APPENDIX A

Filed 12/29/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOSHUA ZAMORA GONZALES, Plaintiff and Appellant, v. CALIFORNIA VICTIM COMPENSATION BOARD, Defendant and Respondent; PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	B323360 (Los Angeles County Super. Ct. No. 20STCP04185)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

The Law Offices of Jarrett Adams, Jarrett Adams, Lillian C. Gaither and Megan D. Baca for Plaintiff and Appellant.

APPENDIX A

Rob Bonta, Attorney General, Jodi L. Cleesattle, Senior Assistant Attorney General, Donna M. Dean, Supervising Deputy Attorney General, and Andrew Huang, Deputy Attorney General, for Defendant and Respondent.

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In California, inmates who are exonerated of their crimes may apply to an administrative board for compensation for the time they were erroneously imprisoned. (Pen. Code, § 4900 et seq.)[1] Here, an inmate convicted as the shooter in a gang-related drive-by shooting applied for such compensation after the United States Court of Appeals for the Ninth Circuit (the Ninth Circuit) granted the inmate's habeas corpus petition and overturned his convictions on the basis of insufficiency of the evidence presented at trial. Under the pertinent statutes in effect in 2020, an inmate's entitlement to compensation in this situation turned on his ability to prove, by a preponderance of the evidence, his "factual innocence." (Former § 1485.55, subd. (b), Stats. 2019, ch. 473 (Sen. Bill No. 269), § 1, eff. Jan. 1, 2020; former § 4903, subd. (a), Stats. 2019, ch. 473 (Sen. Bill No. 269), § 3, eff. Jan. 1, 2020;

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Cal. Code Regs., tit. 2, § 644, subd. (d).)[2] In determining whether the inmate has carried this burden, the "factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus" are "binding" in the compensation proceeding before the board. (§§ 4903, subd. (b), 1485.5, subds. (c) & (d).) This appeal presents two questions. First, does the conclusion of a habeas court granting relief that the evidence at trial was insufficient to support an inmate's conviction beyond a reasonable doubt automatically establish that inmate's factual innocence by a preponderance of the evidence? Second, do the habeas court's summary of the trial record as well as commentary on the relative strength or weakness of the evidence in that record—in the course of granting relief to the inmate—constitute "factual findings" that are "binding" in the subsequent administrative proceeding to award that inmate compensation? We hold that the answer to each question is "no." We further conclude that, even if there were "factual findings" in this case, the board treated them as binding. As a result, we agree with the trial court that the board's denial of compensation to the exonerated inmate in this case does not warrant the issuance of a writ of administrative mandamus and accordingly affirm.

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2 Unless otherwise noted, all further references to the statutes governing an inmate's entitlement to compensation for erroneous conviction and imprisonment are to the statutes in effect at the time the administrative proceedings in this case were conducted.

FACTS AND PROCEDURAL BACKGROUND

I. The Crime

On a Saturday night in October 2008, three men standing on a street corner in a residential neighborhood down the block from a party were shot. The shooter fired from the backseat of a "black" or "dark-colored," newer model Cadillac with rims and three people riding inside. The shooting was gang-related: The men were "talking shit" to passersby, and the shooter in the Cadillac made the archetypical gang challenge—demanding to know, "Where you fools from?"—before opening fire. All three shooting victims survived their wounds.

No direct evidence tied Joshua Zamora Gonzales (Gonzales) to the shooting. No witness, including none of the victims, positively identified Gonzales as the shooter. One victim testified that Gonzales was *not* the shooter, but subsequently clarified that he did not see who shot him. A search of Gonzales's home did not turn up any firearm or firearm paraphernalia. No one came forward to say Gonzales was involved. And Gonzales, in a post-arrest interview, denied being the shooter.

