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5 BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
6 OF THE STATE OF CALIFORNIA
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8 In the Matter of the Claim of:

9 Kevin Baruxes

Proposed Decision

10 Claim No. G543301

(Penal Code § 4900 et seq.)

11 A hearing on this claim limited to a review of the written record was held by Deborah Bain,
12 Hearing Officer, who was assigned to hear this matter by the Executive Officer of the Victim
13 Compensation and Government Claims Board (Board).

14 The claimant, Kevin Baruxes, is represented by Justin Brooks, of the California Innocence
15 Project. Mr. Brooks waived his appearance, waived 15 days' notice of the hearing pursuant to Penal
16 Code section 4902 and agreed to have an informal hearing conducted by the hearing officer upon the
17 written record.¹

18 Deputy Attorney General Jennifer M. Runte represented the Attorney General in this
19 matter. Ms. Runte also waived her appearance, waived 15 days' notice of the hearing pursuant to
20 Penal Code section 4902, and agreed to have an informal hearing conducted by the hearing officer
21 upon the written record.
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27 ¹ Upon presentation of any such claim, the Board of Control shall fix a time and place for the hearing of the claim, and shall
28 mail notice thereof to the claimant and to the Attorney General of this State at least 15 days prior to the time fixed for such
29 hearing. (Penal Code section 4902.)

Findings of Fact

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2 1. The facts of the subject claim stem from the allegations brought by Cortni M. and resulted in
3 the San Diego District Attorney charging Mr. Baruxes with rape by a foreign object while acting in
4 concert, (Pen. Code, § 264.1 and Pen. Code, § 289(a)), rape by a foreign object, (Pen. Code,
5 § 289(a)), oral copulation by acting in concert, (Pen. Code, § 288a(d)), assault to commit a felony,
6 (Pen. Code, § 220), and false imprisonment by violence, (Pen. Code, § 236 and Pen. Code, § 237).
7 The complaint alleged the additional enhancements that Mr. Baruxes personally used a dangerous or
8 deadly weapon during the offenses (Pen. Code, § 667.61(b), Pen. Code, § 667.61(c) and Pen. Code, §
9 667.61(e)), and that he was armed with a dangerous weapon (Pen. Code, § 12022(b)). All counts
10 included the allegation that the offenses were hate crimes motivated by race, color, nationality, country
11 of origin, or ancestry of the victim, (Pen. Code, § 12022.3(b)).

12 2. Cortni M. alleged that Mr. Baruxes committed these offenses with two other men. At trial
13 Ms. M. testified that she resided at an apartment complex in Rancho Bernardo, California, with her
14 husband, Shane Mahaffy. Her upstairs neighbor was "Rocky" Marts. Mr. Marts was a friend of
15 Mr. Baruxes. On a number of occasions, Ms. M. heard these individuals make racist remarks.

16 3. Ms. M. testified at trial that two weeks before the attack, she suffered a miscarriage in her
17 sixth month of pregnancy. On February 15, 1996, the evening of the attack, she observed Mr. Baruxes
18 and Mr. Marts in a car. They called her a "bitch" and a "whore."

19 4. Ms. M. went home. Twenty minutes later she went out to empty the trash. When she entered
20 the trash enclosure, she saw Mr. Baruxes and two other men. Someone grabbed her.
21 Mr. Baruxes called her a bitch and a whore. Mr. Baruxes took out a knife and handed it to the man
22 holding her.

23 5. Mr. Baruxes sexually assaulted Ms. M. During the attack, Mr. Baruxes grabbed her crotch,
24 kissed her, twisted her breast, pulled her hair, forced her to orally copulate him, put his fingers in her
25 vagina, and slapped her. One of the men said that he wanted it to stop, that it had gone too far.
26 Mr. Baruxes referred to Ms. M. as "trash," told her to go back to Africa, and left.

27 6. Ms. M. called 911. Ms. M. provided a physical description of her attacker. She did not tell the
28 911 operator or the responding police about the forcible oral copulation. Ms. M. had a torn shirt,
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1 scratches on her stomach, and a cut on her forearm. San Diego County Detective Danielson
2 interviewed Ms. M. the next day. Ms. M. was unemotional during the interview.

