hearing. Finally, Officer Townsend mistakenly testified at the first preliminary hearing that he was the passenger in the patrol car and even recalled instances of looking through the passenger window. Officer Townsend explained that he had been confused because he had returned the shotgun to the patrol car that night, which is usually the responsibility of the passenger.

2. Sentencing

Following the jury's guilty verdict, Larsen admitted the prior strike and prison term allegations in a bifurcated proceeding. As a result, Larsen was sentenced on August 18, 1999, to 28 years to life under the Three Strikes law.

3. Appellate Review

The California Court of Appeal affirmed the judgment on June 1, 2000, and the California Supreme Court declined review on August 9, 2000. No claim of actual innocence was raised.

4. State Habeas

Five years later on May 18, 2005, Larsen filed a habeas petition before the Los Angeles Superior Court, alleging, for the first time, that his counsel was ineffective for failing to investigate and present exculpatory evidence. Larsen attached a 2001 letter from James McNutt and a 2005 declaration from Mr. McNutt and his wife Elinor McNutt, both asserting that Larsen did not throw the knife that night. The petition was denied. Larsen renewed this claim in habeas petitions before the California Court of Appeal and California Supreme Court, which were also denied on March 28, 2006, and July 25, 2007, respectively.

B. Federal Habeas Proceeding

On July 15, 2008, Larsen filed a federal habeas petition in the United States District Court for the Central District of California. As subsequently amended, the petition claimed that Larsen's trial counsel was constitutionally ineffective for failing to investigate and present exculpatory evidence that someone else was responsible for the offense. The petition included Mr. McNutt's 2001 letter and the 2005 declarations from Mr. and Ms. McNutt, as well as a declaration from Larsen admitting that he first learned about the McNutts from his girlfriend after the jury's guilty verdict but before he was sentenced. The AG moved to dismiss the petition for having been filed six and half years beyond the one-year statute of limitations.[5] In opposition, Larsen asserted that he qualified for the "gateway" exception under *Schlup v. Delo* (1995) 513 U.S. 298, 327 (*Schlup*), which requires a prisoner to demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

1. First Evidentiary Hearing

An evidentiary hearing ensued on May 19, 2009, solely on the *Schlup* issue. Mr. and Ms. McNutt both testified that they were in the Gold Apple parking lot when the police arrived. They had

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[5] 28 U.S.C. § 2244, subd. (d)(1)(a).

plans to meet Ms. McNutt's son, Daniel H. (Daniel),[6] for someone's birthday celebration, possibly at 7:30 p.m. They spotted Daniel seated inside his car, arguing with another man called "Bunker," who was subsequently identified as William Hewitt.[7] A second man stood nearby, who was later identified as Larsen. Hewitt was wearing a baggy, short-sleeve shirt, and, according to Ms. McNutt, Hewitt had black hair that was two to three inches long and slicked back. By comparison, Larsen appeared chubby, with freckles, and short hair.[8] Ms. McNutt recognized Hewitt because "he had come to the house, maybe a week or so before, and I saw him." Ms. McNutt was not sure if Daniel was friends with Larsen, but Daniel knew who Larsen was.

Mr. McNutt, who was six feet and seven inches tall, walked over to the driver's side of Daniel's car and stood a couple feet from Hewitt. Mr. McNutt was facing towards the Golden Apple, while Ms. McNutt remained by the tailgate of her car. Both McNutts were closely watching Hewitt because of his hostility towards Daniel. After a couple more minutes of arguing, someone shouted "five o." From their different vantage points, Mr. and Mrs. McNutt both observed Hewitt throw an object. Mr. McNutt "couldn't swear if it was a knife or a gun" but he assumed it "would probably be a knife, the way it sounded underneath the vehicle." Mr. McNutt thought the object was 10 to 12 inches long. Ms. McNutt similarly acknowledged, "I don't know if it was a knife," but she heard "a metal clank."[9] Mr. and Ms. McNutt did not see Larsen move his hands or throw anything. Mr. McNutt saw Larsen arrested that night, but he never told any of the officers what he had observed. Mr. McNutt claimed he was a "nervous wreck" from all of the officers, their guns, and having been handcuffed and aggressively searched in his groin area.

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[6] For individuals whose criminal background has not been publicly detailed in Larsen's state or federal court proceedings, only the first initial of their last name is disclosed in order to preserve their privacy rights.

[7] The full name is disclosed for those individuals whose criminal background has already been publically detailed.

[8] Mr. McNutt's declaration in advance of the evidentiary hearing similarly described Larsen as the "shorter, heavier man … following behind" Hewitt. (Larsen Ex. J, attachment B.)

[9] Larsen Ex. O at p. 55, lines 13-15.

Mr. McNutt was a military veteran of 22 years, a former police officer for eight years, including time as a chief of police, and, at the time of the hearing, he was employed as a correctional officer in Tennessee. Ms. McNutt suffered from numerous medical ailments that made travel difficult. Her son Daniel had served time in prison, but Ms. McNutt believed he had been fairly treated by the Los Angeles Police Department.[10]

Brian McCracken also testified at the evidentiary hearing that someone other than Larsen had threatened him with a knife earlier that night. McCracken recalled the man had short brown hair, medium build, and was wearing some type of poncho. McCracken was not present in the parking lot when the police arrived. McCracken had known Larsen for many years but denied knowing Hewitt.

In addition to this live testimony, Larsen submitted a 2001 declaration signed by Hewitt admitting the knife was his. Larsen submitted another 2005 declaration signed by Hewitt's girlfriend Jorji Owen averring that Hewitt admitted tossing the knife. Both declarations also claimed that a Los Angeles police officer named Brian Liddy had threatened retaliation if Hewitt or Owen testified on Larsen's behalf.[11] Neither Officer Townsend nor Officer Rex testified in this federal proceeding.

In Findings and Recommendations issued July 13, 2009, the magistrate judge determined that Larsen's new evidence satisfied *Schlup's* gateway exception. The magistrate judge expressly determined that the McNutts were both "credible and persuasive witnesses" with "no apparent reason to perjure themselves for [Larsen's] benefit." The magistrate judge further determined that McCracken's testimony was credible. The district court adopted the recommendation. Accordingly, the AG's motion to dismiss was denied, and the parties proceeded to the merits of Larsen's petition.