Thus, all evidence of Gonzales's involvement in the shooting was circumstantial. He was present at the party. He wore a baseball cap sporting the Pittsburgh Pirates' "P" logo signifying the Playboyz street gang, bragged to other partygoers that he was a member of the Playboyz gang who went by the moniker "Knuckles," and had also previously told police he was a member of that gang. The victims wore "L.A. gear" worn by one of the Playboyz's rival gangs. Gonzales admitted to driving by the victims while in the backseat of a newer model Cadillac with rims and containing three people, although he claimed the Cadillac was "red" "like a fire truck" or "light red." Moments

before the shooting, the victims "started talking shit" *to Gonzales* and Gonzales responded, "what's up." Gonzales had two particles of gunshot residue on his right hand, although that residue—because the test was not conducted until 12 hours after the shooting and because Gonzales had washed his hands in the interim—was equally consistent with Gonzales touching a surface with gunshot residue as with Gonzales firing a gun. In his post-arrest interview, Gonzales also changed his story about being present at the location of the shooting and interacting with the shooting victims and repeatedly refused to answer questions for fear of being known as a "snitch."

II. Gonzales's Prosecution and Conviction

The People charged Gonzales (in San Bernardino County) with three counts of attempted premeditated murder (§§ 187, subd. (a), 664), and shooting from a motor vehicle (§ 12034). The People further alleged that Gonzales personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b)-(d)), personally and intentionally discharged a firearm from a motor vehicle (§ 12022.55), and committed the charged crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

In December 2009, a jury convicted Gonzales of all charged crimes and found true the firearm and gang allegations.

In January 2010, the trial court sentenced Gonzales to prison for 86 years and eight months.

III. Review of Gonzales's Convictions

A. *Direct appeal*

On direct appeal of his conviction, Gonzales challenged the sufficiency of the evidence underlying his convictions. The California Court of Appeal, Fourth Appellate District, held in an

unpublished opinion that circumstantial evidence supported the jury's finding that Gonzales was the shooter—namely, (1) a partygoer's testimony that Gonzales was "dressed like a Playboyz gang member and associating with other gang members"; (2) Gonzales's "admissions to the police that he attended the party, dressed as [the partygoer] described him, and that he was in a car, passing by a group of men on the street at the time of the shooting"; and (3) Gonzales's "positive gunshot residue test." (*People v. Gonzales* (June 3, 2011, E050175) [nonpub. opn.].)

The California Supreme Court denied Gonzales's petition for review.

B. *Federal habeas corpus review*[3]

1. *District Court proceedings*

Gonzales filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. Among other claims, he argued that his convictions were not supported by substantial evidence. In a July 2013 order, the court rejected Gonzales's claim, "find[ing] no defect in the state [appellate] court's analysis and determination" regarding the sufficiency of the evidence. (*Gonzales v. Gipson* (July 19, 2013, ED CV 12-862-BRO (PLA).)

2. *Ninth Circuit proceedings*

Gonzales appealed the denial of his habeas petition to the Ninth Circuit.

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3 Gonzales also filed a petition for writ of habeas corpus in California state court on Eighth Amendment grounds, but that petition was denied and that basis for relief is not at issue in this appeal.

In August 2016, a three-judge panel initially affirmed the denial in a 2-1 decision, with one judge dissenting. (*Gonzales v. Gipson* (9th Cir. 2016) 659 Fed.Appx. 400.)

Gonzales petitioned for rehearing, and the three-judge panel granted the petition and issued a new 2-1 decision in April 2017. (*Gonzales v. Gipson* (9th Cir. 2017) 687 Fed.Appx. 548.) In this decision (which was later modified), the two-judge majority ruled that "the evidence [was] constitutionally insufficient to support Gonzales's convictions." The majority then offered six reasons for this conclusion, each of which summarized and/or made observations about the trial record:

- "First, no eyewitness testified that Gonzales was the shooter or could identify any of the occupants of the vehicle from which the shots were fired."
- "Second, testimony concerning Gonzales's baseball cap and gang affiliation does not distinguish him from other people present on the night of the shooting. . . . No witness testified that the shooter wore a baseball cap that matched the one Gonzales wore that night. The evidence did not establish that a person known as 'Knuckles' was connected with the shooting, nor that the victims were shot to benefit the Playboyz gang specifically."
- "Third, witnesses' descriptions of the car from which the shots were fired did not match descriptions of the car in which Gonzales claimed he was a passenger" because Gonzales "consistently stated" he was in a "light red Cadillac," while witnesses described a "black or dark colored" Cadillac. Also, Gonzales "repeatedly denied ever shooting a gun."
- "Fourth, although Gonzales stated during his police station interview that he was the rear passenger in a car that

drove by some men on the street who were 'talking shit' and that he later heard gunshots, he did not clearly admit that he exchanged words with or motioned to anyone from the backseat of his friend's light red Cadillac."

