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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:
Steven Hypolite

**Proposed Decision
(Penal Code § 4900 et seq.)**

Introduction

Steven Hypolite (Claimant) currently resides in the Republic of Trinidad and Tobago after being deported from the United States. Because a telephonic or other electronic hearing was objected to by the Department of Justice, Office of the Attorney General (AG),¹ this claim was decided based on previously submitted evidence. Staff Attorney Kyle Hedum was assigned to hear this matter by the Executive Officer of the California Victim Compensation and Government Claims Board. The AG was represented by Deputy Attorney General Larenda R. Delaini.

After considering all the evidence, it is determined that claimant has not proven by a preponderance of the evidence that he is innocent of the crime of lewd and lascivious acts on a child under the age of 14.² Therefore, it is recommended that Claimant's claim for compensation pursuant to Penal Code section 4900 et seq. be denied.

¹ Cal. Code Regs., tit. 2, § 617.4(c).
² Pen. Code, § 288 (a).

1 **Background³**

2 Claimant was charged with three counts of committing a lewd act upon a child under the age
3 of 14, with the sentencing enhancement that he committed great bodily injury upon the child by
4 infecting her with herpes. The victim, Brittany, was abandoned by her mother when she was very
5 young and was thereafter placed with various foster parents.⁴ Prior to the spring of 1995, Brittany
6 lived for some time with the Claimant. In April 1995, Brittany went to live with Stephanie. At that
7 time, Brittany was four and one-half years old. She stayed until January 10, 1997. Claimant
8 subsequently sought to adopt Brittany. While Brittany lived with Stephanie, claimant often visited her,
9 sometimes unsupervised.

10 In January 1997, Brittany was placed with the Claimant. On March 17, 1997, Claimant
11 brought Brittany to Dr. Abrams's office because Brittany complained of burning and urgency during
12 urination. Dr. Abrams diagnosed Brittany as having a urinary tract infection and prescribed a liquid
13 antibiotic. He did not conduct a vaginal examination during this visit. Dr. Abrams had seen Brittany
14 on six or seven occasions; she did not complain of pain in her vaginal area or during urination during
15 those visits. In previous visits, Dr. Abrams treated Brittany for impetigo, a bacterial infection of the
16 skin that is not sexually transmitted.

17 On March 24, 1997, Claimant brought Brittany to Dr. Abrams's office for a follow-up
18 appointment. Dr. Abrams examined Brittany and he immediately noticed that she had a severe
19 herpes infection.⁵ Dr. Abrams described Brittany's infection as a nine, on a scale of one to ten with
20 ten being the worst. He opined that Brittany had probably had the outbreak for approximately two or

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26 ³ The background is based on an unpublished appellate opinion, the crime report, investigative reports, trial
testimony, court transcripts, and other claim-related documents.

27 ⁴ Brittany was born on November 18, 1989.

28 ⁵ Dr. Abrams had seen close to 1,000 cases of genital herpes in his 20-year medical career.

1 three days. The outbreak was severe enough that Dr. Abrams thought it was a first outbreak.⁶ Dr.
2 Abrams obtained from Brittany a culture specific to genital herpes along with some bacterial cultures.
3 Dr. Abrams asked Claimant if he knew how Brittany may have been exposed to genital herpes.
4 Claimant said no. Dr. Abrams also asked Brittany, and although she was not very specific, she said
5 that she had been molested by a man that was somewhere between her age and Dr. Abrams's age.
6 Brittany appeared to be very tired and, toward the end of the conversation, her answers "seemed to
7 wander all over the place." She had been at Dr. Abram's office for about five hours.⁷ Based on the
8 nature of the infection, the doctor opined that Brittany had been recently infected. The doctor notified
9 the police because he believed that Brittany had been molested.

10 Later on the same day, Claimant went to Northridge Hospital to be examined for genital
11 herpes. Claimant was reluctant to allow Dr. Lowder to examine his genitals, and Claimant spoke with
12 a social worker for about 15 to 20 minutes. Dr. Lowder told the Claimant, "It's a normal thing to do."
13 Claimant responded, "Well, I masturbate a lot." When Dr. Lowder explained that masturbation was
14 normal for most men, Claimant said, "No, I mean a lot." Claimant finally removed his pants and Dr.
15 Lowder noted that Claimant had four or five small, punctate⁸ scabbing lesions on the tip of his penis.
16 Dr. Lowder also observed that Claimant had warts on the shaft of his penis and swollen lymph glands
17 in his left groin area. Dr. Lowder opined that these symptoms were consistent with a recent genital
18 herpes outbreak. He acknowledged that genital warts may also cause swollen lymph nodes.
19 Claimant refused to allow Dr. Lowder to photograph his genitals or to take a blood test.

20 Brittany was immediately removed from the Claimant's home and on April 3, 1997, Brittany
21 returned to Stephanie's home. Stephanie was given a cream to apply to Brittany's vaginal area. She
22 noticed that Brittany had three ulcers on her vaginal area; two were healing and one was open.

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25 ⁶ According to Dr. Abrams, with genital herpes, especially in women, the first outbreak is usually the worst and the
26 symptoms are fairly severe. Genital herpes takes a week to 10 days to go away, but can disappear faster if
27 treatment is started immediately or if the outbreak is not severe. Stress and illness can cause a second outbreak.
28 Men, on the other hand, may notice a blister on their genital area with some discomfort.

⁷ Dr. Abrams called the police; they arrived around 4:30 p.m. or 5:00 p.m. Claimant was not arrested at that time.

⁸ Characterized by dots or points.

1 Brittany's entire vaginal area was red and irritated.⁹ Shortly thereafter Brittany told both Stephanie
2 and her social worker that the Claimant had hurt her. She said that the Claimant rubbed his penis
3 near her vagina on several different occasions.