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[10] Unbeknownst to the magistrate judge at that time, Larsen, Hewitt, and Ms. McNutt's older son Alfred H. were all members of a white supremacist gang. On the night of Larsen's arrest, Mr. and Mrs. McNutt were living in the home of Alfred's close friend, Dennis S., who was also a convicted felon. Police served a search warrant on that home while the McNutts were living there and arrested one of the occupants.

[11] Liddy was one of four officers in an anti-gang task force who were ultimately exonerated and received multi-million dollar settlements in 2009, after having been falsely arrested and maliciously prosecuted in 2000 for supposedly framing and mistreating suspects. Reston, *L.A. Counsel Oks $20.5-Million Settlement in Rampart Suit*s, L.A. Times (Jan. 29, 2009).

2. Second Evidentiary Hearing

A second evidentiary hearing occurred on November 17, 2009, to resolve Larsen's substantive claim of ineffective counsel. Again, no officers were called to testify. Instead, Larsen's trial counsel Michael Consiglio appeared. According to Consiglio, Larsen maintained that he did not throw the knife and may have eventually identified Hewitt as the culprit, although Larsen initially identified someone else as willing to plead guilty and " take the rap" for the knife (i.e., Thomas Erwin). Larsen once told Consiglio that he had only thrown the copper bar, not the knife. Consiglio contemplated calling Larsen's friend Christian Lloyd as a witness, but Consiglio did not believe Lloyd would testify truthfully. Larsen told Consiglio that Lloyd was present that night and wore his hair in a ponytail. Consiglio admitted that, sometime before sentencing but after the verdict, Larsen informed him about the McNutts. Consiglio nevertheless declined to file a motion for new trial on that ground. Consiglio was disbarred for unprofessional conduct in 2008.

Larsen's trial prosecutor Natalie Admonian also testified at the evidentiary hearing. Admonian recalled that Consiglio had informed her that the defense may call Lloyd to identify Hewitt as the third-party culprit at trial. When prepping for possible cross-examination, Admonian discovered that Lloyd, Hewitt, and Larsen were all associated with the Nazi Low Riders gang and all three knew each other. Larsen had even stayed with Lloyd while on bail for this offense. Admonian disclosed her discovery to Consiglio before the close of her case-in-chief.

In Findings and Recommendations issued April 27, 2010, the magistrate judge concluded that counsel rendered ineffective assistance because there was a "reasonable probability" that the outcome of his trial would have been different if only counsel had located and called the McNutts and McCracken to testify. The magistrate judge reiterated that the McNutts and McCracken had provided credible testimony at the first evidentiary hearing. The district court adopted the recommendation and granted Larsen's petition for writ of habeas corpus.

3. Ninth Circuit Decision

The AG appealed the *Schlup* issue to the Ninth Circuit, which ultimately affirmed the magistrate judge's determination. In a published decision, the Ninth Circuit concluded "that it is more likely than not that no reasonable juror hearing all of the evidence Larsen presented in federal court

would vote to convict him under the beyond-a-reasonable-doubt standard."[12] The Ninth Circuit acknowledged that "while both McNutts testified that Hewitt threw a metallic object under a car in the parking lot, neither testified with certainty that the object was a knife."[13] "But that it may have been physically possible for Larsen to throw a knife during a split second when neither of the McNutts was paying attention does not defeat Larsen's *Schlup* claim.[14] Rather, the new evidence "suggests that the police were mistaken about the identity of the person who threw the knife."[15] Accordingly, "[n]o reasonable juror confronted with such evidence would be convinced beyond a reasonable doubt of Larsen's guilt."[16] Consequently, the district court's ruling was affirmed, leaving the prosecution 90 days to either retry Larsen or release him from prison.

C. Larsen's Prison Release

Larsen was not retried.[17] On March 19, 2013, Larson was released from prison after having been incarcerated for over 13 years (i.e., 4,963 days).

D. Civil Rights Trial

Meanwhile, on May 21, 2012, Larsen filed a federal civil rights lawsuit against the arresting officers and the City of Los Angeles for malicious prosecution. A jury trial ensued. For the first and only time in any judicial proceeding, Mr. McNutt, Officer Rex, and Officer Townsend all appeared and testified in person before a jury. All three witnesses generally repeated the same version of events as in their prior testimony, with some new details. Several key witnesses also appeared, including Larsen.

In his deposition and trial testimony, Officer Rex confirmed that he did not know Larsen before his arrest and was unaware that Larsen was a convicted felon in the Nazi Low Riders gang.

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[12] *Larsen v. Soto* (9th Cir. 2013) 730 F.3d 930, 942.

[13] *Id*. at p. 943.

[14] *Ibid*.

[15] *Ibid*.

[16] *Ibid*.

[17] By 2011, possession of a dirk or dagger no longer qualified for indeterminate Three Strikes sentencing under Realignment. (Assembly Bill 109.)

Officer Rex did know that the Gold Apple was a hangout for convicted felons where drugs were sold and prostitutes loitered. Officer Rex "saw Mr. Larsen's face for sure" that night while in the car after the lights came on. It was "pretty obvious" and "plain as day" that Larsen threw the object. After working over eight years for the Los Angeles Police Department, Officer Rex left in good standing and was currently employed as a police officer in Colorado, where he had worked for the past 10 years. At the time of Larsen's arrest, Officer Rex had been partners with Officer Townsend for about six weeks.

Officer Townsend also testified in his deposition and at trial that he did not know Larsen before the night of his arrest. Officer Townsend had absolutely no doubt that he saw Larsen threw the object that landed underneath the car. Officer Townsend recalled that, at the time of this observation, he was placing the patrol car gear into park and moving to step out of the car. Officer Townsend denied seeing anyone of Mr. McNutt's notable height at the Gold Apple that night. Officer Townsend was currently employed as a detective supervisor by the Los Angeles Police Department, where he had worked for the past 20 years. Shortly before testifying, Officer Townsend was approached outside the courtroom by former police officer Liddy, whom Officer Townsend heard had somehow been implicated in the Rampart CRASH unit scandal. Officer Townsend knew that Liddy knew Larsen because, sometime in 1999 when Liddy transferred into Officer Townsend's station, Liddy once mentioned to Officer Townsend that he did not realize Officer Townsend was Larsen's arresting officer. Officer Townsend did not consider Liddy a friend, never spoke to Liddy about the current civil proceeding, and had no idea how Liddy found him at the courthouse. Liddy told Officer Townsend that he happened to be serving as a federal juror in another courtroom.