3 7. Ms. M. met with Detective Danielson again on February 22, 1996. Ms. M. was upset and had
4 a bruise on her cheek. It was at this meeting she mentioned for the first time the oral copulation. From
5 a photo line-up she identified Mr. Baruxes and his brother, Scott. Ms. M. identified Scott Baruxes as the
6 man who held her arms during the attack. Ms. M. was not able to identify the third man, because she
7 claimed that she never saw him clearly.

8 8. Mr. Baruxes was arrested on February 23, 1996. He had Nazi, Ku Klux Klan and Aryan
9 Brotherhood paraphernalia on his person at the time of his arrest. At trial, his grandmother, mother, a
10 swim and tennis club manager, and a doctor all testified to his whereabouts as to the day and evening
11 of February 15, 1996. On rebuttal the D.A. produced evidence showing that Mr. Baruxes could have
12 been at the scene within eight minutes of the last sighting by an alibi witness.

13 9. On June 14, 1996, the jury convicted Mr. Baruxes on all counts and found the enhancements
14 to be true. On October 22, 1996, after denying Mr. Baruxes' motion for a new trial, the court sentenced
15 him to 15 years to life in prison, plus a three-year enhancement, for a total term of 18 years to life.

16 10. The court also denied Mr. Baruxes' motion to produce or review Ms. M.'s medical and
17 employment records. Mr. Baruxes claimed that these records would demonstrate that Ms. M. had a
18 history of claiming that she was abused or battered by third parties.

19 11. Mr. Baruxes filed an appeal which was rejected and the conviction affirmed. Mr. Baruxes
20 filed a writ to the Superior Court of San Diego County and the California Supreme Court; both petitions
21 were denied. On or about May 17, 2002, he filed a Writ of Habeas Corpus in the Superior Court of
22 California, County of San Diego. The writ was based on the discovery of new evidence. The origin of
23 the new evidence was an e-mail from Michael Chaney to the District Attorney.

24 12. Mr. Chaney was the ex-finance of Ms. M. Mr. Chaney informed the D.A. that Ms. M. had
25 confessed to him that the individual that was serving time had not raped her. Ms. M. told Mr. Chaney
26 that Mr. Baruxes was a cruel man and deserved what he got. Mr. Chaney told the D.A. that Ms. M.
27 was a chronic liar.

28 13. Later when interviewed, Mr. Chaney stated that Ms. M. told him that she was not sure that
29 Mr. Baruxes committed the crime because she had been in shock and did not know what happened.

1 She also told him details substantially different than those testified at trial. For example, she informed
2 him that three or four people had sodomized her with a broomstick, and that as a result of the attack
3 she had suffered a miscarriage, sustained a head injury, and developed epilepsy. She told him various
4 stories regarding the medical treatment she received. She said: 1) she went to work the next day; 2)
5 she was hospitalized after the attack for four days; and 3) she was hospitalized for a month.

6 14. Mr. Chaney also reported that Ms. M. had, on one occasion after they argued and spent the
7 night apart, told him that she had been mugged. She admitted later that this was a lie. After they broke
8 up, Ms. M. falsely accused Mr. Chaney of stalking her and assaulting her. Subsequently, Mr. Chaney
9 retracted his initial statements to the D.A. and said that his earlier statements were a "big mistake."

10 15. As a result of Mr. Chaney's initial disclosure, the San Diego District Attorney's Office and
11 the Defense conducted further investigation. Mr. M.'s former boyfriend, former roommate, and former
12 husband, Mr. Mahaffy, were interviewed.

13 16. The investigation revealed a pattern of lying, deception, manipulative behavior, and false
14 allegations. Ms. M. told people she had cancer when she did not. She faked epileptic seizures. She
15 falsely accused a boyfriend of physically assaulting her. She told a roommate that her child had died
16 during the eighth month of her pregnancy, but the doctors forced her to carry it full term. She claimed
17 that she and her husband named the baby and buried the child on the beach after the birth.
18 Additionally, the investigation revealed that Ms. M. lied to employers; shoplifted, possibly had a drug
19 problem, may have engaged in prostitution, and was unable to hold a job.