4 On April 4, 1997, a social worker in the adoption division at DCFS spoke with Brittany about
5 the molestation. Brittany denied the things that were told to the police.¹⁰ She denied that anything
6 happened with a boy named Ryan. The social worker also asked Brittany about a man in the park.
7 Brittany denied that anyone touched her inappropriately. To the social worker, Brittany did not seem
8 particularly upset or happy. She did notice that Brittany kept scratching her genital area.

9 According to Stephanie, she asked Brittany if she knew how she got the infection. Brittany
10 said that she did not. Stephanie also asked Brittany if anyone had hurt her and she said that the
11 Claimant had hurt her. She said that the Claimant made her get out of the bathtub and lie down on
12 the bathroom floor. He then put his penis on her vagina. Brittany yelled, "Stop." Claimant told her to
13 be quiet.

14 On April 5th or 6th, the social worker spoke with Brittany again.¹¹ Brittany told her that the
15 Claimant put his penis near her vaginal area. Brittany explained that it hurt and she asked Claimant
16 to stop. Claimant did not stop. Brittany told her that the conduct occurred in her bed and Claimant's
17 bed.¹² He woke her up, they both had their clothes off, and Claimant was moving up and down.

18 On June 26, 1997, a blood sample was obtained from Claimant after the court granted the
19 People's motion to require Claimant to produce blood samples and swabs.

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21 ⁹ In June 1997, Brittany had another herpes outbreak. Stephanie took Brittany to the doctor, and observed the
22 sores. According to Stephanie, the outbreak was much less severe. Brittany had fewer sores and the sores were
23 not as red and open.

24 ¹⁰ According to the police report, Brittany told a police officer that her brother's friend Ryan had come to their
25 house. While in the backyard, Ryan put his hand inside Brittany's underwear and began to fondle her. Ryan also
26 put something hard between Brittany's legs. Brittany also said an adult touched her while she was at the park
27 with claimant. The officer noted that Brittany had told a nurse that an adult touched her while she was at the park
28 with claimant. The adult pulled Brittany's hair, spread her legs, and punched her. Brittany initially indicated that
she did not know the adult, but later said that she knew him, but declined to disclose his name.

¹¹ Stephanie was present during the conversation. The social worker went to the house because Stephanie said
that Brittany disclosed to her that something had happened. Brittany referred to Claimant's genitalia as a penis
and her genitals as an "infection."

¹² According to Stephanie L., Brittany told the social worker that the touchings happened in the "Barbie
room," claimant's bedroom, and the living room.

Criminal Trial Testimony

1
2 Brittany testified that on several occasions, beginning in January 1997 when she lived with
3 Claimant, he molested her. He took off both of their clothes, laid her down, and rubbed his erect
4 penis between her legs and in the area of her vagina. In addition, Stephanie and the social worker
5 testified about Brittany's hearsay statements made to them about the Claimant's molestation.

6 Dr. Lowder, who examined Claimant in the emergency room, testified that the herpes virus
7 may be spread by autoinoculation and fomite transmission. "Autoinoculation" occurs when an
8 infected person has a genital lesion on one part of his body and scratches another body party,
9 transmitting the virus to the newly scratched area. In this regard, an infected person could transfer
10 simplex one or two from his mouth to his genitals. "Fomite transmission" refers to picking up an
11 organism from an inanimate object, such as when the virus is left behind on a toilet seat. Dr. Lowder
12 did not recall fomite transmission being a strong possibility, but could not say that transmission in that
13 manner was impossible. Dr. Lowder opined that approximately 15 to 20 percent of sexually active
14 adults have been exposed to genital herpes, causing their bodies to create antibodies for the virus.
15 Dr. Lowder explained that our bodies create antibodies to some proteins in a virus, and a blood test
16 will reveal the presence of those antibodies. An infected person may have herpes simplex I on his
17 genitals and simplex II in his mouth. Dr. Lowder is familiar with studies indicating that, in some
18 African American populations, 40 percent of the people may have antibodies to genital herpes.

19 Dr. Abrams, who treated Brittany, testified that a genital herpes outbreak in a male, who was
20 not undergoing oral or topical treatment, may take two to three weeks to heal. The virus is more
21 transmittable toward the beginning of the outbreak. As the sores heal, they become less and less
22 infectious, until they are really not infectious at all. When a female is exposed to the virus, her first
23 outbreak is likely to occur within two to five days and no longer than one week later. According to Dr.
24 Abrams, herpes is a virus and there are two simplexes. Simplex I causes fever blisters around the
25 mouth and can cause blisters on other parts of the body. With simplex I, if an infected person
26 touched his mouth and then rubbed another part of his body, he could get herpes blisters on that
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1 body part. On the other hand, simplex II, also known as genital herpes, is almost always transmitted
2 through sexual contact.¹³

3 Doctor Plaeger, an associate professor in the Department of Pediatrics in the Division of
4 Immunology at the UCLA School of Medicine, has published articles regarding herpes. Dr. Plaeger
5 explained that the herpes virus has two simplexes. Simplex I is usually seen in childhood; simplex II
6 is usually not seen until college when persons become sexually active. If an infected person had
7 simplex I in the form of a cold sore or fever blister and touched his genitals, he could spread the virus
8 to the genitals through breaks in the skin. But, the virus would still be simplex I. Dr. Plaeger opined
9 that it would be very unusual for a child to have simplex II on his mouth, unless his mouth came into
10 contact with the genitals of an infected person. In that situation, a child could transmit simplex II to
11 himself by touching his own genitals. The herpes virus is not transmitted by contact with toilet seats
12 or doorknobs.

13 Dr. Plaeger opined that by the age of 10 or 12, around 70 or 80 percent of the population has
14 come into contact with the herpes virus. In the African American community, the numbers are higher;
15 around 80 or 90 percent of the population tests positive for the herpes antibody. The herpes virus
16 can be passed at birth or while the fetus is in utero. When transmission occurs in that manner, the
17 infant will usually have encephalitis or disseminated herpes. "Disseminated herpes" refers to a
18 condition where the infant's entire body is covered with herpetic lesions.