Contrary to his earlier testimony in the habeas proceeding, Mr. McNutt insisted in his deposition testimony that he had actually observed a five-inch blade on the object thrown by Hewitt. At trial, Mr. McNutt also insisted, for the first time, that Hewitt's hair was in a ponytail. Mr. McNutt described Hewitt as wearing a T-shirt. In his deposition and trial testimony, Mr. McNutt acknowledged that he and his wife had been living in the home of Dennis S. (Dennis), who was a friend of Mr. McNutt's stepson Alfred H. (Alfred), at the time of Larsen's arrest. During their stay, the police served a search warrant on Dennis' home and ultimately arrested one of the occupants. Mr.

McNutt claimed that he had stayed at Dennis' home for only three to four weeks, but 18 days after Larsen's arrest, Mr. McNutt applied for a California identification card using Dennis' address. Mr. McNutt denied seeing anyone at the home with Nazi Low Riders gang tattoos and further denied that Alfred was a member of any gang. Mr. McNutt acknowledged that Alfred visited Dennis' house but denied that Alfred lived there. Mr. McNutt had recently retired from the Department of Corrections in Tennessee after nine years employment. Before that, Mr. McNutt worked as head of security for Boomtown Casio in Truckee for three years, after having been a police officer in Fayetteville, North Carolina, for nine years, and then chief of a three-person police force in Garland, North Carolina, for three years. At the time of Larsen's arrest in June 1998, Mr. McNutt was unemployed.

For the first time, Larsen testified under oath about the night of his arrest. In his trial testimony, Larsen admitted going to the Gold Apple with Lloyd, meeting Hewitt there, and encountering Daniel in the parking lot. Larsen had met Daniel a couple of times, but he denied knowing the McNutts. Larsen insisted that Hewitt was wearing a flannel shirt and that Hewitt's hair was in a ponytail.[18] Hewitt confronted Daniel, who was seated in the driver's seat of his vehicle, which was backed into a parking space against the chain link fence facing towards the bar. As the two argued, Larsen stood behind Hewitt within arm's reach, and Lloyd stood behind Larsen. A tall man approached, whom Larsen only later discovered was Mr. McNutt. Significantly, Larsen admitted that he knew Dennis, but Larsen denied ever going to Dennis' home where the McNutts' had been living. When police suddenly arrived, Larsen insisted that Hewitt threw something, which he thought was a knife because Hewitt had possessed a knife earlier that evening. Larsen denied ever crouching or throwing anything. Larsen claimed he falsely identified himself because he had previously been beaten up by the police, although he admitted that he had not previously encountered Officer Rex or Officer Townsend. In his deposition testimony, Larsen also admitted joining the Nazi Low Riders gang in 1994 and sponsoring Hewitt into that gang, but Larsen denied that Lloyd was a member. Larsen also denied that he was a White supremacist. Larsen claimed that

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[18] Larsen's longtime friend Lloyd also testified at Larsen's civil rights trial that Hewitt was wearing a flannel shirt and had his hair in a ponytail that night. Lloyd further claimed that he (Lloyd) was also wearing a flannel shirt and had his hair in a ponytail too.

he had previously been threatened by Liddy, the former police officer, but Larsen did not see Liddy at the Gold Apple bar on the night of his arrest. Finally, in his deposition testimony, Larsen denied conspiring with Alfred to kill two Los Angeles police officers.

Hewitt also testified in a deposition and before the civil rights jury. Hewitt could not recall any of the events that occurred at the Gold Apple bar on June 6, 1998, because he had been under the influence of drugs, including methamphetamine and heroin. At that time, Hewitt always carried some type of weapon with him. Hewitt stated at the deposition, "If I had the knife, it's my beef, right?" He also did not recall being asked to claim the knife was his. Hewitt vaguely recalled signing a declaration for Larsen in late 2000, but he was so high that he did not bother to read it. Hewitt confirmed his signature on the declaration dated January 14, 2001, but Hewitt insisted that the date was not correct because he had been in rehab at that time. Hewitt went to rehab in January 2001, had been clean since, and was currently worked as a self-employed contractor. Hewitt admitted that he and Larsen were both members of the Nazi Low Riders gang in 1998, but Hewitt stopped being friends with Larsen once Hewitt stopped using drugs.

Finally, Moira Curry of the Los Angeles County District Attorney's Office testified. She was the prosecutor assigned to Larsen's case once the federal court granted the habeas petition in 2013. Curry spoke to Officers Rex and Townsend, visited the crime scene with Officer Townsend, reviewed the case file, and attempted to locate the knife. Curry fully intended to retry Larsen on the original charge of possessing a concealed dirk or dagger. However, because the Three Strikes law had been amended to no longer provide an indeterminate life sentence for this particular offense, Larsen faced a maximum sentence of nine years imprisonment if convicted. Because Larsen had already served over 13 years, her office declined to retry him in order to conserve judicial resources.

On October 22, 2015, the jury unanimously concluded that Larsen failed to "prove, by a preponderance of the evidence, that either of the [ ] Defendants maliciously prosecuted him or caused the malicious prosecution of him". The jury further concluded, unanimously, that Larsen failed to "prove that any of the following Defendants' conduct was malicious, oppressive or in reckless disregard of his constitutional rights".

E. CalVCB Compensation Application

Larsen filed the underlying application for compensation as a wrongfully convicted person on September 8, 2014. Larsen alleged that he was entitled to an automatic recommendation for compensation under then-existing law because the federal court's *Schlup* determination was tantamount to a finding that his new evidence points unerringly towards innocence.[19]

After requesting and receiving multiple extensions of time, the AG submitted a Pre-Hearing Brief on October 16, 2015, with numerous exhibits. The exhibits included extensive prison records for Larsen, as well as criminal history reports for Alfred, Daniel, Dennis, Hewitt, and Lloyd. Notably, Alfred was a documented Neo-Nazi gang member, and he had listed Dennis as "next of kin" on his prison form. Larsen's prison record confirmed that he had joined the Nazi Low Riders gang while incarcerated in 1989, approximately 10 years before his arrest at the Gold Apple bar. Larsen eventually became an influential leader who ordered numerous assaults by fellow gang members against other inmates, often with sharp weapons. Larsen became associated with Hewitt in Los Angeles County jail in 1993, and he sponsored Hewitt into the gang around 1995. By December 2006, Larsen officially dissociated from the gang after a dispute with another Nazi Low Riders member.

