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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:

12 **James Ochoa**

13 Claim No. **G565437**

Proposed Decision

(Penal Code § 4900)

14
15 **Introduction**

16 An in-person hearing on this claim was held on October 11, 2007, in Sacramento, California, by
17 Kevin Kwong, Hearing Officer, California Victim Compensation and Government Claims Board (Board).
18 The claimant, James Ochoa, was represented by attorney Joshua Stock. The California Attorney
19 General's Office did not appear at this hearing. The record remained open for the submittal of
20 additional documents. Additional documents were received on November 29, 2007, and the record
21 closed. As explained below, Ochoa has not met the statutory requirements to receive compensation
22 under Penal Code section 4900 because he contributed to his conviction by pleading guilty.

23 **Procedural Background**

24 On May 23, 2005, Ochoa was arrested for two counts of armed robbery and carjacking which
25 allegedly occurred outside a Buena Park nightclub earlier in the morning. On December 8, 2005,
26 after three days of his jury trial, Ochoa pled guilty to second degree armed robbery and was
27 sentenced to two years in state prison.

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1 In October 2006, James McCollum, who was in police custody on an unrelated auto theft
2 charge, confessed to the robbery and carjacking crimes to which Ochoa had pled guilty. On October
3 19, 2006, the District Attorney filed a petition for a writ of habeas corpus.¹ This petition was granted,
4 and Ochoa was released from prison on October 20, 2006.² On November 22, 2006, the court
5 granted Ochoa's unopposed petition for a finding of factual innocence.³ Ochoa's application to the
6 Board under Penal Code section 4900 was received on January 11, 2007.

7 The Attorney General's Office decided to not present evidence opposing Ochoa's Penal Code
8 section 4900 claim. However, in a brief to the Hearing Officer, the Attorney General's Office stated
9 that satisfying the second element of Penal Code section 4903 was "problematic" because Ochoa
10 pled guilty and therefore he contributed to his conviction and resulting imprisonment.

11 **Summary of Evidence**

12 In the early morning on May 23, 2005, co-workers Juan Carlos Orellana and Adalberto
13 Gonzalez went to a nightclub in Buena Park. They each drove their own cars and parked in the
14 parking lot of a closed auto shop. The line to enter the nightclub was too long, so Orellana and
15 Gonzalez went back to their cars and stood outside as they planned where they should go. While
16 talking, they were approached by what they described as a young Hispanic male who had a gun.
17 The male demanded their wallets and one of their cars. Orellana gave the perpetrator his car
18 because he had a Lojack security device installed that could shut the car off. The perpetrator
19 escaped, but Orellana's car, the perpetrator's clothing, and the weapon, which was actually a bb gun,
20 were later recovered.

21 The victims gave a description of the perpetrator to the police at the crime scene. One of the
22 officers had made a field stop of Ochoa a few hours earlier and thought that Ochoa matched the
23 physical description of the perpetrator. The officer showed the victims a picture of Ochoa and the
24 victims identified him as the perpetrator. The police went to Ochoa's home and arrested him. The
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26 ¹ Exhibit D. All exhibits refer to the evidence submitted by Ochoa in his claim under Penal Code
27 section 4900.

28 ² Exhibit E.

29 ³ Exhibits G and H.

1 victims were taken to Ochoa's home and they visually identified Ochoa as the perpetrator as he sat
2 on his driveway in police custody. Before trial, the interior of Orellana's car and the objects found
3 inside were subjected to DNA testing. The DNA results from the car and the recovered items did not
4 match Ochoa's DNA.

5 After three days of the trial, Ochoa pled guilty to second degree armed robbery. Ochoa told
6 the Judge that he was innocent but was scared. Ochoa's attorney, Scott Borthwick, refused to join
7 the plea agreement. Ochoa was sentenced to two years in state prison. Approximately 10 months
8 after Ochoa pled guilty, it was discovered that the DNA found on the items recovered in Orellana's
9 car belonged to McCollum.