19 Dr. Plaeger explained that the best test for herpes involves taking a culture of the fluid in the
20 blisters to see if the fluid contains the virus. A blood test can also be conducted. If a person has the
21 antibodies, he has been in contact with the virus. Dr. Plaeger reviewed Claimant's blood test results
22 and determined that the Claimant had "a long standing herpes infection" or a re-correspondence.
23 The blood test provided evidence that the infection had "been there for some time. The blood test
24 results also confirmed that the Claimant was infected with herpes simplex II.

25 The prosecution and defense stipulated that a blood sample was taken from the Claimant and
26 that the blood tested positive for the antibodies for herpes simplex I and herpes simplex II. The

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28 ¹³ There are tests that can differentiate between strains of the herpes virus.

1 prosecution and defense further stipulated that Dr. Abrams obtained a swab from Brittany which
2 tested positive for herpes simplex II.

3 Claimant did not testify at trial. He presented evidence of inconsistent statements Brittany had
4 made identifying her assailant. In those statements, she said that she had been molested by a friend
5 of her brother and by an adult she had met at the park. The jury returned with a guilty verdict of one
6 count of lewd conduct on a minor and found the great bodily injury allegation to be true. Claimant
7 was sentenced to 15 years-to-life in prison.

8 **Appellate History**

9 **Writ of Habeas Corpus in State Appellate Court, 1999**

10 While Claimant's direct appeal was pending, he filed a petition for writ of habeas corpus. The
11 Second Appellate District denied the state habeas petition, rejecting claims that (1) Claimant's
12 sentence was unauthorized based on erroneous charges; (2) the People refused to collect potentially
13 exculpatory evidence; (3) Claimant's conviction was based on false evidence that defense counsel
14 was ineffective for failing to test; (4) defense counsel was ineffective for failing to introduce known
15 evidence and make a motion based on the People's failure to collect exculpatory evidence; (5)
16 defense counsel was ineffective for failing to investigate material witnesses; and (6) defense counsel
17 was ineffective for failing to retain an expert witness and advocate for claimant. The factual basis for
18 many of claimant's grounds for relief primarily concerned the herpes testing. Claimant urged that he
19 did not have genital herpes; thus the prosecutor engaged in misconduct by arguing that he did, and
20 defense counsel should have requested that additional testing be performed.

21 **Writ of Habeas Corpus in State Supreme Court, 1999**

22 Still while his direct appeal was pending, Claimant filed another petition for writ of habeas
23 corpus. The California Supreme Court denied the state habeas petition, rejecting claims that (1)
24 Claimant's sentence was unauthorized based on erroneous charges; (2) defense counsel was
25 ineffective for failing to research, investigate, and prepare for trial; (3) defense counsel was ineffective
26 for failing to introduce known evidence and impeach the key prosecution witness; (4) the People
27 refused to collect potentially exculpatory evidence; (5) the People presented false evidence which
28 defense counsel failed to review; (6) defense counsel was ineffective for failing to introduce known

1 evidence and make a motion based on the People's failure to collect exculpatory evidence; (7)
2 defense counsel was ineffective for failing to investigate and call material witnesses; (8) defense
3 counsel was ineffective for failing to retain an expert witness and advocate for claimant; (9) defense
4 counsel was ineffective for failing to advise claimant on his right to testify and to introduce exculpatory
5 and corroborating evidence; and (10) newly discovered evidence exists demonstrating that Brittany's
6 mother had a genital herpes outbreak about three weeks after Brittany's birth.¹⁴ Once again, the
7 factual basis for many of Claimant's grounds for relief primarily concerned the herpes testing. He
8 continued to urge that he did not have genital herpes; thus the prosecutor engaged in misconduct by
9 arguing that he did, and defense counsel should have requested additional testing.

10 **Appeal of Conviction, 2000**

11 After briefing by the parties, the California Court of Appeal, Second Appellate District affirmed
12 Claimant's judgment and sentence, save for a modification to the great bodily injury enhancement. In
13 affirming the conviction, the Court of Appeal rejected Claimant's allegations that (1) Brittany was not
14 competent to testify; (2) the presence of Stephanie as a support person for Brittany denied claimant
15 due process and violated the Confrontation Clause; (3) the trial court had a sua sponte duty to
16 instruct the jury regarding Brittany's out-of-court statements; and (4) CALJIC 2.20.1 on evaluating the
17 testimony of a child witness was unconstitutional. The California Supreme Court denied Claimant's
18 petition for review.

19 **Second Writ of Habeas Corpus in State Supreme Court, 2001**

20 After the Second Appellate District affirmed Claimant's judgment and sentence on direct
21 appeal, Claimant filed yet another petition for writ of habeas corpus. The California Supreme Court
22 denied the petition, rejecting claims that (1) the trial court abused its discretion and erred by denying
23 defense motion for appointment of a medical expert and limiting the scope of defense investigation;
24 (2) defense counsel performed deficiently by making a damaging argument, failing to object to

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26 ¹⁴ This allegation appears specious. According to the social worker's report, Brittany's "birth records indicated
27 that she was a healthy, term newborn with hyperbilirubinemia (jaundice). There is a statement on the birth
28 records that the birth mother denied a history of sexually transmitted diseases or drug use. There is no indication
on the hospital birth records that either Brittany or her birth mother had herpes type II or any other type of herpes
or other sexually transmitted disease."

1 Stephanie as a support person, and failing to impeach a key prosecution witness; (3) the appellate
2 court's modification of the great bodily injury enhancement violated due process and decreased the
3 People's burden of proof; (4) the trial court prejudicially erred when responding to the jury's questions
4 during deliberation; (5) the sentence of 15 years-to-life is statutorily and unconstitutionally prohibited;
5 and (6) appellate counsel performed deficiently by failing to present all arguable issues in the Court of
6 Appeal.