- "Fifth, the two particles of gunshot residue on Gonzales's right hand do not connect him to any gun fired on the night of the shooting" because, due to the delay in time and hand-washing, "it was just as likely the particles came from contacting a surface contaminated with gunshot residue as from firing a firearm, handling a firearm, or being in close proximity to a discharged firearm."
- "Sixth, despite a thorough search, police officers found no weapons, bullets, gun magazines, gun cleaning devices, or other firearm paraphernalia at Gonzales's home."

Because Gonzales's "convictions rest on" what the two-judge majority characterized as "a speculative and weak chain of inferences that he was the shooter and that he personally discharged a firearm," the majority reiterated its conclusion that the evidence at trial was "constitutionally insufficient" because it "does not permit any rational trier of fact to conclude that Gonzales was guilty beyond a reasonable doubt."

IV. Administrative Proceeding Seeking Compensation

A. *Filing of petition for compensation*

Following his release from custody on July 25, 2017, Gonzales in August 2017 filed a claim with the California Victim Compensation Board (the Board) seeking $450,240 in compensation for the 3,216 days he was incarcerated under the now-invalid convictions.

The Board stayed the proceedings while Gonzales litigated a petition for a finding of his factual innocence in the San

Bernardino County Superior Court. After an evidentiary hearing at which Gonzales testified, the court denied his petition, finding that the sum total of evidence—including that Gonzales "was at the location [of the shooting], matched the description, was wearing a hat consistent with gang involvement, was untruthful [during his post-arrest interview]," and had "gunshot residue on his hand"—indicated that Gonzales was, "in fact, factually culpable and guilty."[4]

B. *Hearing*

At the behest of the Board, a hearing officer conducted an evidentiary hearing on Gonzales's petition for compensation in April 2019.

The People introduced an enhanced audio recording of Gonzales's post-arrest interview, which made it possible to hear and understand a portion of Gonzales's statement that was previously "inaudible" in the version that was part of the trial record; in that portion, Gonzales admitted that he had asked the men on the street corner, "Oh, where are you fools from, dawg?"

Gonzales introduced an affidavit from "Dave Herrada," who declared that he drove his "light red colored Cadillac" the night of the party and that no one from the car fired a firearm. Gonzales did not call Herrada to the stand, so he was not subject to cross-examination.

Gonzales also testified. Gonzales reaffirmed that he was at the party, that the men on the corner approached him and his friends "aggressively" as they drove by in a "light red Cadillac," and that he and his friends ignored those men and drove off. Gonzales denied asking the men, "[W]here are you fools from?"

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4 The court also added its view that Gonzales "should still be in prison for this crime."

until he was confronted with the enhanced recording, at which point he admitted it. Gonzales denied being a member of the Playboyz gang, but acknowledged that he had been photographed throwing Playboyz "gang signs," that he had registered as a Playboyz gang member with the police, that he proclaimed himself to be "Knuckles from Playboyz" on a social media profile, and that he had told the police in his post-arrest interview that he bragged to other partygoers he was "Knuckles" with the Playboyz gang.

C. *Ruling*

Following post-hearing briefing, the Board in September 2020 adopted the hearing officer's 31-page ruling denying Gonzales's claim for compensation. Specifically, the Board concluded that Gonzales "failed to satisfy his burden of proving he is more likely innocent, than guilty, of his vacated convictions" and "failed to demonstrate his innocence by a preponderance of evidence."

The Board acknowledged—as Gonzales and the People urged—that it was bound by "any factual finding[s]" of the Ninth Circuit in granting habeas relief and by the San Bernardino County Superior Court in denying a finding of factual innocence, but found that those two sets of findings were "not necessarily inconsistent" because the Ninth Circuit's ruling assessed whether the evidence at trial was sufficient to prove guilt beyond a reasonable doubt, while the Superior Court assessed whether the trial evidence and additional evidence proved that Gonzales was innocent by a preponderance of the evidence. The Board went further by treating the Ninth Circuit's "characterizations of the trial court record" as "factual findings," and listed several of the characterizations set forth in the Ninth Circuit's decision.

