

## MEMORANDUM

**To:** The California Commission on the Fair Administration of Justice

**From:** Mary LeClair, Law Student. Wrongful Convictions: Causes and Remedies Seminar, Golden Gate University School of Law

**Re:** Statutory Obstacles for Exonerees Seeking Monetary Compensation for Wrongful Conviction and Incarceration.

**Date:** October 22, 2007

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### Introduction

This paper addresses the question posed by the Commission of whether or not Californians who have been exonerated of felonies by establishing their factual innocence are receiving adequate statutory compensation for the wrongful deprivation of their liberty.

The answer is no. There are a number of problems associated with the statutory scheme for compensating exonerees with up to \$100 per day for the months and years they were wrongly confined behind bars. Many of these problems are caused by the limitations of Penal Code section 851.8, the California statute that provides arrestees and some defendants a formal mechanism for establishing factual innocence and expunging arrest records. Other problems arise from onerous procedural and jurisdictional hurdles found in the practical application of California Penal Code sections 4900-4906, the compensation statute. Still other problems stem from a lack of harmony and inner consistency between the two remedial statutes.

This set of recommendations will discuss ways of amending Penal Code § 851.8 to include convicted and subsequently exonerated defendants in its procedure for establishing factual innocence. It will also discuss ways of amending and reforming a number of flaws in Penal Code sections 4900-4906 and in the administration of the California Victim's Compensation and Government Claims Board (hereinafter, "the Board") that lead to unjust denials for exonerees seeking state compensation for their lost years. Finally, the paper will recommend ways to

harmonize both the letter and the spirit of the only two California statutes that grant relief and remedy to those citizens who have languished in prison for crimes they did not commit.

### **The Statutes**

California Penal Code § 851.8 provides for the establishment of factual innocence and the sealing and destruction of arrest records if, after an evidentiary hearing of the petitioner's case, the Superior Court "finds that no reasonable cause exists to believe that the arrestee committed the crime for which the arrest was made." (Pen. Code sec. 851.8, subsections (a), (b), (c), and (e)). Persons who qualify to petition for a finding of factual innocence under § 851.8 are limited to those individuals who have been: arrested but not charged (a), arrested, charged, but not convicted (c), acquitted (e), or petitioning with the concurrence of the prosecuting attorney (d). It is important to note that under § 851.8 (b), the burden of proof for factual innocence rests with the petitioner, and may be rebutted by the prosecutor using any relevant, material and reliable evidence. Once a court is satisfied that "no reasonable cause" existed to arrest or prosecute the petitioner, the court makes an official finding of factual innocence.

The other relevant statute for our purposes is California Penal Code, sections 4900-4906.

Section 4900 provides that:

*Any person who, having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison for that conviction, is granted a pardon by the Governor for the reason that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her, or who, being innocent of the crime with which he or she was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he or she was imprisoned, may, under the conditions provided under this chapter, present a claim against the state to the California Victim Compensation and Government Claims Board for the pecuniary injury sustained by him or her through the erroneous conviction and imprisonment (emphasis added).*

Section 4906 states that: "The California Victim Compensation Board and Government Claims

Board is hereby authorized to make all needful rules and regulations consistent with the law for the purpose of carrying into effect this chapter."

### **Issues and Recommendations**

#### **Issue 1: § 851. 8 Does Not Cover those Convicted and Subsequently Exonerated.**

As explained above, Section 851.8 provides relief for arrestees who are not charged (851.8(a)), defendants whose cases are dismissed (851.8(c)) or who are acquitted (851.8(e)), or defendants whose cases are dismissed with the concurrence of the prosecution (851.8 (d)), *but the statute does not explicitly provide relief for a defendant who has been erroneously convicted of a felony and subsequently exonerated.* The statute does not explicitly discuss defendants with convictions, an omission that has led to much litigation. In *People v. McCann*, 141 Cal. App. 4th, 353 (2006) the Appeals Court held that an appellate reversal of a felony conviction based on insufficient evidence was the functional equivalent of an acquittal for §851.8's purposes. But in *People v. Adair*, 29 Cal. 4th 895, 909 (2003), the California Supreme Court reversed a trial court that found an acquitted murder defendant factually innocent under §851.8 because the substantial evidence test used by the lower court proved only that the case presented reasonable doubts, but did not negate all reasonable cause for having arrested and charged the defendant. The *Adair* Court established that appellate courts must review factual innocence cases de novo. *Id.* at 909.