7 **Writ of Habeas Corpus in Federal Court, 2001**

8 Claimant filed a petition for writ of habeas corpus in the United States District Court for the
9 Central District. The District Court denied the federal habeas petition with prejudice, rejecting the 25
10 claims raised by Claimant.

11 **Writ of Habeas Corpus in State Superior Court, 2004**

12 After the state and federal courts had denied claimant's habeas petitions, Claimant filed a
13 petition for writ of habeas corpus in the Los Angeles County Superior Court. The Superior Court
14 denied the petition, rejecting claims that (1) Claimant was a factually innocent person illegally in
15 custody and (2) his due process rights were violated by the People's failure to collect potentially
16 exculpatory evidence. The Superior Court determined that the same issues had been rejected in a
17 habeas petition filed with that court on March 11, 1999 and denied on April 12, 1999.

18 **Second Writ of Habeas Corpus in Federal Court, 2008**

19 Claimant filed another petition for writ of habeas corpus in the United States District Court for
20 the Central District alleging that (1) the trial court erred when it resentenced him in his absence; (2)
21 the prosecutor engaged in misconduct during the jury trial; (3) defense counsel provided ineffective
22 assistance; and (4) the prosecutor destroyed evidence in bad faith. The Central District rejected
23 Claimant's argument that he had a right to be present during resentencing and found that his
24 presence would not have changed the outcome. The Central District rejected the remaining claims
25 on the ground that they had been raised in Claimant's first federal habeas petition, which had been
26 denied on the merits.
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1 **Second Writ of Habeas Corpus in State Superior Court, 2012**

2 Claimant filed yet another petition for writ of habeas corpus in the Los Angeles County
3 Superior Court. Claimant alleged that he had been convicted based on false evidence, and included
4 a declaration signed by Brittany recanting her trial testimony. The Superior Court rejected Claimant's
5 claim, and denied the state habeas petition. The Superior Court gave "very little credence" to the
6 declaration wherein Brittany purportedly recanted her trial testimony because it was written by
7 another person, contained very little detail, was written over a decade after her trial testimony, and
8 was later repudiated.¹⁵

9 **Board of Parole Hearings**

10 **First Parole Board Hearing, 2009 (Denied)**

11 The evaluation for Claimant's initial parole consideration hearing indicated that, among other
12 things, Claimant declined to discuss the commitment offense. However, he maintained that he does
13 not have genital herpes. During the hearing, Claimant denied committing the offense. He explained
14 that the prosecutor lied about his blood test results and presented false testimony. Claimant testified
15 at his hearing that he did not test positive for genital herpes and there were no genital swab test
16 results to show that he tested positive for genital herpes.

17 The Board of Parole found Claimant unsuitable for parole. The panel considered the
18 commitment offense and Claimant's lack of remorse. The panel also found Claimant not credible
19 noting that he continued to maintain his innocence despite the weight of the evidence itself. The
20 Board determined that the Claimant lacked insight into the causative factors of his conduct as
21 evidenced by his statements over and over in the hearing that "the prosecutor lied and that he
22 (Claimant) should not be here in the first place."

23 **Second Parole Board Hearing, 2011 (Denied)**

24 The evaluation for Claimant's second parole hearing indicates that the Claimant refused to
25 discuss the facts of the underlying offense except to discuss the nature and seriousness of it. He
26 continued to claim that the prosecutor lied about the herpes test results in order to obtain a

27 ¹⁵ Brittany was subsequently interviewed by a prosecutor and an investigator and she disclosed that she did not
28 know what she signed and also that she did not want claimant released because he had sexually assaulted her.

1 conviction. The Board of Parole Hearings again found Claimant unsuitable for parole because he
2 posed an unreasonable risk of danger if released. One commissioner noted that the Claimant had a
3 grandiose conspiracy theory that led to his false conviction. This conspiracy involved law
4 enforcement, prosecutors, medical and lab personnel, and the eight-year-old victim.

5 **Third Parole Board Hearing, 2013 (Granted)**

6 In his third hearing on August 7, 2013, the Board of Parole hearings found Claimant suitable
7 for parole. The panel found that there were some circumstances tending to show unsuitability but
8 determined that the circumstances were outweighed by other factors. Despite the panel's duty of
9 accepting as true the findings of the court, the Presiding Commissioner remarked,

10 " But in your case, there are significant indications that your version that you're not guilty isn't
11 implausible. There is testimony that we've received by [Brittany] that recants everything that
12 you said - - I mean recants everything that she said when she testified in court when she was
13 a minor that resulted in your conviction, and she says that you did not ever sexually molest
14 her or otherwise hurt her in any manner when she was a minor.¹⁶ That by itself may not mean
15 a whole lot to us because you were convicted, and we don't know what the circumstances are
16 that go along with that....and that there may be some doubt that maybe you were the wrong
17 guy that was convicted of the crime".

18 **Governor Brown's Request for En Banc Review**

19 On October 18, 2013, Governor Brown requested an en banc review of the decision of the
20 Board of Parole Hearings. Governor Brown commended Claimant for taking positive steps to
21 improve himself while incarcerated. However, Governor Brown further noted that the Claimant had
22 filed appeals challenging his conviction on many grounds in both state and federal courts. All of his
23 appeals have been dismissed. In 2002, a magistrate judge called the evidence of his guilt
24 "overwhelming." At his recent parole hearing, he made several claims to the Parole Board that are
25 contrary to the record and that courts have soundly rejected.

26 ¹⁶ Presiding Commissioner Peck misspoke when he said the Board of Parole Hearings had received *testimony*
27 from Brittany. Instead, the Board of Parole Hearings received a declaration that was signed by Brittany and
28 prepared by someone else wherein Brittany purportedly recanted her trial testimony and denied that the Claimant
had ever molested or hurt her.