"The Board then enumerated three reasons for its conclusion that Gonzales had not met his burden of establishing his factual innocence. First, the Board set forth the evidence from the trial that circumstantially inculpated Gonzales, including (1) "his presence at the crime scene"; (2) the "striking number of shared circumstances between Gonzales and the shooter," such as both leaving the party around the same time in a newer model Cadillac with rims and with three people in it, both being seated in the back seat of the Cadillac, both wearing baseball caps, both passing the three men on the street corner at around the same time, and both asking the men where they were from; (3) the presence of two particles of gunshot residue on Gonzales's hand, "suggest[ing] the possibility that he was the shooter"; and (4) his status as "an admitted and documented" member of a street gang in what was a "gang-motivated" shooting. Second, the Board found Gonzales's testimony before the hearing officer to be "not credible" given that he "falsely described" his criminal history, and given the sheer number of "patently inconsistent statements" he made about the shooting—which included both "admitt[ing] and den[ying]" (1) "being a member of the Playboyz gang," (2) "being present when shots were fired," and (3) "asking the victims where they were from." Third, the Board found Herrada's declaration "untrustworthy" because (1) his name did not exactly match the name given by Gonzales as someone who was with him on the night of the shooting; (2) the declaration omits the name of the third person in the Cadillac; and (3) the declaration contradicted some of Gonzales's own statements, which also were internally inconsistent, regarding who owned and who drove the Cadillac on the night of the shooting."

V. Administrative Mandamus Proceedings

In December 2020, Gonzales filed a petition for a writ of administrative mandamus in the Los Angeles County Superior Court seeking to overturn the Board's denial of his claim for compensation.[5] After the Board answered the petition, Gonzales, the Board, and the People (as the real party in interest) briefed whether Gonzales was entitled to relief. The court convened a hearing in July 2022, and issued a 16-page written ruling a week later.

The court ruled that the Board's denial of Gonzales's compensation claim did not constitute a prejudicial abuse of discretion because it was "supported by substantial evidence." The court found that the Board had "give[n] 'binding effect'" to both the Ninth Circuit's findings and the San Bernardino County Superior Court's findings, and was able to do so because those two courts applied "different . . . standards." The court next found that the Board's conclusion that Gonzales had not proven his factual innocence by a preponderance of the evidence was reasonable and supported by substantial evidence.

VI. Appeal

Following the entry of judgment, Gonzales filed this timely appeal.

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5 Gonzales also styled his petition as one for traditional mandamus, but that type of writ is unavailable where, as we conclude in Section I of the Discussion below, an administrative agency holds an evidentiary hearing and is vested with discretion to determine the facts (and hence does not have a ministerial duty to act in a certain way). (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.)

DISCUSSION

Gonzales argues that the trial court erred in denying his petition for a writ of administrative mandamus seeking to compel the Board to grant his claim for compensation for erroneous conviction and imprisonment.[6]

I. Pertinent Law

A. *Administrative mandamus*

A person aggrieved by the ruling of an administrative agency may file a petition for a writ of administrative mandamus to invalidate that ruling. (Code Civ. Proc., § 1094.5, subd. (a).) As pertinent here, a writ will issue if the administrative agency has committed a "prejudicial abuse of discretion," which exists when the ruling is "not supported by the [agency's] findings" or those "findings are not supported by the evidence." (*Id.*, subd. (b).) The degree of judicial scrutiny turns on the extent to which the agency's ruling involves or substantially affects a "fundamental, vested right." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 139, 144; *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 778.) Where such rights are at stake, the trial court's task is to independently evaluate whether the agency's findings are supported by the record, and *our* task, in reviewing the grant or denial of such a writ, is to examine whether *the trial court's* ruling is supported by substantial evidence. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33

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6 In his briefs on appeal, Gonzales purports to also challenge the San Bernadino County Superior Court's denial of his petition for a finding of factual innocence, but Gonzales forfeited any challenge to that ruling by failing to timely appeal it. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 ["if an order is appealable, appeal must be taken or the right to appellate review is forfeited"].)