10 Ochoa's Testimony

11 During his hearing before the Board, Ochoa provided the following testimony. On May 22,
12 2005, he returned home sometime between 10:00 and 11:00 p.m. He went to bed later that evening
13 and awoke when the police entered his home to arrest him. Ochoa thought that the incident was a
14 mistake or a set-up, but was confident that the truth would come out.

15 Ochoa retained Borthwick, whom his parents knew, to be his defense attorney. Ochoa stated
16 that he believed that Borthwick did a good job representing him. Ochoa refused to accept any plea
17 bargain because he wanted to prove his innocence. Through Borthwick, Ochoa learned that the
18 Judge was not happy that he declined a two year plea bargain, and that the Judge would sentence
19 him to life in prison if the jury returned a guilty verdict.

20 Ochoa became nervous when the trial began. Ochoa said that he was threatened and
21 harassed by the Judge. He felt that the Judge was trying to get him convicted. The Judge kept
22 speaking out and making facial expressions that Ochoa believed to be against him. Even though
23 Ochoa knew that he was innocent he felt that he was not going to get a fair trial. Ochoa, who was 20
24 years old at the time of the trial and had a young son, believed that he could not take the risk of being
25 sentenced to life in prison. He testified that he was willing to "do my time and get out." Ochoa
26 decided that taking the two year prison term plea bargain was his only option because he could not
27 gamble with his life.

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1 Borthwick's Testimony

2 During the hearing before the Board, Borthwick provided the following testimony. The
3 prosecution's case against Ochoa relied solely on the eyewitness testimony from the two victims. In
4 a pretrial motion, Borthwick sought to exclude the victims' photo identification of Ochoa at the crime
5 scene as being highly suggestive and a violation of Ochoa's due process rights. Additionally, the
6 Orange County DNA lab results showed that the DNA found in Orellana's vehicle and on the
7 perpetrator's clothing did not match Ochoa's DNA. Borthwick pointed out that these DNA test results
8 were from the county crime lab and not from an independent forensic test paid for by Ochoa.

9 Ochoa faced a sentence of 15 years to life in prison if convicted. Two plea bargains were
10 presented to Ochoa. The district attorney presented an offer of two years in prison and one strike
11 against Ochoa's record. The Judge suggested a second offer of credit for time served and two
12 strikes. Immediately after Ochoa rejected the offers, the Judge's demeanor changed. Borthwick felt
13 that the Judge was pressuring him to get Ochoa to take one of the offers. The Judge told Borthwick
14 that Ochoa would be sentenced to the maximum life sentence if convicted. Borthwick stated that the
15 Judge has a reputation as being a judge that sentences criminals to lengthy and maximum prison
16 terms.

17 Once trial began, Borthwick encountered many problems with the Judge. Borthwick
18 described the Judge as being hostile to the defense and that he tried to undermine the defense's
19 case. The Judge denied Borthwick's pretrial motion to suppress the victims' photo identification
20 without allowing Borthwick to make an oral argument as to why the photo identification violated
21 Ochoa's due process rights. Borthwick stated that he was interrupted numerous times during his
22 opening statement. When the court resumed after lunch, the Judge wanted to proceed to the
23 prosecution's case in-chief even though Borthwick was not finished with his opening statement. The
24 Judge told Borthwick that he had 10 minutes to finish his opening statement.

25 Borthwick described two other specific instances involving the Judge's behavior. In the first
26 instance, during the examination of one of the victims, the Judge spoke for the victim and the
27 prosecution by stating "so you could see the face of the perpetrator." Since the prosecution of Ochoa
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1 relied solely on eye witness identification, Borthwick felt that the Judge was trying to help prove that
2 the victims had a good look at the perpetrator.