20 17. Mr. Mahaffy related a prior alleged assault by Ms. M. Mr. Mahaffy was in the service when
21 he and Ms. M. were married. He was scheduled to be deployed in December of 1997, or January of
22 1998. One night after Ms. M. and he had gone to bed, he was awakened by her screaming. He found
23 Ms. M. in the living room. She told him that she had been attacked. She said she had gone out to
24 the car to get a book when suddenly she was attacked by a man with a box cutter. Mr. Mahaffy
25 observed a very small scratch on Ms. M.'s finger. Mr. Mahaffy found Ms. M.'s claim to be highly
26 questionable.

27 18. Mr. Mahaffy said Ms. M. was three or four months pregnant in late January or early
28 February 1996. A medical examination revealed that the fetus was dead. Ms. M. immediately had a
29 D&C. They never named the child or had any service on the beach.

1 19. Ms. M. requested that he ask not be deployed due to the miscarriage. Mr. Mahaffy told her
2 that he did not believe the Navy would allow him to stay home because of the miscarriage. When
3 Ms. M. reported that she had been sexually assaulted, Mr. Mahaffy asked permission of the Navy not
4 to be deployed. It was his opinion that Ms. M. knew that if she reported that she had been raped, he
5 would not be deployed.

6 20. When Ms. M. was contacted she expressed sorrow over the length of Mr. Baruxes'
7 sentence. Ms. M. stated that she was 90% sure that Mr. Baruxes did not commit the crime.

8 21. On July 15, 2003, Deputy District Attorney Kelly Rand appeared on behalf of the San Diego
9 District Attorney's Office on the writ. She stipulated to the Writ of Habeas Corpus and moved to
10 dismiss the complaint for lack of sufficient evidence.

11 22. San Diego County Judge Michael Wellington set aside the conviction and granted the writ.
12 Judge Wellington noted that Mr. Baruxes spent seven years in prison for something he shouldn't have
13 spent any time for. Judge Wellington further stated that, on behalf of the criminal justice system, they
14 were sorry for the price Mr. Baruxes had paid.

15 23. Mr. Baruxes petitioned the court for a finding of factual innocence under Penal Code section
16 851.8. The District Attorney stipulated to the petition. Judge Wellington granted the petition on August
17 5, 2003.

18 24. On May 3, 2004, Deputy District Attorney Rand wrote a letter to the Board with respect to
19 Mr. Baruxes' claim. She stated that she became convinced of Mr. Baruxes' innocence after speaking
20 with the victim. The victim changed her story several times during the interview. The victim's credibility
21 became even more of a concern after the D.A.'s office learned that Ms. M. had falsely accused other
22 people of committing crimes against her. Ms. Rand stated that she was satisfied that Mr. Baruxes did
23 not commit the alleged crime. Further, she is not convinced that any crime occurred.

24 25. On May 6, 2004, Deputy Attorney General Runte wrote to the Board on behalf of the
25 California Department of Justice. Ms. Runte had reviewed Mr. Baruxes' Penal Code section 4900 *et*
26 *seq* claim. Ms. Runte stated that the Attorney General's Office was convinced beyond a
27 preponderance of the evidence that Mr. Baruxes did not commit the crimes for which he was
28 convicted. Further, Ms. Runte concluded that Mr. Baruxes did not in any way contribute to his arrest
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1 or conviction. On behalf of the Attorney General's Office, Ms. Runte recommended that Mr. Baruxes'
2 claim be granted.

3 26. According to the claim, Mr. Baruxes is seeking an award of \$265,000 for 2,650 days in
4 custody. Mr. Baruxes was sentenced on June 14, 1996. Jeff Chin, Assistant Director of the California
5 Innocence Project, stated that the 2,650 days were calculated from June 14, 1996, the date of the
6 verdict to July 16, 2003, the of date of release. Mr. Chin said that the initial days cited of 2,650, were
7 in error and the actual number is 2,587 days. The 2,587 days include both local custody time and the
8 time Mr. Baruxes spent at the California Department of Corrections (CDC).