Cal.3d 392, 395; *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057-1058.) But where no such rights are at stake, the trial court's task is to more deferentially evaluate whether the agency's findings are supported by substantial evidence, and *our* task, in reviewing the grant or denial of such a writ, is to step into the trial court's shoes and independently examine for ourselves whether *the agency's* findings are supported by substantial evidence. (*JKH Enterprises*, at pp. 1057-1058.) An exonerated inmate has no fundamental, vested right to compensation (*Tennison v. California Victim Comp. & Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1181-1182 (*Tennison*); *Madrigal v. California Victim Comp. & Government Claims Bd.* (2016) 6 Cal.App.5th 1108, 1113 (*Madrigal*)), so we employ the more deferential review (*Holmes v. California Victim Comp. & Government Claims Bd.* (2015) 239 Cal.App.4th 1400, 1406 (*Holmes*)). We independently review any subsidiary legal questions, including the meaning of statutes. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95-96 [meaning of statutes]; *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 956 [legal questions reviewed de novo].)

B. *Compensation for erroneously convicted and imprisoned persons*

"California has long had a system for compensating exonerated inmates for the time they spent unlawfully imprisoned" and thus "'away from society, employment, and their loved ones.'" (*People v. Etheridge* (2015) 241 Cal.App.4th 800, 806; *Larsen v. California Victim Comp. Bd.* (2021) 64 Cal.App.5th 112, 123 (*Larsen*); *Holmes*, *supra*, 239 Cal.App.4th at p. 1405.) That system is defined by various statutes (§§ 4900 et seq.,

1485.5, 1485.55) (the compensation statutes) as well as regulations promulgated under those statutes (§ 4906; Cal. Code Regs., tit. 2, § 640 et seq.). "Although those statutes have been recently amended, our Legislature has not expressly declared them to be retroactive to previously filed claims" (§ 3; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209), so we describe the administrative system in place while Gonzales's claim was pending before the Board—that is, between August 2017 and September 2020.

Under that system, an inmate who has been "imprisoned in state prison" for "any part" of a felony sentence and who is "innocent of the crime" because, among other things, the crime "was not committed by him," may "present a claim" to the Board for compensation due to the "erroneous conviction and imprisonment."[7] (§ 4900.)

If the inmate has already obtained a finding of "actual innocence" that establishes his "factual innocence by a preponderance of the evidence"—either as part of state or federal habeas relief or from a separately filed petition seeking a finding of actual innocence (under sections 851.8 or 851.86)—then the Board is automatically obligated to recommend that the Legislature compensate the inmate without the need for any hearing. (§§ 4902, 1485.55, subds. (b), (c) & (e), 851.865, subd.

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7 The statute of limitations for such claims changed on January 1, 2020, when our Legislature increased the limitations period from two years to ten years. (Compare former § 4901, Stats. 2016, ch. 31 (Sen. Bill No. 836), § 251, eff. June 27, 2016, with § 4901, Stats. 2019, ch. 473 (Sen. Bill No. 269), § 2, eff. Jan 1, 2020).) Although the administrative proceedings in this case straddle this legislative change, this is of no consequence because Gonzales filed his claim within the two-year window.

(a); *Larsen*, *supra*, 64 Cal.App.5th at pp. 123-124, 128-129 [finding by federal habeas court that inmate was "actually innocent" in order to overcome a procedural bar is equivalent to a finding of factual innocence by a preponderance of the evidence].) Making a prior judicial finding that the inmate is factually innocent preclusive makes sense, as doing so "streamline[s] the compensation process" and "ensure[s] consistency between the Board's compensation determinations" and the "earlier court proceedings" that have already decided the "identical" question that is presented to the Board in the compensation proceedings. (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118; *Tennison*, *supra*, 152 Cal.App.4th at p. 1175.)

In all other instances, however, the Board must convene an evidentiary hearing before a hearing officer. (Cal. Code Regs., tit. 2, § 644, subd. (a).) At that hearing, the inmate bears the burden of establishing, by a preponderance of the evidence, that they are "factually innocent" of the crime(s) for which they were erroneously imprisoned.[8] (§ 1485.55, subd. (b); § 4903, subd. (a); Cal. Code Regs., tit. 2, §§ 644, subd. (d)(1), 642, subd. (a)(3); *Holmes*, *supra*, 239 Cal.App.4th at pp. 1403, 1405; *Diola v. State Board of Control* (1982) 135 Cal.App.3d 580, 588, fn. 7.) The Board (through the hearing officer) may consider not only the prior record from the inmate's trial, but also any new evidence

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8 In a legislative amendment effective on January 1, 2022, the *People* now bear the burden of proving an inmate's guilt by clear and convincing evidence if the inmate is exonerated through the grant of a writ of habeas corpus in state or federal court. (Former § 4900, subd. (b), Stats. 2021, ch. 490 (Sen. Bill No. 446), § 3, eff. Jan. 1, 2022); former § 4902, subd. (d), Stats. 2021, ch. 490 (Sen. Bill No. 446), § 4, eff. Jan. 1, 2022; Cal. Code Regs., tit. 2, § 644, subd. (e).)