1 Governor Brown also stated that the appellate record makes it clear that the doctor concluded
2 that Brittany had been infected through sexual contact. Next, Claimant also made much of the results
3 of a blood test. While this blood test did not conclusively prove Claimant had a recent recurrence of
4 herpes, two physical examinations in the same month as Brittany's diagnosis irrefutably showed that
5 the Claimant had an active outbreak of herpes simplex II at the time Brittany was suffering from
6 herpes simplex II. Finally, Governor Brown determined that Claimant's assertion that the jury did not
7 have access to the blood test results was flatly contradicted by the record.

8 The Parole Board, en banc, granted Claimant's request to be paroled.

9 Interview of Brittany Regarding Her Declaration

10 On March 4, 2013, the Los Angeles County District Attorney's Office's interviewed Brittany.
11 When asked about the declaration, Brittany explained that the Claimant's mother paid her to sign the
12 declaration and she confirmed that the Claimant had sexually molested her.

13 Brittany said that the Claimant's mother would call her on the telephone and kept telling her,
14 over and over again, to sign the declaration. She said that she did not want to sign the declaration.¹⁷
15 Brittany eventually signed the declaration, but she was later told that the Claimant's mother planned
16 to send her another declaration to sign. Although Brittany read the declaration before signing it, she
17 did not understand its contents. She admitted that she has a "little bit" of trouble reading and that she
18 mostly reads comic books. Brittany cannot read "big words."

19 When asked if she remembered living with Claimant, Brittany responded that she
20 remembered Claimant calling her into his bedroom. She did not recall what happened after that.
21 Brittany thought she remembered testifying that Claimant touched her privates with his "peanut."

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23 ¹⁷ Brittany's claims of being pressured to sign the declaration recanting her testimony are supported by several
24 letters that she had received from the claimant's mother wherein Brittany was urged once again to sign the form.
25 In one letter, claimant's mother wrote in relevant part: Enclosed you will find another set of documents—a letter
26 from your father which he wrote to me and I am now sending to you so that you can read for yourself and make
27 an informative and wise decision as to whether you will sign or not sign the declaration form. . . . Do not be afraid
28 of coming to court because you do not have to. All you need is to sign the form before a notary officer and mail it
back to me as soon as possible. . . . Your father's freedom for something which he did not do and will never do
since he cares for children depends solely on your signing the form so please sign it and release both he and
yourself from this burden, and also the rest of the family. She enclosed \$25 dollars to cover Brittany's expenses.
After signing the declaration, Brittany received another \$20 dollars.

1 When asked if she had seen Claimant's penis, Brittany said that she saw it when Claimant called her
2 into the bedroom. He stood in the doorway with his pants down. Then, Claimant grabbed Brittany's
3 arm and pulled her in the bed. He put his penis in her "private part."

4 According to Brittany, the Claimant touched her with his penis "a couple of times." She
5 clarified that the touchings occurred on different occasions. Brittany did not want them to happen.
6 Claimant touched her vagina with his penis in the bathroom. She was naked and his penis was
7 exposed. In the living room, Claimant removed his penis from his pants, pulled down Brittany's pants,
8 and then inserted his penis in her vagina while she was standing up.

9 Although her declaration indicated that Brittany wanted the Claimant immediately released
10 from incarceration, Brittany said that she did not know what "incarceration" meant. She also said that
11 she wanted Claimant to remain in prison and did not want him out. Brittany also did not know what it
12 meant to recant. She understood it "to mean that like, it seems like he wants to get out like so fast,
13 that he wants to get out of there right away." Brittany did not want to help Claimant get out of prison.
14 When Brittany did not immediately sign and return the declaration, her sister called and then got mad
15 at Brittany and hung up on her. Brittany told the investigator that she only signed because her sister
16 kept telling her to sign it. According to Brittany, the Claimant's mother pressured her to sign the
17 declaration and she also sent Brittany money; not every day, but once in a while. She sent her \$20
18 or \$25 at a time.

19 One of Claimant's adult children also asked and encouraged Brittany to sign the declaration.
20 He took her to the post office and paid for the notary. Brittany did not know what it meant to
21 "execute" something or to sign under penalty of perjury.

22 Penal Code Section 4900 Claim

23 Claimant's Argument

24 On March 17, 1997, Claimant brought Brittany to Dr. Abrams's office because Brittany
25 complained of burning and urgency during urination. Dr. Abrams diagnosed that Brittany had a urinary
26 tract infection and prescribed a liquid antibiotic. He did not conduct a vaginal examination during this
27 visit.

1 On March 23, 1997, Brittany showed Claimant some clear blisters in her private area and
2 complained that it hurt when urinating. Claimant asked Brittany if anyone had touched her privates
3 and she replied in the negative. Claimant took Brittany back to Dr. Abrams on Monday March 24,
4 1997, and she was diagnosed with genital herpes type II via a genital swab (culture) test.

5 Brittany was questioned in private by Dr. Abrams's staff for three hours during which Brittany
6 unequivocally denied that anyone including Claimant had ever touched her privates inappropriately.
7 Dr. Abrams properly concluded that Brittany became infected with genital herpes type II by touching
8 herself from mouth to genitals, which is a common process called "autoinoculation."

9 Emergency room physician Dr. Lowder examined Claimant on March 24, 1997, and found
10 several genital warts on Claimant's penis. Dr. Lowder incorrectly determined that the dried scabs
11 appeared to be healing herpes lesions, even though Claimant informed him during the examination
12 that the scabs were the result of genital warts and extensive masturbation.