3 Borthwick said the second instance showed the pettiness and lack of professionalism of the
4 Judge. Borthwick was yelled at for stepping in the wrong place, but he testified at the hearing that he
5 only stepped six inches away from the podium as he was pointing at an exhibit. The Judge then
6 yelled at Borthwick for "going crazy" during his opening statement and made a sarcastic remark
7 about whether or not Borthwick was going to comment about Ochoa's shoelaces. Borthwick's
8 testimony regarding the statements made at trial is supported by the trial transcript.⁴

9 After three days of the trial, Ochoa told Borthwick that he wanted to plead guilty. According to
10 Borthwick, Ochoa felt that the Judge was trying to get him convicted. Borthwick tried to talk Ochoa
11 out of his decision to plea and told him to talk to his family, who also did not want Ochoa to plead
12 guilty. Borthwick testified that there was a "mountain of exculpatory evidence" and that he thought
13 that Ochoa was innocent. However, Borthwick told Ochoa that juries can be unpredictable and that if
14 he was wrong it would be Ochoa, and not himself, who would have to pay the consequences.
15 Borthwick did not join Ochoa's plea because he felt that Ochoa was innocent.

16 The day after Ochoa plead guilty, Borthwick wrote a letter to the Judicial Council of
17 California.⁵ The letter detailed Borthwick's belief that the Judge acted unethically and improperly as a
18 judge. The Judicial Council found insufficient evidence of judicial misconduct.⁶

19 Finally, Borthwick testified that Ochoa had an illusionary choice in this matter. Although
20 Ochoa had a choice to plea or go through with the trial, he really did not have a choice because the
21 risk of going forward with trial was extremely high and the Judge was acting unethically. Borthwick
22 said that no person could put their life in the jury's hands when there was a short plea agreement
23 available.

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26 ⁴ Exhibit I.

27 ⁵ Exhibit J.

28 ⁶ Exhibit J.

1 Statement from Scott Baugh

2 During the hearing, Ochoa presented a news article from the *Los Angeles Times* that contains
3 statements from Scott Baugh, and a declaration from Baugh supporting the statements he made in
4 the article.⁷ Baugh was described by Ochoa as one of the drafters⁸ of the Penal Code section 4900
5 *et seq.* statute. Baugh stated in the article that Ochoa should receive compensation under the
6 statute and that Ochoa had a "Hobson's Choice." Baugh stated that excluding somebody in Ochoa's
7 position from compensation is not the spirit of the statute, and that the second element of the statute
8 (that the wrongfully convicted felon not have contributed to his own arrest) was meant to stop
9 frivolous and fraudulent claims.

10 **Findings**

11 A preponderance of the evidence supports each of the following findings:

- 12 1. Ochoa did not commit the crimes for which he was arrested.
- 13 2. Ochoa faced a sentence of 15 years to life in prison if he was convicted by the jury.
- 14 3. The Judge told Borthwick that he would sentence Ochoa to life in prison if the jury
15 returned a guilty verdict.
- 16 4. Borthwick and Ochoa's family did not want Ochoa to plead guilty and advised him not to
17 do so.
- 18 5. Ochoa voluntarily and intelligently pled guilty.
- 19 6. Borthwick did not join the guilty plea because he believed in Ochoa's innocence.

20 **Determination of Issues**

21 A person convicted and imprisoned for a felony may submit a claim to the Board for pecuniary
22 injury sustained as a result of his erroneous conviction and imprisonment.⁹ Penal Code section 4903
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24 ⁷ Exhibits L and M.

25 ⁸ Penal Code section 4900 was originally drafted in approximately 1941. Baugh served in the
26 California State Assembly from 1995-2000. Currently, Baugh is chairman of the Republican Party of
27 Orange County. (<http://www.ocgop.org/about/chairman/>). During the 2000-2001 legislative session,
Baugh authored A.B. 1799 which amended Penal Code section 4904.

28 ⁹ Pen. Code, § 4900.