"relevant" to the question of the inmate's factual innocence. (Cal. Code Regs., tit. 2, § 641; § 4903, subd. (a).) But certain "factual findings and credibility determinations" are "binding" on the Board—namely, and as pertinent here, "the factual findings and credibility determinations establishing the court's basis for *granting*" (1) "a writ of habeas corpus," or (2) "an application for a certificate of factual innocence as described in Section 1485.5." (§ 4903, subd. (b), italics added; accord, § 1485.5, subd. (c) ["In a contested or uncontested proceeding [seeking a declaration of factual innocence], the express factual findings made by the court, including credibility determinations, in considering a petition for habeas corpus . . . or an application for a certificate of factual innocence, shall be binding on the . . . Board"].) The *denial* of an application for a certificate of factual innocence, by contrast, is *not* binding on the Board. (§ 1485.55, subd. (d) [no "presumption" "exist[s]" following the "failure to" "obtain a favorable ruling"].) If the inmate carries their burden,[9] the Board must recommend that the Legislature compensate the inmate. (§ 4904.)

The statutorily prescribed rate of compensation is $140 per day of incarceration served, although the Legislature retains discretion not to award such compensation. (§ 4904.)

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9 In addition to establishing innocence by a preponderance of the evidence, the inmate also must show "the pecuniary injury" they sustained as a result of the "erroneous conviction and imprisonment." (§§ 4903, subd. (a), 4900, 4904.) That second element is not at issue here, where the People stipulated to Gonzales's pecuniary injury if he first proved his factual innocence.

II. Analysis

In light of these pertinent legal principles, the overarching question we confront is whether substantial evidence supports the Board's ruling that Gonzales failed to sustain his burden of proving his factual innocence of the attempted murder and firearm charges by a preponderance of the evidence. Gonzales asserts we need not examine the substantiality of the evidence because he is entitled to administrative mandamus relief for three preliminary reasons. Specifically, he argues that (1) the Ninth Circuit's grant of habeas relief is synonymous with a finding of factual innocence, and automatically entitles him to compensation; (2) the Board erred by not treating the Ninth Circuit's "factual findings" as "binding"; and (3) the Board committed other procedural errors. Only if these preliminary arguments fail must we assess the substantiality of the evidence supporting the Board's ruling.

A. *Does a grant of habeas relief based on insufficiency of the evidence compel a finding of the inmate's factual innocence by a preponderance of the evidence?*

The answer is "no," and we reach this conclusion for two reasons.

First, a court's invalidation of a conviction due to insufficiency of the evidence is not equivalent to a finding of factual innocence. A finding that the evidence was insufficient to support a conviction means only that there was not enough evidence presented at trial for a reasonable jury to find the inmate guilty beyond a reasonable doubt. (*United States v. Powell* (1984) 469 U.S. 57, 67; *People v. Covarrubias* (2016) 1 Cal.5th 838, 891.) Such a finding is different from the finding of

factual innocence that entitles an inmate to compensation in three significant ways.

For starters, the standard of proof is not the same. Rather than a habeas court's task of assessing whether the evidence is sufficient to support a finding of guilt *beyond a reasonable doubt*, the Board's task is to examine whether the evidence is sufficient to support a finding of innocence *by a preponderance of the evidence*. The former requires that the evidence imbue the factfinder with an "abiding conviction" in the truth of the finding (CALCRIM No. 220); the latter requires merely that the evidence makes the finding more likely than not (e.g., *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1093). This is why a person acquitted of murder may still be held civilly liable for wrongful death—evidence that is not enough to establish guilt by the higher standard can still establish liability by the lower standard.