13 At the end of a March 31, 1997, hearing DCFS decided to place Brittany and Calvin back with
14 Stephanie, which was accomplished on or about April 3, 1997. The very next day on about April 4,
15 1997, Stephanie immediately alleged that Brittany told her that the Claimant molested her on the
16 bathroom floor after a bath and that Brittany was scared to come back home with claimant. Claimant
17 was arrested and charged pursuant to a warrant on April 29, 1997.

18 In June 1997 the State moved for and obtained samples of Claimant's blood and oral and
19 genital swabs for the specific purpose to determine "whether or not Claimant has the relevant genital
20 herpes type II infection."

21 On or about July 14, 1997, Claimant's herpes blood test results came back from the Unilab
22 laboratory and defense counsel was provided with a copy. No written herpes blood test results were
23 ever moved into evidence during the entire criminal proceedings in this case, and neither the judge,
24 the jury, nor Claimant had ever seen Claimant's actual written herpes blood tests results for
25 themselves.

1 During an August 15, 1997, pretrial conference the State prosecutor announced that Claimant
2 tested positive for genital herpes. However, it was never proven that Claimant had genital herpes type
3 II as opposed to genital herpes type I.

4 On August 7, 2013, California's Executive branch, as represented the California Board of
5 Parole Hearing, in a full and fair quasi-judicial/administrative hearing looked at the above facts and
6 decided to release Claimant on parole. The panel unambiguously held at page three of its decision:
7 "But in your case, there are significant indications that your version that you're not guilty isn't
8 implausible." The State Executive branch as represented by the California Board of Parole Hearing
9 then went even further to explain and hold at page 4 of its decision: "There's also an indication that a
10 lot of the things that you were – a lot of the reasons why you were convicted as far as the physical
11 evidence – there may be some question about that – so that leaves us some doubt that maybe you
12 were the wrong guy that was convicted of the crime."

13 On October 18, 2013 Governor Brown requested an en banc review of Claimant's grant of
14 parole. On November 19, 2013, the California Board of Parole Hearing sitting en banc again reviewed
15 the above-stated facts and evidence and upheld the August 7, 2013, decision.

16 These authoritative and very weighty decisional statements and holdings of the Executive
17 Branch were not necessary to the paramount consideration of claimant's suitability for parole because
18 claimant was otherwise suitable and never should have been convicted and incarcerated in the first
19 place. But, the decision by the Executive Branch after a full and fair hearing put the Judicial Branch on
20 notice and in check as to the erroneousness of this conviction.

21 On October 2, 2012, Brittany signed and had notarized her declaration under the penalty of
22 perjury attesting to the truth that Claimant is actually innocent and also explaining that she implicated
23 Claimant only because she was told to do so by Stephanie. She also recanted her trial testimony that
24 Claimant molested her. On December 3, 2013, Claimant was released from State custody, and on
25 March 10, 2014, Claimant was removed from the United States due to this erroneous conviction.

26 It is beyond Claimant's control that his defense attorney turned out to be an incompetent idiot
27 who prejudicially failed to do his job and it is beyond claimant's control that the State of California
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1 Judicial branch as represented by the State prosecutor withheld critical exculpatory information and
2 lied about Claimant's herpes tests results to erroneously convict Claimant. The State's and defense
3 counsel's stipulation that Claimant's blood tested "positive" for the herpes antibodies without proof
4 constitutes prejudicial ineffective assistance of counsel.

5 At the time of his arrest and erroneous conviction in 1997, Claimant was a struggling self-
6 employed entrepreneur of Hypo Enterprises Paralegal, a process service in North Hollywood, earning
7 enough to pay the mortgage for his four bedroom house and also pay full-time private school fees at
8 Montessori Academy for his children. Claimant supplemented his modest income as an independent
9 contractor servicing computer systems for JPC Computers in Inglewood, California.

10 Claimant also has fourteen years prior experience as a biomedical engineering technician to
11 fall back on in case his business venture failed. These facts establish that Claimant was gainfully
12 employed prior to being incarcerated and that Claimant could have been gainfully employed if not for
13 being incarcerated. As a result of being incarcerated, Claimant suffered a monetary loss from April 29,
14 1997, the date of arrest to December 3, 2013, the date of release from State custody.

15 **AG's Argument**

16 Claimant has filed no less than seven petitions for writ of habeas corpus in state and federal
17 courts—all of which have been denied—making some of the same meritless allegations that he makes
18 here, including that (1) he does not have genital herpes and (2) Brittany has recanted her trial
19 testimony. Based on the overwhelming evidence against Claimant, he remains rightfully convicted of
20 committing a lewd and lascivious act on Brittany which resulted in her contracting genital herpes, a
21 sexually transmitted disease for which there is no cure. He has not proven his innocence.

22 Brittany, who was only seven-years-old at the time of the crime, has repeatedly accused
23 Claimant of having inappropriate sexual contact with her. Although Brittany first claimed that she had
24 been molested by Ryan or a male at the park near Target, Brittany eventually told the police that she
25 knew who touched her, but declined to disclose the adult's name. Brittany's initial failure to identify
26 Claimant as her molester is consistent with the delayed and piecemeal disclosures that frequently are
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1 present when the molester is a relative or family friend.¹⁸ Brittany later told Stephanie that the
2 Claimant had hurt her by putting his penis on her vagina. She later told her social worker that the
3 Claimant had sexually molested her by putting his penis near her vaginal area. The social worker
4 wrote in her dispositional report, which was not submitted during trial, that Brittany disclosed that
5 Claimant had molested her on several occasions.

6 Brittany also told her Court Appointed Special Advocate that the touching happened "a lot" and
7 that it occurred before she had met Stephanie. In addition, in June 1997, Brittany testified about the
8 molestation during the preliminary hearing. She stated that Claimant hurt her private part while they
9 were in his bedroom. Claimant removed Brittany's clothing and touched her vagina with his penis.
10 Brittany described that his penis was hard and he moved it while touching her. Finally, Brittany
11 testified about being molested at trial when the jury was present and able to assess her credibility.
12 She again consistently described the incident in Claimant's bedroom, where he moved his "hard" penis
13 while touching her vagina. She also mentioned additional incidents that occurred in the living room
14 and her bathroom.