Significantly, the AG's exhibits also included an investigative report of Alfred, Larsen, and Hewitt for solicitation to murder two Los Angeles police officers. According to the report, a member of the Nazi Low Riders gang claimed that, on August 28, 1998, at the Gold Apple bar, Alfred had offered to pay $2,000 for each murder to Larsen and Hewitt because the officers were hindering Alfred's drug operation. The report noted that Alfred "led" a group of White supremacists, and Larsen and Hewitt were both members of the Nazi Low Riders gang. However, the gang member failed a lie detector test, and Alfred flatly denied the accusation when interrogated by police. The report concluded that the offered information was "probably tied to bar room banter utilized by [the gang member] in an attempt to ward off an arrest…."

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[19] Former Pen. Code, § 1485.55, subd. (a), amended by Stats. 2016, ch. 31, § 245 (SB 836), eff. Jun. 27, 2016, and by Stats. 2016, ch. 785 § 3 (SB 1134), eff. Jan. 1, 2017.

On November 5, 2015, Larsen moved to strike the AG's Pre-Hearing Brief as an unauthorized response filed beyond the 60-day statutory period.[20] Larsen also moved to bar consideration of the AG's exhibits as an impermissible attempt to avoid the federal court's binding factual findings with prejudicial character evidence.[21]

Both motions were denied on November 12, 2015. The previously-assigned CalVCB hearing officer explained that the AG's brief had been timely filed within the extended period of time. The hearing officer further concluded that the federal court's factual findings were not binding because no court had affirmatively found Larsen to be actually innocent and, therefore, due consideration would be given to all of the evidence presented.

F. Denial of Actual Innocence Finding By Federal Court

On November 30, 2015, Larsen returned to federal court with a motion for a finding of factual innocence. Larsen attached his application for compensation from CalCVB, as well as the AG's Pre-Hearing Brief. Larsen emphasized the reason for his motion was to qualify for automatic compensation as an erroneously convicted person under California Penal Code section 1485.55. Larsen reasoned that a finding of innocence would merely "clarify" the magistrate judge's earlier decision that Larsen qualified for the *Schlup* gateway exception. Larsen warned that, if the federal court "cannot provide the requested clarification, then [the AG] will no doubt continue its slanderous pursuit in claiming that Larsen is, in fact, guilty in order to persuade the VCGCB to deny Larsen compensation to which he is entitled."

On June 15, 2016, the magistrate judge who had previously granted Larsen's federal habeas petition denied his motion for a finding of factual innocence. In the Findings and Recommendation, the magistrate judge reiterated that Larsen was granted habeas relief "because he received ineffective assistance for his trial counsel, not because it found him innocent." Larsen was allowed to pass through *Schlup*'s gateway exception to the statutory limitations bar because he "had demonstrated it was 'more likely than not that no reasonable juror would have convicted him in the

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[20] Pen. Code, § 4902.

[21] Pen. Code, § 4903, subd. (b).

light of the new evidence' he presented." The magistrate judge emphasized that "*the Court did not affirmatively conclude that Petitioner was actually innocent of possessing a dagger*." In other words, a finding of actual innocence "was not necessary to determine that Petitioner was able to pass through the *Schlup* gateway and have his ineffective assistance of trial counsel claim heard on the merits." "Therefore, because nothing in the Court's prior Orders requires clarification, and as *the Court never affirmatively determined that Petitioner was innocent of possessing a dagger*, Petitioner's Motion is DENIED."

Larsen objected to the magistrate judge's findings and recommendation. After conducting de novo review, the district court judge adopted the magistrate judge's recommendation on July 12, 2016.

III.

DETERMINATION OF ISSUES

Penal Code section 4900 allows any person, who has been erroneously convicted and imprisoned for a felony offense, to apply for compensation from CalVCB.[22] CalVCB must recommend compensation to the Legislature, without conducting a hearing, if the claimant was found by a court to be actually innocent by a preponderance of evidence in a proceeding for a declaration of actual innocence or a motion to vacate the judgment.[23] CalVCB must also recommend compensation, without conducting a hearing, if a court grants a contested habeas petition based upon a finding that the claimant is factually innocent.[24]

Otherwise, CalVCB may recommend compensation after a hearing only if the claimant proves, by a preponderance of the evidence, that (1) the crime with which he was charged was either not committed at all, or, if committed, was not committed by him and that (2) he sustained an injury through

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[22] Pen. Code, § 4900.

[23] Pen. Code, § 4902, subd. (a) [referring to Pen. Code, §§ 851.865 and 1473.6].

[24] Pen. Code, § 1485.55, subd. (a).

his erroneous conviction and imprisonment.[25] The Attorney General may introduce evidence in opposition to the claimant.[26] "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it.[27] If the claimant satisfies this burden of persuasion, then CalVCB shall recommend to the Legislature an award of compensation equal to $140 per day for every day of time spend in custody.[28]

CalVCB hearings are not governed by traditional rules of evidence.[29] Instead, CalVCB may consider the "claimant's denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant of the crime…."[30] However, none of these circumstances may be deemed sufficient evidence to warrant a recommendation for compensation "in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged."[31] CalVCB may also "consider as substantive evidence the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence admitted in prior proceedings for which claimant had an opportunity to object."[32]

Ultimately, all relevant evidence is admissible in a CalVCB hearing "if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs,"[33] even if a common law or statutory rule "might make its admission improper over objection in any other

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[25] Pen. Code, §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims Board* (2006) 152 Cal. App. 4th 1164.

[26] Pen. Code, § 4903, subd. (a).

[27] *People v. Miller* (1916) 171 Cal. 649, 652.

[28] Pen. Code, § 4904.

[29] See Cal. Code Regs., tit. 2, § 615.1, subd. (a) ["The formal hearing provisions of the Administrate Procedure Act … do not apply"].

[30] Cal. Code Regs., tit. 2, § 641, subd. (a).

[31] Cal. Code Regs., tit. 2, § 641, subd. (a).

[32] Cal. Code Regs., tit. 2, § 641, subd. (b).