Next, the burden of proof is not the same because it is assigned to a different party. Rather than a habeas court's task of asking whether *the People* proved the inmate's *guilt*, the Board's task is to examine whether *the inmate* has proven his *factual innocence*. This means that in cases where the evidence is in equipoise, that "tie" must be resolved against the inmate (as the party assigned the burden) and against relief—which further expands the universe of instances in which evidence insufficient to prove guilt beyond a reasonable doubt may nevertheless not entitle an inmate to a finding of factual innocence. This is precisely what our Supreme Court, the United States Supreme Court, and every other court to consider the issue have consistently and uniformly concluded—namely, that a finding of legal insufficiency due to the "'prosecution's failure of proof'" at

trial is *not* necessarily equivalent to a finding of factual innocence by a preponderance of the evidence. (*People v. Adair* (2003) 29 Cal.4th 895, 907; *Bousley v. United States* (1998) 523 U.S. 614, 623 [distinguishing "actual innocence" requiring proof that "'it is more likely than not that no reasonable juror would have convicted [an inmate]'" from "mere legal insufficiency" of the evidence at trial]; *Larsen, supra*, 64 Cal.App.5th at p. 131, fn. 11 ["a jury's acquittal of a defendant after considering evidence admitted during a criminal trial is not a determination that the defendant is innocent, only that he or she is 'not guilty'"].)

And significantly, the records in the two tribunals are not the same: A habeas court reviewing the sufficiency of the evidence is limited to the trial record, while the Board is charged with considering the trial record *and* any further "relevant" evidence the parties elect to present. (Cal. Code Regs., tit. 2, § 641, subd. (c).) What is more, this additional evidence includes some evidence that may have been excluded at trial. (*Id.*, subd. (d) ["Evidence . . . may be admitted even though there is a common law or statutory rule which might make its admission improper over objection in any other proceeding"].) This leeway makes perfect sense, as the Board's task is to get to the bottom of whether the inmate is indeed innocent of the crime. Thus, to illustrate, an inmate who persuades a habeas court that the evidence *in the trial record* was insufficient to convict him of distributing narcotics would not be entitled to a finding of factual innocence before the Board if a telephone call containing the inmate's confession and recorded without permission in violation of section 632 was excluded at trial but admitted before the Board.

Second, our Legislature's recent amendment of the compensation statutes confirms that a court's grant of relief on habeas corpus is *not* the equivalent of an inmate proving his factual innocence by a preponderance of the evidence. In 2021, our Legislature enacted Senate Bill No. 446 (2021-2022 Reg. Sess.), which for the first time erected a presumption that the dismissal of convictions following the grant of a habeas petition automatically entitles an inmate to compensation unless the People, at a Board hearing, prove the inmate's guilt by clear and convincing evidence. (§ 4900, subd. (b), Stats. 2021, ch. 490 (Sen. Bill No. 446), § 3, eff. Jan. 1, 2022; § 4902, subd. (d), Stats. 2021, ch. 490 (Sen. Bill No. 446), § 4, eff. Jan. 1, 2022.) If, as Gonzales asserts, any grant of habeas relief already automatically entitles an inmate to compensation, Senate Bill No. 446's amendments would be entirely superfluous. Because we do not presume that our Legislature engages in idle acts (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 935 [amendment of statute is presumed to change its meaning and effect]; *Stockton Teachers Assn. CTA/NEA v. Stockton Unified School Dist.* (2012) 204 Cal.App.4th 446, 461), our Legislature's own actions confirm that a grant of habeas relief is not equivalent to a finding of actual innocence.[10]

Gonzales resists this conclusion with one further argument. Specifically, he makes the two-step argument that the Ninth Circuit's finding of insufficient evidence compels a finding of factual innocence because (1) a finding of legal insufficiency compels a finding of factual innocence under section 851.8 in *People v. McCann* (2006) 141 Cal.App.4th 347, 355-358

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10 This is also why we reject Gonzales's argument, raised for the first time in his reply brief, that Senate Bill No. 446 merely clarified existing law.