#### **Recommendation 1:**

Amend § 851.8 to include clauses that expand eligibility to those:

1. Convicted felons whose convictions are vacated by a state or federal court for:
  - DNA or other forensic evidence exoneration
  - insufficient evidence so as to merit a directed verdict under Penal Code § 1118.1
  - constitutional violations that prejudiced defendant's ability to present exculpatory

evidence where such evidence would more likely than not have exonerated them.

2. Convicted felons whose circumstances do not fit under 1) above, when new evidence, not presented at trial, convinces the prosecuting attorney that the defendant is factually innocent of the crime(s) of which he was convicted.

**Issue 2: §851.8 (i) Negates the Value of the Finding of Factual Innocence**

851.8, subsection (i) provides: "Any finding that an arrestee is factually innocent pursuant to subdivision (a), (b), (c), (d), or (e) shall not be admissible as evidence in any action." This is internally inconsistent and illogical. The subsection virtually writes an obstacle for the exoneree into the remedial statute itself, and eviscerates any value a finding of factual innocence may have to the individual found factually innocent. Considering §851.8's very high burden of proof, the adversarial nature of the proceeding in the court of original jurisdiction, and the "no reasonable cause" standard, a finding and declaration of factual innocence *should be* admissible in any future criminal or civil actions as an especially reliable and weighty final judgment.

**Recommendation 2:**

Amend 851.8 (i) by removing the word "not", so that it reads; "*shall* be admissible in any action." (emphasis added)

Also add language that makes a Superior Court's finding and order of factual innocence *res judicata*, and binding upon any California executive, administrative, legislative or judicial body.

**Issue 3: §§ 4900 Does Not Recognize Factual Innocence Under § 851.8.**

While it may seem logical that a Superior Court's finding of factual innocence under §851.8 satisfies § 4900's condition precedent of "being innocent of the crime with which he or she was charged" for purposes of receiving compensation from the state, the Board does not automatically recognize such an order. Instead, the Board is vested with the power to conduct its own time-consuming, duplicative investigation and evidentiary hearing on a claimant's innocence. (See § 4906, above). Sections 4900 et seq., however, are silent at best or conflicting at worst, as to

procedures for establishing innocence.

**Recommendation 3:**

Amend §4900 to adopt language specifically including those found factually innocent under § 851.8 by the Superior Court that tried them. Closely track or duplicate the language of the amended §851.8 so that the criteria for factual innocence are identical and unambiguous.

**Issue 4: The Board's Procedures, Evidentiary Standards, and Burdens of Proof Are Vague and Arbitrary.**

What does it mean to be factually innocent under both § 851.8 and § 4900? Section 4900 is silent as to what a claimant must specifically provide to the Board in order to prove his or her innocence, apart from a pardon from the Governor (which, ironically, may be only constructive or putative innocence). But buried deep within the California Administrative Code, which governs the Board's duties, responsibilities and regulations, is section 641, which outlines what the Board may consider in determining whether a claimant is indeed innocent of a felony conviction for which he or she has served prison time:

§641. Burden of Proof.

*In reaching its determination of the merits of the claim, claimant's mere denial of commission of the crime for which he was convicted; reversal of the judgment of conviction on appeal; acquittal of claimant on retrial; or, the failure of the prosecuting authority to retry claimant for the crime, may be considered by the Board but will not be deemed sufficient evidence to warrant the Board's recommendation that claimant be indemnified in the absence of substantial independent corroborating evidence that claimant is innocent of the crime charged. Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to which claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and the crime with which he was charged, may be considered by the Board as substantive evidence. The Board may also consider any other information that it may deem relevant to the issue before it.*

Cal. Admin. Code, Title 2, Division 1, Chapter 1, Article 5, § 641 (emphasis added).