[33] Cal. Code Regs., tit. 2, § 641, subd. (c).

proceeding."[34] CalVCB "may also consider any other information that it deems relevant to the issue before it."[35]

Nevertheless, CalVCB's broad authority to consider all relevant evidence when deciding a claimant's application for compensation is expressly limited by Penal Code section 4903. Specifically, subdivision (b) of that section provides:

> "the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial pursuant to Section 1473.6, or an application for a certificate of factual innocence as described in Section 1485.5 shall be binding on the Attorney General, the factfinder, and the board."[36]

In *Madrigal*, the Second District Court of Appeal considered the meaning of this subdivision in Penal Code section 4903, in combination with former Penal Code sections 1485.5 and 1485.55.[37] At that time, former section 1485.5 provided that express factual findings by a court, rendered in an uncontested judicial proceeding, were binding upon CalVCB.[38] By comparison, former section 1485.55 provided that, in a contested judicial proceeding, CalVCB was bound by a court's determination that either the claimant's new evidence points unerringly to innocence or demonstrates innocence by a preponderance of evidence; in either scenario, CalVCB was required to grant the application without a hearing.[39] But for the majority of claimants who did not fall within either of these statutes (i.e., there was a contested judicial proceeding that did not result in a finding of actual innocence or evidence that unerringly pointed to innocence), Penal Code section 4903 applied.[40]

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[34] Cal. Code Regs., tit. 2, § 641, subd. (d).

[35] Cal. Code Regs., tit. 2, § 641, subd. (f).

[36] Pen. Code § 4903, subd. (b).

[37] *Madrigal, supra*, 6 Cal.App.5th at pp. 1114-1120 [analyzing former Pen. Code, § 1485.5, subd. (c), added by Stats. 2013, ch. 800, § 2 (SB 618), eff. Jan. 1, 2014, amend. by Stats. 2014, ch. 28, eff. June 20, 2014, and former Pen. Code, § 1485.55, subd. (a), (f), added by Stats. 2013, ch. 800, § 3, eff. Jan. 1, 2014].

[38] *Madrigal, supra*, 6 Cal.App.5th at p. 1114 [examining former Pen. Code, § 1485.5, subd. (c)].

[39] *Id*. at p. 1115 [examining former Pen. Code, § 1485.55, subds. (a), (f)].

[40] *Id*. at pp. 1118-1119 [examining Pen. Code, § 4903, subd. (b)].

Under section 4903, "the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus" are "binding on" CalVCB.[41]

Madrigal confirmed that binding determinations under Penal Code section 4903 are not limited to issues involving actual innocence. Rather, the binding effect extends to any factual determination supporting the legal basis for granting habeas relief.[42] For example, section 4903 applied to the federal court's factual finding that Madrigal's proffered alibi witness was "credible" and "strong" because this finding supported the decision to grant habeas relief for ineffective counsel."[43] On the other hand, section 4903 did not apply to the federal court's finding that Madrigal was "actually innocent" because that finding occurred in the course of a bail hearing.[44] *Madrigal*'s construction of section 4903 "ensure[d] consistency between the Board's determinations and the factual findings made in post-conviction relief proceedings, including those not based on actual innocence."[45]

The result in *Madrigal* is bolstered by recent amendments to Penal Code sections 1485.5 and 1485.55. Specifically, subdivision (c) of Penal Code section 1485.5 currently provides:

> In a contested or uncontested proceeding, the express findings made by the court, including credibility determinations, in considering a petition for habeas corpus, a motion to vacate judgment pursuant to Section 1473.6, or an application for a certificate of factual innocence, shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board.[46]

Subdivision (d) defines "express factual findings" as "findings established as the basis for the court's ruling or order."[47] Subdivision (e) clarifies that the court may be either state or federal.[48] Thus, section

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[41] Pen. Code, § 4903, subd. (b).

[42] *Madrigal, supra,* 6 Cal.App.5th at pp. 1118-1119.

[43] *Id*. at pp. 1112 & 1119.

[44] *Id*. at p. 1120.

[45] *Id*. at p. 1119.

[46] Pen. Code, § 1485.5, subd. (c), most recently added by Stats. 2016, ch. 31, § 244 (SB 836), eff. Jun. 27, 2016, amend. by Stats. 2016, ch. 785 § 2 SB 1134), eff. Jan. 1, 2017.

[47] Pen. Code, § 1485.5, subd. (d).

[48] Pen. Code, § 1485.5, subd. (e).

1485.5 confirms that CalVCB is bound by any factual determination necessary to support a court's decision to grant habeas relief.

As for the current version of section 1485.55, it continues to require CalVCB to automatically recommend compensation without a hearing "if the court has found that the person is factually innocent" in a proceeding for habeas relief or to vacate the judgment.[49] Section 1485.55 merely specifies the procedures by which an applicant may seek such a determination.[50]

In light of the foregoing authority, CalVCB is bound by a federal court's factual findings when granting a habeas petition, even if those findings do not establish actual innocence.[51] Nevertheless, as explained below, Larsen's application is recommended for denial because, even considering the federal court's binding determinations of credibility, he nevertheless failed to prove by a preponderance of the evidence that he is innocent of possessing a dirk or dagger.

A. Larsen's Absence Did Not Withdraw His Claim

At the threshold, Larsen did not abandon his claim for compensation by failing to appear in person at the hearing. Typically, a claimant's failure to appear "shall constitute a withdrawal of the action…."[52] Nevertheless, a claimant "may … be represented by an attorney or other person" at a CalVCB hearing.[53] Because Larsen's counsel appeared at the hearing in his place, his absence did not trigger a withdrawal of his application for compensation. Accordingly, the AG's contrary position is denied.

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[49] Pen. Code, § 1485.55, subds. (a)-(f), amended by Stats. 2016, ch. 31, § 245 (SB 836), eff. Jun. 27, 2016, and by Stats. 2016, ch. 785, § 3 (SB 1134), eff. Jan. 1, 2017.

[50] *Ibid*.

[51] See *Madrigal*, 6 Cal.App.5th at pp. 1117-1119; Pen. Code, §§ 1485.5, subd. (c), 4903, subd. (b).

[52] Cal. Code Reg., tit. 2, § 617.9.

[53] Cal. Code Reg., tit. 2, § 617.3.

B. No Court Has Found Larsen To Be Innocent As Required For Automatic Compensation

In his application, Larsen asserts that he is entitled to a recommendation for compensation, without a hearing, under former Penal Code section 1485.55 because the federal court's *Schlup* determination is tantamount to finding that his new evidence points unerringly to innocence. Larsen's counsel similarly argued at the hearing that the federal court "inherently" found him innocent by a preponderance of evidence.