9 27. According to the CDC records, Mr. Baruxes was in continuous State custody at CDC
10 from November 7, 1996, until he was discharged on July 16, 2003, a total of 2,442 days.

11 28. Mr. Baruxes was eighteen years old when he was arrested. He was employed in a work
12 program as a painter and was in the process of obtaining his General Education Degree (GED). He
13 had a job offer with a painting company that was to start after he received his GED. Additionally,
14 Mr. Baruxes was planning to attend community college and learn an additional trade.

15 29. For most of his imprisonment, he was kept in Level 4 where he had few privileges.
16 Mr. Baruxes was stabbed in the chest while he was incarcerated. His recovery took a number of
17 months. Mr. Baruxes' obtained his GED while in prison. He is now twenty-six years old and is without
18 job skills or money. As a result of the erroneous conviction, Mr. Baruxes lost the opportunity to attend
19 college, to learn a trade, and to be gainfully employed.

20 **Determination of Issues**

21 1. A person convicted and imprisoned for a felony may submit a claim to the Board for
22 pecuniary injury sustained through his erroneous conviction and imprisonment. (Pen. Code, § 4900.)
23 The claim must be filed within six months judgment of acquittal or discharge given, or after pardon
24 granted, or after release from imprisonment. (Pen. Code, § 4901.)

25 2. The court granted Mr. Baruxes' writ on July 15, 2003, and he was released from custody on
26 July 16, 2003. The Board received the claim on January 14, 2004, or 181 days after the defendant
27 was released. However, Penal Code section 7, subdivision 13, defines "month" as a calendar month
28 unless otherwise expressed. Mr. Baruxes filed the claim within six calendar months of release and
29 therefore, has filed a timely claim.

1 3. The claimant must prove the following: (1) that the crime with which he was charged was
2 either not committed at all, or, if committed, was not committed by him; (2) that he did not by any act
3 or omission on his part, either intentionally or negligently, contribute to the bringing about of the
4 arrest or conviction for the crime; and (3) he sustained pecuniary injury through the erroneous
5 conviction and imprisonment. (Pen. Code, § 4903.) The Board may consider any information that it
6 deems relevant to the issues. (Cal. Code Regs., tit. 2, § 641.) The claimant has the burden of
7 proving his innocence by a preponderance of the evidence. (*Diola v. Board of Control* (1982) 135
8 Cal.App.3d 580, 588 fn 7, 185 Cal.Rptr.2d 511, 516 fn 7.)

9 4. A finding of factual innocence shall not be made unless the court finds that no reasonable
10 cause exists to believe that the person committed the offense. (Pen. Code, § 851.8(b).) To obtain a
11 finding of factual innocence, the person must establish that facts exist that "... would lead no
12 person of ordinary care and prudence to believe or conscientiously entertain any honest and strong
13 suspicion...." that the person is guilty of the charged crimes. (*People v. Mathews* (1992) 7
14 Cal.App.4th 1052, 1056, 9 Cal.Rptr.2d 348, 350, citing *People v. Scott M.* (1985) 167 Cal.App.3d 688,
15 699, 213 Cal.Rptr. 456.)

16 5. Paragraphs 12 through 25 of the Findings of Fact provide sufficient evidence that
17 Mr. Baruxes did not commit the crimes for which he was convicted.

18 6. Paragraphs 12 through 25 of the Findings of Fact provide sufficient evidence that
19 Mr. Baruxes did not by any act or omission on his part contribute to the bringing about of his arrest or
20 conviction for the crimes at issue.

21 7. Paragraph 28 and 29 of the Findings of Fact provide sufficient evidence that Mr. Baruxes
22 sustained pecuniary injury through his erroneous conviction and imprisonment.