Section 641 permits the Board to expressly refuse to deem reversals, acquittals, and refusals to re-

try a defendant as sufficient evidence of innocence in the absence of substantial, independent corroborating evidence of the claimant's innocence. This is understandable caution, as convictions may be reversed and defendants may be acquitted for any number of reasons, many of which do not bear on actual, factual innocence. Yet rather than clearly providing fair notice of what a claimant must present to the Board, and in what format, § 641 acts as a further obstacle to the exonerated claimant by being so obscured in the Administrative Code, by enumerating only what it will *not* consider as a sufficient showing of innocence, and by granting the Board arbitrary and unlimited power to decide what evidence to consider, and what weight that evidence will have.

This uncertainty and the dearth of standardized guidelines for claimants has a cure: amend both § 641 of the Administrative Code and § 4900 of the Penal Code to give preclusive effect to an §851.8 finding of factual innocence by a Superior Court. Before such a finding is made, the defendant must serve his petition for a finding of factual innocence on both the local prosecuting agency and the State Attorney General. Both prosecutorial bodies thus have the opportunity to contest the defendant's claim of innocence at a hearing before a neutral magistrate. A finding of factual innocence resulting from such a proceeding should thus be viewed as a final judgment made by the body best situated to make the determination, the Court in which the defendant was convicted.

The case of San Francisco exoneree John Tennison tragically yet aptly illustrates the unjust result wrought by the failure of the applicable statutes to work in harmony.

In 1990 John Tennison was found guilty for the shooting murder of Roderick Shannon in a jury trial in the San Francisco Superior Court. *Tennison v. California Victim Compensation and Government Claims Board*, 152 Cal. App 4th, 1164, 1169 (2007). During the pendency of a federal habeas petition, Tennison obtained exculpatory evidence not available to him at trial, including the confession of another man to the shooting, and the testimony of two other witnesses

corroborating the confessor's story, among other evidence. (*Id.* at 1170). In 2003, a federal district court vacated Tennison's conviction because of the knowing suppression of the exculpatory evidence by prosecutors and police. (*Id.*) Later in 2003 Tennison petitioned for, and received, an order and declaration of his factual innocence under § 851.8 from the San Francisco Superior Court, with the District Attorney's concurrence. (*Id.* at 1171).

In 2004 Tennison petitioned the Board for compensation under Penal Code § 4900. The State Attorney General recommended the Board deny the claims. Later that year the Administrative Law Judge (hereinafter, "ALJ") issued a decision concluding Tennison "failed to establish by a preponderance of the evidence that he is entitled to compensation pursuant to §4903," and denied his claim. (*Id.* at 1172).

The Board agreed with the ALJ's determination that the Superior court's findings of "factual innocence" pursuant to § 851.8 (i) were "not binding and inapplicable" to a § 4900 proceeding, and refused to give preclusive effect to the San Francisco Superior Court's official finding of factual innocence. (*Id.* at 1173). The Board also stated that Tennison had failed to carry the burden of "establishing by a preponderance of the evidence that he did not commit the crimes for which he was charged and convicted; and did nothing by way of act or omission, either negligently or intentionally, to contribute to his arrest and convictions." (*Id.*) Both the appellate division of the San Francisco Superior Court and the 1st District Court of Appeals affirmed the Board's decision.

Penal Code sections 851.8 and 4900 et. seq. as currently written and implemented by the Board, worked in tandem to deny John Tennison and those similarly situated the statutory compensation they deserve for spending years in prison for crimes they did not commit. Amending Penal Code §851.8 will remove the faulty logic of its non-binding and non-evidentiary status, as well as expanding the pool of eligible claimants--the wrongly convicted and

incarcerated--to include those who are in most need of the statute's relief. Amending Penal Code §§4900-4906 and § 641 of the Administrative Code to reflect and blend with § 851.8's changes will remove the arbitrary power of the ALJs and other non-criminal law experts involved in the Board's oversight of compensating the wrongfully imprisoned.

**Recommendation 4:**

(A) Penal Code §4900 should be amended to blend with amendments in §851.8 changing the language of *who* may petition for factual innocence (see Recommendation 1 above).