The current version of Penal Code section 1485.55 requires a judicial finding that "the person is factually innocent," whereas the former version permitted a judicial finding that the "new evidence on the petition points unerringly to innocence…." The current version of section 1485.55 applies to the resolution of Larsen's application, even though his application was filed before this statutory amendment was enacted.[54] Because no state or federal court has found Larsen to be factually innocent, it necessarily follows that he is not entitled to automatic compensation.

But even under the former version of Penal Code section 1485.55, Larsen is still not entitled to automatic compensation because no court ever found that his new evidence points unerringly to innocence. Instead, the magistrate judge concluded that, "had the jury been able to consider [Larsen's new] evidence, 'no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." The Ninth Circuit similarly concluded that "[n]o reasonable juror confronted with such evidence would be convicted beyond a reasonable doubt of Larsen's guilt." But finding a defendant "not guilty" is not at all equivalent to finding him innocent. Indeed, the magistrate judge unequivocally explained when denying Larsen's recent motion for a finding of innocence that "the Court did not affirmatively conclude that Petitioner was actually innocent of possessing a dagger."

Thus, the federal court findings under *Schlup* are patently insufficient to trigger an automatic recommendation for compensation under current or former Penal Code section 1485.55.

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[54] See *Tennison, supra*, 152 Cal.App.4th at 1181-1182 [finding "application for monetary compensation pursuant to section 4900 is neither fundamental nor vested" right because the "right to obtain compensation does not vest until a claimant persuades the Board on the merits of the application"]; see also *Madrigal, supra*, 6 Cal.App.5th at p. 1115 n.6 [retroactively applying clarifying amendment from 2014 to Penal Code section 1485.5].

C. Binding Determinations of Credibility

As Larsen's post-*Madrigal* briefing emphasizes, the original proposed decision concluded that CalVCB was not bound by the magistrate judge's credibility findings when granting Larsen's habeas petition because those findings concerned ineffective counsel rather than actual innocence. Under *Madrigal* and the current versions of Penal Code sections 1485.5 and 1485.55, as well as Penal Code section 4903, this conclusion is no longer valid. Accordingly, a de novo review of the entire application is required, giving due deference to the federal court's binding factual findings.

1. McNutts

The AG's post-*Madrigal* briefing argues that CalVCB need not be bound by the federal court's factual determination of the McNutts' credibility because newly discovered evidence significantly undermines their credibility. In the AG's view, *Madrigal* is distinguishable because, unlike Larsen's case, no new evidence was presented during the CalVCB hearing to impeach the federal court's credibility determination.

True, new evidence subsequently uncovered during the civil rights litigation seemingly undermines the McNutts' credibility. Namely, Ms. McNutt's sons Alfred and Daniel both associated with Larsen, and Larsen also associated with the McNutts' landlord Dennis, who was a convicted felon like Alfred, Daniel, and Larsen. Even though Mr. McNutt had been a police officer in North Carolina, he nevertheless moved across the country with his wife to live in Dennis's home and had no job. The McNutts lived with Dennis for a longer period than Mr. McNutt was willing to admit and continued to reside there even after the home was raided by police. These overlapping social circles strongly suggest that the McNutts associated with Larsen, despite their contrary testimony. Also, Mr. McNutt testified inconsistently about whether he had actually viewed the object thrown by Hewitt. In addition, Mr. McNutt suddenly claimed, along with Larsen and Lloyd, that Hewitt wore his hair in ponytail that night, contrary to his wife's testimony at the evidentiary about Hewitt's hairstyle. Finally, Mc. McNutt unequivocally denied that his stepson Alfred was in a gang, despite overwhelming evidence to the contrary. Viewed together, this new evidence calls into question Mr. McNutts' veracity.

However, neither Penal Code section 4903, nor Penal Code section 1485.5, allow for CalVCB to disregard a federal court's factual finding under any circumstance, even if shown to be incorrect by clear and convincing evidence.[55] Thus, even if *Madrigal* may be distinguished on this ground, these statutes may not. Accordingly, CalVCB is bound by the federal court's factual finding of the McNutts' credibility when considering the merits of Larsen's habeas petition.

This binding determination of the McNutts' credibility is not without limits. Contrary to Larsen's suggestion in his post-*Madrigal* briefing, a finding of credibility does not equal accuracy. Simply because the McNutts credibly testified that they saw Hewitt and not Larsen throw an object does not preclude CalVCB from determining that the McNutts may have been mistaken. Even the Ninth Circuit recognized "that it may have been physically possible for Larsen to throw a knife during a split second when neither of the McNutts was paying attention… ." Accordingly, CalVCB must assume that the McNutts testified truthfully at the evidentiary hearing about their observations, but CalVCB need not assume that their recollection of those observations was necessarily correct. CalVCB may still consider all of the evidence before it when determining whether the McNutts' sincere version of events constitutes an accurate depiction of those events.

Furthermore, the binding determination of the McNutts' credibility solely applies to the federal court's findings in support of the habeas relief and not to any other proceeding. Consequently, the factual findings by the magistrate judge when ruling on the statute of limitations defense under *Schlup* does not bind CalVCB.[56] Nor does it extend to any factual findings in the Ninth Circuit decision, as the Ninth Circuit solely considered the *Schlup* ruling and not the merits of Larsen's habeas petition.

Accordingly, CalVCB is only bound by the magistrate judge's factual determination when granting Larsen's habeas petition that "the McNutts were credible and persuasive witnesses" whose informal statements and formal testimony "maintained a consistent version of events." CalVCB is not

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[55] By comparison, a federal court considering a state prisoner's habeas petition may reject a state court's earlier factual finding upon a showing of clear and convincing evidence to the contrary. (28 U.S.C. § 2254(e).)

[56] See *Madrigal, supra*, 6 Cal.App.5th at p. 1120 [concluding that federal court's finding of actual innocence at bail hearing was not binding under Pen. Code § 4903].

bound by the magistrate judge's findings when ruling on *Schlup* that the McNutts had "no apparent reason to perjure themselves," they both "had unobstructed views of [Hewitt] and [Larsen], unlike Townsend and Rex," that Mr. McNutt "was standing only two feet away from [Hewitt] when [Hewitt] threw the object], and it was "unbelievable" that the McNutts would fly across the country "to give perjurious testimony on behalf of Petitioner, with whom they have no ties."[57] Moreover, the binding determination that the McNutts were persuasive does not preclude a determination by CalVCB that the officers were equally or even more persuasive, given that the officers never appeared before the magistrate judge, and, therefore, no such comparative assessment was possible.