23 8. If a claimant meets the requirement of Penal Code section 4903, the Board shall report the
24 facts of the case and its conclusion to the Legislature with a recommendation that the Legislature
25 make an appropriation to indemnify the claimant for his pecuniary injury. (Pen. Code, § 4904.) The
26 appropriation recommended shall be a sum equal to \$100 per day of incarceration served after the
27 claimant's conviction. (*Ibid.*)

28 9. Penal Code section 4904 states that the amount of the appropriation recommended shall
29 "be a sum equivalent to one hundred dollars (\$100) per day of incarceration served subsequent to

1 the claimant's conviction" It is generally accepted that a conviction in a criminal case in California
2 only becomes complete upon the conclusion of the sentencing hearing and entry of judgment (see,
3 generally Penal Code sections 1191 and 1202, and *People v. Hartsell* (1973) 34 CA3d 8, 13; 109
4 Cal.Rptr.2d 627, 630.) Judgment is synonymous with the pronouncement of sentence. (*People v.*
5 *Chlad* (1992) 6 CA4th 1719, 1725, 8 Cal.Rptr.2d 610) However, it should be noted that a small
6 number of California decisions have allowed guilty jury verdicts and guilty pleas to be used *against*
7 criminal defendants for impeachment and penalty enhancements purposes in subsequent felony
8 trials, despite the fact that sentencing had not yet occurred. (*People v. Martinez* (1998) 62
9 Cal.App.4th 1454, 73 Cal.Rptr.2d 358, and *People v. Rhoads* (1990) 221 Cal.App.3d 56, 270
10 Cal.Rptr. 266.)

11 10. A plain reading of Penal Code section 4900, however, indicates that the statute is
12 designed to compensate a previously convicted person who was (1) wrongly convicted and (2)
13 incarcerated in a State prison.² By necessity, these two events can only occur once the sentencing
14 hearing in the criminal case has been concluded and the defendant has been remanded to the
15 California Department of Corrections. On the other hand, Penal Code section 4904 suggests that a
16 claimant can be indemnified for each "... day of incarceration served subsequent to the claimant's
17 conviction. . . ."

18 11. Mr. Baruxes spent 2,442 days in State prison custody, for a total of \$ 244,200. Should the
19 Board consider compensating Mr. Baruxes for the time spent in local custody *after* the jury verdict,
20 the calculation would run from June 16, 1996, to November 6, 1996, a period of 145 days, for an
21 additional compensation of \$14,500, for a total of \$ \$258,700.

22 12. A reasonable argument can be made on the circumstances of this case that Mr. Baruxes
23 should be entitled to be compensated from the jury verdict to the sentencing hearing and
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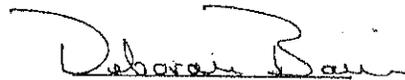
25 ² Any person who, having been convicted of any crime against the State of California amounting to a felony, and having been
26 imprisoned therefor in a State prison of this State shall hereafter be granted a pardon by the Governor of this State for the
27 reason that the crime with which he was charged was either not committed at all or, if committed, was not committed by him,
28 or who, being innocent of the crime with which he was charged for either of the foregoing reasons, shall have served the term
29 or any part thereof for which he was imprisoned, may, under the conditions hereinafter provided, present a claim against the
State to the State Board of Control for the pecuniary injury sustained by him through such erroneous conviction and
imprisonment. (Penal Code section 4900.)

1 transportation to CDC. During this unusually lengthy period of local incarceration, Mr. Baruxes
2 defense attorney filed a motion for a new trial. Had Mr. Baruxes not sought to challenge his
3 erroneous conviction during this period of time between verdict and sentencing, he would have been
4 transported to state prison in a more expedited fashion and the appropriate number of days for
5 compensation would not be at issue. Weighing all of the facts and equities, under the circumstances
6 of this case, this seems the more reasoned view.

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8 Order

9 The Board shall recommend that the Legislature make an appropriation in the amount of
10 \$258,700 to indemnify Mr. Baruxes for pecuniary injury sustained through his erroneous conviction
11 and imprisonment.

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14 Date: June 7, 2003



15 DEBORAH BAIN
16 Hearing Officer
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