1 provides that in order to state a successful claim for compensation, the claimant must prove the
2 following by a preponderance of the evidence:¹⁰

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

8 If the claimant meets his burden of proof, the Board shall recommend to the legislature that an
9 appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the
10 claimant.¹¹

11 The evidence establishes that Ochoa did not commit the crimes of armed robbery and car
12 jacking. McCollum, the true perpetrator, confessed to the crimes, and his DNA matches the DNA
13 found in the stolen car. Ochoa's petition for habeas corpus was granted and he received a finding of
14 factual innocence. Therefore, Ochoa has met his burden of proving that he did not commit the crimes
15 with which he was charged.

16 However, the evidence also establishes that Ochoa contributed to his erroneous conviction
17 because he pled guilty. The jury never determined that Ochoa was guilty of any crime and they could
18 have found him innocent. Without the DNA evidence matching Ochoa's DNA, and with what Borthwick
19 called "a mountain of exculpatory evidence," it was possible that Ochoa would have been acquitted.
20 Since Ochoa admitted guilt when he had the possibility of being found innocent, his own action caused
21 him to be erroneously convicted.

22 The evidence shows that Ochoa's plea was voluntary and intelligent. He was represented by
23 an attorney of his own choosing. The evidence indicates that Borthwick vigorously defended the case,
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25 ¹⁰ *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation*
26 *and Government Claims Board* (2000) 152 Cal. App. 4th 1164. Preponderance of the evidence means
27 "evidence that has more convincing force than that opposed to it. (*People v. Miller* (1916) 171 Cal.
649, 652.)

28 ¹¹ Pen. Code, § 4904.
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1 and Ochoa testified that Borthwick did a good job. Ochoa contemplated his decision to plead guilty
2 with Borthwick and his family, and decided to go against their advice and plead guilty.

3 Ochoa argues that his guilty plea did not contribute to his conviction because he had no choice
4 but to plead guilty. Ochoa explains that he was threatened by the Judge with life in prison and that he
5 could not put his life into the hands of a jury when a two year plea bargain was on the table. Even if
6 Ochoa made a rational choice in pleading guilty, Penal Code section 4903 does not provide for the
7 consideration of mitigating factors when determining if the claimant contributed to his own conviction.
8 Ochoa had the choice to not plead guilty. By choosing to plead guilty, Ochoa was given the more
9 lenient sentence of a two year prison term. In return, he waived his right to a jury trial, the ability to be
10 acquitted by a jury, and he admitted guilt to the crimes with which he was charged.

11 Despite Ochoa's allegations that the Judge acted improperly in this case, there is no evidence
12 that Ochoa was not going to receive a fair trial. The Judicial Council of California did not take adverse
13 action against the Judge based on the complaint filed. Also, Borthwick advised Ochoa to not accept
14 the plea bargains. Borthwick believed that Ochoa still had a chance to be acquitted despite the alleged
15 improper conduct of the judge.

16 Although receiving a life sentence would have been a severe punishment, Borthwick testified
17 that life in prison was within the scope of the sentencing length. Ochoa's plea was motivated by his
18 fear of spending life in prison combined with his belief that the Judge wanted him convicted. Fear of
19 the sentence is frequently a motivating factor for a criminal defendant to plead guilty but is not a basis
20 for overturning a plea as long as the plea was voluntary and intelligent.¹²

21 Finally, the statements from Baugh regarding the spirit of Penal Code section 4900 are given
22 little weight. While it is determined that Ochoa is not bringing a frivolous claim, it is also true that
23 Ochoa told the court that he was guilty of the crimes with which he was charged despite his attorney's
24 advice to not admit guilt. Now, Ochoa is stating that he was erroneously convicted despite his guilty
25 plea.

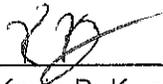
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29 ¹² See *Brady v. United States* (1970) 397 U.S. 742, 755-756.

1 Ochoa has not proven by a preponderance of the evidence that he did not contribute to his own
2 conviction. Thus, his claim under Penal Code section 4900 is denied.

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4 Dated: February 5, 2008

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7 Kevin D. Kwong
8 Hearing Officer
9 California Victim Compensation and
10 Government Claims Board
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