Similarly, the binding effect of the magistrate judge's credibility finding for Mr. McNutt does not extend to his subsequent testimony during Larsen's civil rights litigation. Indeed, the jury's verdict in the civil rights litigation reflects an adverse finding of Mr. McNutt's credibility in favor of Officers Townsend and Rex. Thus, CalVCB is free to disbelieve Mr. McNutt's new assertions during the civil rights litigation, such as his claim that he actually a five-inch blade on the object thrown by Hewitt, or that Hewitt wore in his hair in a ponytail, or that Alfred was not in a gang.

2. McCracken

CalVCB is similarly bound by the magistrate judge's determination, when granting Larsen's habeas petition, that McCracken's "provided credible testimony … that the person holding the knife [inside the bar] was someone other than Petitioner." Accordingly, CalVCB must assume that McCracken truthfully testified that someone other than Larsen threatened him with a knife that resembled the knife that was subsequently located by the officers. This assumption still does not preclude CalVCB from inferring that Larsen possessed a different knife, or possibly even the same one, later that evening while standing in the parking lot.

3. Hewitt and Owen

In his post-*Madrigal* briefing, Larsen asserts that the magistrate judge found that the declarations from Hewitt and his girlfriend Owen were credible. The AG counters that such a finding

[57] Even if these findings were, somehow, deemed to be binding, it still would not alter the final determination that Larsen has failed to demonstrate his innocence by a preponderance of the evidence in this proceeding.

is “implausible” since neither Hewitt nor Owen personably appeared before the magistrate judge. A close review of the magistrate judge’s ruling to grant habeas relief reveals no findings on their credibility. The magistrate judge did take notice that, in 1997, Owen pled guilty to forgery of access cards to defraud. The magistrate judge further noted the trial prosecutor’s testimony that Hewitt associated with the Nazi Low Riders gang.

Given the absence of any credibility determination for either Hewitt or Owen, CalVCB is free to make its own assessment based upon all relevant evidence before it. This evidence includes Hewitt’s testimony during Larsen’s civil rights proceeding that he signed the declaration while under the influence of drugs without reading it and that he had no recollection about the events on June 6, 1998. For this reason, as well as the overall weight of evidence implicating Larsen, neither of these declarations constitutes credible evidence of Larsen’s innocence.

4. Larsen

The magistrate judge expressly found Larsen’s statement that he "discovered the names of James and Elinore McNutt . . . after [his] conviction but before [he] was sentenced" to be “credible, given his obvious incentive to alert his counsel about the McNutts at the earliest possible time.” This credibility determination in support of the decision to grant habeas relief is binding upon CalVCB. But again, the binding effect solely applies to this particular statement by Larsen and does not extend to his subsequent testimony in the civil rights litigation or to his declaration in support of his application for compensation.

D. Gang Evidence

By regulation, CalVCB may consider any relevant information even if otherwise inadmissible under traditional evidentiary rules.[58] In his Motion to Strike, Larsen objected to the AG’s evidence of his prior gang involvement and criminal history as impermissible character evidence. Larsen’s point is well-taken.

The AG’s gang evidence is solely considered to the extent it shows that Larsen ran in the same social circles as Hewitt, Lloyd, the McNutts’ sons, and the McNutts’ landlord, and, therefore,

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[58] Cal. Code Regs., tit. 2, § 641.

any of these persons may have had a motive to lie on Larsen's behalf. Otherwise, the gang evidence is not considered for any other purpose, such as bad character or criminal disposition by Larsen or any of these witnesses. Moreover, it is assumed that Larsen, Hewitt, and Alfred did not actually conspire to murder two officers. Instead, the investigative report of this accusation is deemed relevant solely to the extent it confirms that Larsen, Hewitt, and Alfred all knew each other.

E. Larsen Failed To Demonstrate Actual Innocence

With these caveats in mind, Larsen has failed to demonstrate his innocence by a preponderance of the evidence in this proceeding. Again, CalVCB is bound to find that the McNutts truthfully and persuasively testified that they observed Hewitt throw an object that could have been a knife and did not observe Larsen throw anything. CalVCB is also bound to find that McCracken truthfully testified that someone besides Larsen held a knife to his throat earlier that night. Even with these binding factual findings, it was still possible for Larsen to have thrown the knife in the manner described by Officer Rex and Officer Townsend.

Any other explanation is simply not believable under all of the circumstances. Larsen was standing about 10 feet to the left of where the knife was discovered, while the copper bar was up to 30 feet away to Larsen's right, and no other weapons were discovered. It may be inferred that Hewitt was one of the two men standing to Larsen's right, closest to the copper bar. Thus, the McNutts may have observed Hewitt throw an object that turned out to be the copper bar, and the metallic sound the McNutts heard may have been from the knife thrown by Larsen. Significantly, Officers Rex and Townsend unequivocally identified Larsen as the person who threw the object where the knife was discovered, and they did so not only during the criminal trial but again decades later during the civil rights litigation.

Notably, the officers' description of Larsen's short hair and green flannel shirt matched his mug shot from that night. Because the reported gunman was wearing the same type of shirt, both officers had a compelling motive to focus their attention on Larsen. Although Larsen and Lloyd claimed during the civil rights trial that Hewitt was also wearing a flannel shirt that night, both Mr. and

Mrs. McNutt unequivocally refuted that allegation during their evidentiary hearing testimony.[59] Officer Townsend similarly testified that he did not observe anyone else wearing a flannel shirt that night, and Officer Rex added that no one within the vicinity of Larsen, not even the other two men to his right, was wearing a heavy coat or flannel.[60] Also, Hewitt did not resemble Larsen at all.[61] Under these circumstances, it is highly unlikely that both officers would have mistakenly identified Larsen as the person who threw the knife.

It is even less likely that the officers falsely identified Larsen. Neither officer had any idea who Larsen was, as evidenced by the fact that Larsen was arrested and booked in jail under the false name he provided. Also, Officers Townsend and Rex had only been partners for six weeks at the time of Larsen's arrest, and both officers continued their exemplary service as police officers for the next 13 years. By comparison, Officer Townsend's misrecollection about being a passenger and his omission about the element of concealment are inconsequential.