15 Brittany did not waver from her allegations against Claimant until nearly 15 years later, after
16 receiving money from and being pressured by Claimant's mother and Claimant's family. The
17 circumstances surrounding Brittany's alleged recantation demonstrate why California courts have
18 repeatedly held that recantations by witnesses who previously provided sworn testimony should be
19 viewed with suspicion.¹⁹

20 Claimant presented to the Board of Parole Hearings and submitted with his claim a declaration
21 signed by Brittany on October 2, 2012, wherein she purportedly recanted her trial testimony and
22 denied that Claimant had ever molested or hurt her. However, Claimant failed to provide to the Board
23 of Parole Hearings a copy of the Los Angeles County District Attorney's Office's subsequent interview
24 on March 24, 2013, of Brittany wherein she explained that Claimant's mother paid her to sign the
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26 ¹⁸ See *People v. Patino* (1994) 26 Cal.App.4th 1737, 1742-1743 [describing expert testimony regarding Child
27 Sexual Abuse Accommodation Syndrome].

28 ¹⁹ See e.g., *In re Roberts* (2003) 29 Cal. 4th 726, 743; *In re Weber* (1974) 11 Cal.3d 703, 722; *People v. McGaughran* (1961) 197 Cal.App.2d 6, 17.

1 declaration and confirmed that claimant had sexually molested her. She also stated that she felt
2 pressured to sign the declaration because the claimant's mother and other relatives kept calling and
3 writing her. Nor does Claimant acknowledge that at least one court has already given "very little
4 credence" to Brittany's alleged recantation.²⁰

5 Although Claimant has repeatedly alleged in state and federal courts and before the Board of
6 Parole Hearings—just as he does here—that he does not have genital herpes, the genital
7 examination, blood test results, and expert testimony at trial prove otherwise. As an initial matter,
8 Claimant's conduct during the genital examination by Dr. Lowder revealed his consciousness of guilt.
9 Claimant was reluctant to have his genitals examined, likely because he was trying to hide the lesions
10 on his penis. Even after speaking with a social worker for 15 to 20 minutes, Claimant remained
11 reluctant. Claimant ultimately allowed Dr. Lowder to conduct the examination, but refused to allow Dr.
12 Lowder to photograph his genitals. There is no reason for such reluctance and refusal, outside of
13 Claimant's desire to hide evidence of his guilt.

14 In addition, the genital exam itself demonstrated that Claimant was likely suffering from a
15 recent genital herpes outbreak. Dr. Lowder observed four or five small, punctate scabbing lesions on
16 the tip of Claimant's penis, warts on the shaft of his penis, and swollen lymph glands in Claimant's
17 groin area. The "crusty lesions" "appear[ed] to be healing herpes lesions." In Dr. Lowder's expert
18 opinion, these symptoms were consistent with a recent genital herpes outbreak. Although Claimant
19 maintains that the scabbing areas were genital warts that he had picked off, Dr. Lowder clearly
20 differentiated between the scabbing lesions and warts so he knew what the two conditions looked like.
21 And, according to the district attorney's office, Claimant refused to allow a doctor to obtain genital
22 swabs, again showing his consciousness of guilt.

23 The court ordered blood test, which was not done until nearly three months after claimant's
24 genital exam, revealed that the Claimant had a "long standing infection" or a re-correspondence.
25 During the genital examination on March 24, 1997, Claimant's lesions were "crusty" and appeared to

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27 ²⁰ Claimant subsequently provided a declaration from his mother that stated that she did not provide money to
28 Brittany to encourage her to sign the declaration. She also claimed that Brittany was fully aware of what was
contained in the declaration and that Brittany signed it because she wanted to get the Claimant out of prison.

1 be healing. When Claimant underwent the blood test on June 26, 1997, pursuant to court order, he
2 did not have any lesions; thus, genital swabs were not utilized because there was nothing to swab.

3 Finally, Claimant contends that he has proven that he is actually innocent of the lewd and
4 lascivious act that he was convicted of in 1997. He states, "[a]lthough California's Governor has not
5 granted a pardon per se... the California State Executive branch has implicitly recognized and
6 acknowledged that Claimant is actually innocent and erroneously convicted of this crime." He is
7 wrong. Claimant's conviction has been upheld by every state and federal court considering his
8 contentions.

9 And, far from acknowledging that "Claimant is actually innocent and erroneously convicted,"
10 Governor Brown expressly stated that Claimant made claims to the Board of Parole Hearings "that
11 [were] contrary to the record and that courts ha[d] soundly rejected." The Governor also noted that
12 Claimant's claim about how Brittany contracted herpes was "not true" and another assertion was "flatly
13 contradicted by the record." Also, Governor Brown stated "All of (Claimant's) appeals have been
14 dismissed. In 2002, a magistrate judge called the evidence of his guilt "overwhelming." Thus, there is
15 no evidence that the California State Executive branch has acknowledged that Claimant is innocent.

16 In addition, Claimant contends that since Brittany "*unequivocally denied*" that anyone had
17 touched her private parts, "Dr. Abrams properly concluded that [Brittany] became infected with genital
18 herpes type II by touching herself from mouth to genitals, which is a common process called
19 'autoinoculation.'" His contention is false for several reasons. First, according to Dr. Abrams's
20 testimony, Brittany told him that she had been molested by a man that was somewhere between her
21 age and Dr. Abrams's age; thus, she did not unequivocally deny ever being touched. Second, Dr.
22 Abrams did not conclude that Brittany gave herself herpes simplex II. Moreover, the evidence does
23 not support such a conclusion. Dr. Abrams testified that herpes simplex II is almost always transmitted
24 through sexual contact. Brittany would have had to come into contact with the genitals of another
25 infected person in order to get genital herpes in her mouth, which she could then spread to her vaginal
26 area.