(B) Sections 4900-4906 should be amended to reflect the change to § 851.8 that mandates that an order and declaration of factual innocence by a Superior court will be admissible evidence in any action. (See Recommendation 2, above).

(C) Section 4900 should also be amended to provide that anyone who satisfies the requirements of the amended §851.8 for wrongly convicted felons *shall* be entitled to compensation without further proceedings.

(D) Finally, Section 641 of the California Administrative Code should also be amended to reflect these changes.

**Issue 5: Negligence Language is Inappropriate in the Factual Innocence Setting.**

Penal Code § 4903 sets out that:

On such hearing the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto. The claimant must prove the facts set forth in the statement constituting the claim, including the fact that the crime with which he was charged was either not committed at all, or, if committed, was not committed by him, *the fact that he did not, by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged*, and the pecuniary injury sustained by him through his erroneous conviction and imprisonment. (emphasis added)

In addition to § 4903's requirement that the claimant prove that he or she did not negligently or intentionally bring about his or her own conviction, § 4901 requires that the facts a claimant states to the Board must be "verified in the manner provided for the verification of complaints in civil actions," and that the claimant's burden must be sustained by a preponderance of the evidence. This is a confusing infusion of the language of civil tort actions, which is out of place in a claim with the magnitude of a wrongfully incarcerated exoneree. How does one prove that he did not intentionally get himself arrested and charged? Or that he or she, most likely a low-income defendant using the services of a public defender or a court-appointed attorney, was negligent in becoming convicted? The language is nonsensical, and shifts the burden established for criminal proceedings under the United States Constitution. Bringing a claim before the Victim Compensation and Government Claims Board is indeed a civil action, but the requirements and burdens of the claimant are confused, at some times being less stringent than requirements of a criminal proceeding (preponderance, for example), and at other times more stringent (reversal or a vacated conviction by a criminal court not sufficient to establish innocence).

**Recommendation 5:**

Again, blending the language in the relevant two Penal Code Statutes, as well as the language found in the Administrative Code, is the solution to the confusing mish-mash of proofs, showings and burdens. One standard should be outlined in all three codes. That standard should be that of "no reasonable cause" established in § 851.8, which arguably is the functional equivalent of "beyond a reasonable doubt." Case law establishes rules for many foreseeable problematic or technical issues such as a conviction reversed based on illegally seized evidence or the substantial evidence rule; *People v. Adair*, 32 Cal.App.4th, 895 (2003), or a reversal based on an insanity defense; *Ebberts v. State Board of Control*, 84 Cal. app. 3d, 329 (1978). Superior Courts can

effectively screen out those reversals and acquittals which do not establish factual innocence and can do so more reliably, as the court which originally tried the case is in the best position to re-evaluate witness credibility and evidentiary matters in light of new evidence: the primary engine behind the establishment of innocence after conviction.

### **Conclusion**

While wrongful convictions are relatively rare occurrences, they represent a travesty of the American justice system of the greatest magnitude, and should be rectified in as expedient and as efficient a manner as possible. When someone is wrongfully convicted and imprisoned, and then eventually exonerated, the statutory compensation mechanism should be speedy and easy to navigate. Imposing hurdles and obstacles to the men and women who have suffered a grave injustice at the hands of the state amounts to an unconscionable continuation of the first injustice. Yet this is precisely what is happening under California's current statutory scheme.

California Penal Code sections 851.8 and 4900-4906 represent the only formal procedures for the wrongfully convicted to receive a measure of monetary damages for the lost part of their lives. The statutes do not work well by themselves and they do not work well together to swiftly appropriate the funds that men and women need to rebuild their shattered lives.

The legislature has acted to put in place procedures for establishing actual innocence and to compensate the innocent men and women erroneously incarcerated, and the legislature should now act to repair the flaws and fill the gaps of the systems they have created. The legislature should adopt the recommendations outlined above so that compensation under §4900 is awarded simply and smoothly as a matter of course after a court's determination of factual innocence under § 851.8. The men and women whose liberty has been sacrificed in the name of the People of the State of California deserve no less.