As for former officer Liddy's supposed interference with Larsen's prospective witnesses for his criminal case and Liddy's coincidental appearance at the courthouse during Larsen's civil rights trial, the evidence of Larsen's guilt nevertheless remains strong. During the civil rights trial, Larsen admitted that Liddy was not present at the Gold Apple bar when Officers Rex and Townsend plainly observed Larsen toss the knife. Larsen also declined to suggest that the knife had been planted and insisted, instead, that Hewitt had thrown it. Thus, by Larsen's own admission, Liddy could not have framed Larsen. Mr. McNutt's version of events similarly precludes any suggestion that Larsen may have been framed. Accordingly, Liddy may have had a personal desire to see Larsen convicted

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[59] AG Ex. X at pp. 32, 64.

[60] Larsen Ex. K at p. 47 [lines 15-20], at p. 194 [lines 16-28]. Of course, by Lloyd's account, there were at least three persons wearing a flannel jacket that night (i.e., Larsen, Hewitt, and Lloyd), which would have included both men to Larsen's right.

[61] That night, Larsen was almost 29 years old, 5 feet and 8 inches tall, between 130 and 160 pounds, with blue eyes and closely cropped brown hair. (See AG Exs. O, R, RR.) By comparison, Hewitt was 27 years old, 5 feet and 9 inches tall, 140 pounds, with brown eyes and brown hair. (See AG Exs. R, BB.) During the evidentiary hearing proceedings, both McNutts described Larsen as shorter and heavier than Hewitt.

based upon Liddy's prior experience in the anti-gang task force, but that desire ultimately had no bearing on whether or not Larsen was actually guilty.

Overall, even assuming the McNutts and McCracken truthfully testified about their recollections on the night of Larsen's arrest, Larsen still fails to prove that, more likely than not, he is actually innocent. To the contrary, the weight of the evidence strongly suggests that Larsen is guilty.

This determination is bolstered by multiple sources. First, the prosecutor tasked with retrying Larsen after the habeas proceeding fully intended to do so after speaking with both officers, viewing the crime scene, and reviewing the case file. The only reason a retrial did not occur was because of a change in the Three Strikes law that precluded a life sentence even if Larsen were convicted.

Second, the only jury to hear live witness testimony from Mr. McNutt and Officers Rex and Townsend unanimously ruled in favor of the officers. Although this was a civil rights trial with different legal defenses, the officers' credibility was necessarily an important factor in reaching the verdict.

Third, Hewitt also testified before this civil rights jury and expressly disavowed any veracity to his declaration. Hewitt explained that he had been too intoxicated to recall what occurred at the Gold Apple bar. Hewitt no longer used drugs or associated with Larsen. But given Hewitt's close association with Larsen and their membership in the same gang, it seems unlikely that Hewitt would have remained silent on the night of June 8, 1998, if Larsen had been arrested for Hewitt's own crime.

Fourth, Larsen's declaration in support of his CalVCB application offers no details about the night in question. Instead, the declaration merely asserts, in summary fashion, that he "was arrested for a crime I did not commit" just 10 days before his 29th birthday. The declaration fails to disclose exactly who was with Larsen in the parking lot that night and further fails to identify who actually threw the knife. Although Larsen subsequently testified about these details during his civil rights proceeding in 2015, this testimony only occurred after Larsen submitted his CalVCB application in 2014.

Fifth and finally, Larsen appears incredible. Over the years, he has changed his story multiple times. Larsen initially advised his first appointed trial attorney that someone named Erwin would plead guilty to throwing the knife. Larsen later told his privately-retained trial attorney Consiglio that

he (Larsen) had only thrown the copper bar.[62] Then Larsen claimed to Consiglio that Hewitt actually threw the knife. Finally, after the jury's guilty verdict, Larsen offered the McNutts' version of events that he (Larsen) did not throw anything at all.

Larsen's untrustworthiness is further demonstrated by the testimony from the civil rights proceedings from both Larsen and Lloyd that Hewitt was wearing a flannel shirt that night, given the contrary testimony from both McNutts that Hewitt was wearing a loose, shirt-sleeved shirt, as well as the officers' testimony that no one besides Larsen was wearing a flannel shirt. Moreover, Lloyd's testimony that he and Hewitt were both wearing a flannel shirt, in addition to Larsen, appears incredible. It is also suspicious that Larsen, Lloyd, and Mr. McNutt all testified for the first time at the civil rights trial that Hewitt wore his hair in a ponytail, whereas Ms. McNutt had described Hewitt's hair as just two to three inches long and slicked back. Tellingly, Larsen only mentioned to Consiglio that Lloyd wore his hair in a ponytail with no mention of Hewitt's hairstyle. Thus, with the exception of the magistrate judge's binding determination that Larsen credibly told his attorney about the McNutts after his conviction but before sentencing, Larsen is not at all credible.

In sum, after reviewing and considering the voluminous record in this matter, along with the federal court's binding factual findings in support of the decision to grant habeas relief, it is determined that Larsen has failed to meet his burden to prove by a preponderance of the evidence that he did not commit the crime with which he was charged and convicted. This determination is entirely consistent with the federal court's decision that Larsen's criminal conviction was constitutionally infirm due to counsel's ineffective representation at trial, not actual innocence. Because all of the evidence presented before CalVCB fails to prove Larsen is more likely than not actually innocent of possessing a dirk or dagger on the night of June 6, 1998, his application is recommended for denial.

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[62] As the magistrate judge noted, this fact is relevant to Larsen's credibility but was not relevant to whether counsel's representation was constitutionally adequate.

As a result of this determination, Larsen is not eligible for compensation as an erroneously convicted person. Therefore, it is not necessary to consider whether he sustained any injury as a result of his erroneous conviction and imprisonment.

For all of the foregoing reasons, Larsen's claim for compensation is hereby recommended for denial.

Date: April 20, 2017

Laura Simpton
Hearing Officer
California Victim Compensation Board

BEFORE THE VICTIM COMPENSATION BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Claim of:

Daniel Larsen

PC 4900 Claim No. 14-ECO-01

Notice of Decision

On June 15, 2017 the California Victim Compensation Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: June 19, 2017

Tisha Heard
Board Liaison
California Victim Compensation Board