27 Finally, Claimant contends that the prosecutor lied to the trial court when she said that
28 Claimant tested positive for genital and oral herpes. He urges that the prosecutor's statement "literally

1 means that Claimant's genital swabs tested positive for the virus." While that may be how Claimant
2 interpreted the prosecutor's statement, the prosecutor did not represent to the jury that genital swabs
3 had been obtained and tested. And, knowing that Claimant refused to allow a doctor to obtain genital
4 swabs, that is likely not something the prosecutor would have said. Most importantly, no state or
5 federal court has been willing to declare the Claimant factually innocent or grant habeas relief based
6 on this exact complaint about the genital herpes testing and results.

7 **Determination of Issues**

8 Penal Code section 4903 establishes the requirements for a successful claim for those
9 individuals who claim to have been imprisoned as a result of an erroneous conviction. In order to be
10 successful on such a claim, a claimant must prove, by a preponderance of the evidence, that the
11 crime with which he was charged was either not committed at all, or, if committed, was not committed
12 by him and that he sustained a pecuniary injury through his erroneous conviction and imprisonment.²¹
13 "Preponderance of the evidence" means evidence that has more convincing force than that opposed
14 to it.²²

15 In reaching its determination of the merits of the claim, the Board may consider the claimant's
16 mere denial of commission of the crime for which he was convicted, reversal of the judgment of
17 conviction on appeal, acquittal of the claimant on retrial, or the failure of the prosecuting authority to
18 retry claimant for the crime. However, those factors will not be deemed sufficient evidence to warrant
19 the Board's recommendation that a claimant be indemnified in the absence of substantial
20 independent corroborating evidence that the claimant is innocent of the crime charged.²³ The Board
21 may also consider as substantive evidence testimony of witnesses the claimant had an opportunity to
22 cross-examine, and evidence to which the claimant had an opportunity to object, admitted in prior
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26 ²¹ Pen. Code, § 4903, *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim*
Compensation and Government Claims Board (2006) 152 Cal. App. 4th 1164.

27 ²² *People v. Miller* (1916) 171 Cal. 649, 652.

28 ²³ Cal. Code Regs., tit. 2, § 641.

1 proceedings relating to the claimant and the crime with which he was charged. Finally, the Board
2 may also consider any information that it may deem relevant to the issue before it.²⁴

3 In this case it is determined that the Claimant has not proven by a preponderance of the
4 evidence that he is innocent of the crime of committing a lewd act upon a child under the age of 14,
5 with the sentencing enhancement that he committed great bodily injury upon the child by infecting her
6 with herpes. The Claimant has been unsuccessful in all his numerous attempts to prove wrongdoing
7 on the part of the prosecutor and to shed doubt on the validity of his positive herpes I and II blood
8 test. He claims he does not have herpes simplex II, and he keeps referring to the absence of swabs
9 to support that argument. But, this argument is specious because the record is clear that there are
10 no swabs because the Claimant refused to allow swabs to be taken of the active sores on his penis at
11 the time Brittany was suffering an outbreak of herpes simplex II.

12 Claimant claims because the California Board of Parole granted him parole he is thus
13 innocent of the crime. He believes that the Board's statements that "in your case, there are
14 significant indications that your version that you're not guilty isn't implausible," and "that there may be
15 some doubt that maybe you were the wrong guy that was convicted of the crime" are proof of his
16 innocence. This belief is wrong. Although the California Board of Parole commented on the
17 claimant's conviction in his third parole hearing, such comment was improper and irrelevant because
18 the Board of Parole must accept as fact the guilty verdict imposed by the trial court. The Board of
19 Parole is not permitted to decide guilt or innocence.

20 It is also determined that because Brittany did not understand much of what was contained in
21 the declaration, which was written by someone else and signed under substantial pressure, it cannot
22 be said that Brittany's purported recantation provides credible evidence of Claimant's innocence. In
23 addition, the declaration by Claimant's mother is given no weight because it is contradicted by the
24 voluminous trial and appellate records.

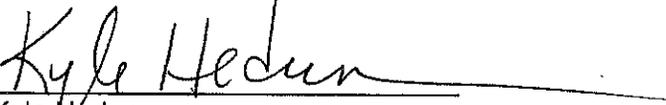
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27 ²⁴ Cal. Code Regs., tit. 2, § 641.
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1 Finally and most importantly, it is determined that the Claimant's continuing argument that he
2 does not have herpes simplex II is fallacious because the record reflects that the prosecution and
3 defense both stipulated in open court that a blood sample was taken from the Claimant and that the
4 Claimant's blood tested positive for the antibodies for herpes simplex I and herpes simplex II.²⁵

5 **Conclusion**

6 Because the Claimant presented no credible evidence that he is innocent of the crime for
7 which he was incarcerated, it is recommended that the Board deny his claim for compensation.

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9 Date: December 1, 2014

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11 Kyle Hedum
12 Hearing Officer
13 California Victim Compensation and
14 Government Claims Board

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27 ²⁵ In addition, Claimant provided a letter from an appellate attorney dated September 27, 1999, in which the
28 attorney confirmed that the Claimant tested positive for herpes type II and that Claimant's trial attorney agreed to stipulate that Claimant had genital herpes II.

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BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA

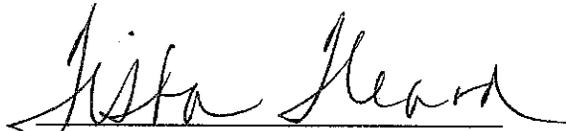
In the Matter of the Claim of:

Notice of Decision

Steven Hypolite

On January 15, 2015, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: January 16, 2015



Tisha Heard
Board Liaison
California Victim Compensation and
Government Claims Board