(*McCann*); and (2) a finding of factual innocence under section 851.8 compels a finding of factual innocence under the compensation statutes. Although the second step of Gonzales's argument is correct (§§ 4902, subd. (a), 1485.55, subds. (b), (c) & (e), 851.865, subd. (a); *Tennison, supra*, 152 Cal.App.4th at p. 1175 [section 851.8 proceedings and proceedings for compensation "concern the identical issue: whether the evidence proves the defendant did not, *in fact*, commit a particular crime"]), the first step of his argument is incorrect: *McCann* does not establish a broad rule that a finding of legal insufficiency equates to a finding of factual innocence. Instead, *McCann* stands for a far narrower corollary that legal insufficiency equates to a finding of factual innocence when the insufficiency ruling rests on the finding that the inmate "*could not possibly have been guilty*" of the crime(s) at issue (in *McCann*, due to the doctor-inmate having a valid license and due to the expiration of the statute of limitations for a lesser included offense). (*McCann*, at p. 358, italics added; *People v. Gerold* (2009) 174 Cal.App.4th 781, 793 [reading *McCann* as standing solely for this narrower proposition].) Because nothing indicates that Gonzales "could not possibly have been guilty" of the crimes in this case, this case falls outside the boundaries of *McCann*'s corollary.

B. *Did the Board disregard the statutory mandate to treat the Ninth Circuit's "factual findings" as "binding"?*

To answer this question, we must ask two subsidiary questions: (1) What is a "factual finding" for purposes of the compensation statutes, and (2) did the Board disregard any such "factual findings"?

1. *What is a "factual finding" within the meaning of section 4903, subdivision (b)?*

Section 4903, subdivision (b), requires the Board to treat as "binding" "the factual findings and credibility determinations establishing the court's basis for *granting* a writ of habeas corpus." (Italics added.) The compensation statutes do not define "factual findings"; the closest analogue is the definition for "express factual findings" within the habeas statutes (and, specifically, in section 1485.5), which defines them as "findings established as the basis for the court's ruling or order." (§ 1485.5, subd. (d).) But does this refer to the *factual* basis for the court's ruling, the *legal* basis for that ruling, or both?

It clearly encompasses the *factual* basis. Thus, "factual findings and credibility determinations" by a habeas court certainly—and traditionally—include (1) the court's ultimate findings of fact (such as that the evidence was insufficient to establish guilt beyond a reasonable doubt, or that trial counsel was constitutionally ineffective); and (2) the court's subsidiary findings of fact and credibility determinations, made after the court has entertained new evidence that the court has observed firsthand during the habeas proceedings, which is commonplace as many defendants seek habeas relief on the basis of constitutional grounds that require additional factfinding beyond the trial record (such as constitutional claims involving wrongful withholding of discovery, juror misconduct, or the ineffective assistance of counsel).

But do "factual findings and credibility determinations" also reach the *legal* basis for the habeas court's ruling? More to the point, do "factual findings" include the habeas court's summary of, observations about, and characterizations of the

trial record when the habeas court is *not* finding *facts* after entertaining new evidence but is instead making a legal assessment, after reviewing the static record from the trial proceedings, about whether that record contains sufficient evidence to support a conviction? In other words, if a habeas court summarizes the trial evidence or otherwise comments that some or all of the evidence is "weak" as part of its rationale for concluding that the evidence was insufficient, is that summary or commentary *itself* a "factual finding"?

We conclude the answer is "no" for three interrelated reasons.

First, the fact that a habeas court summarizes or comments on the static trial record is not enough to make that summary or commentary a "factual finding" of that court. Courts make comments all the time that are not "factual findings": A court's finding that a juvenile defendant suffers from "'irreparable corruption'" warranting a lifetime sentence is not a "factual finding" (*People v. Blackwell* (2016) 3 Cal.App.5th 166, 192); a court's "observation[s]" or "remark[s]" about whether an item was an instrumentality of a crime is not a "factual finding" (and is instead a "legal determination[]") (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 557, fn. 12); and a court's commentary about the "subject of selective enforcement" in the course of ruling on a motion to suppress is not a "factual finding" (*People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 952).

Second, "factual findings" are typically findings that can be reviewed for substantial evidence (e.g., *City of San Marcos v. Loma San Marcos, LLC* (2015) 234 Cal.App.4th 1045, 1053) and "credibility determinations" are determinations that are unreviewable unless the testimony at issue is "'"physically

impossible or inherently improbable'"" (*People v. Prunty* (2015) 62 Cal.4th 59, 89 (conc. & dis. opn. of Cantil-Sakauye, C.J.)). Such deference is accorded to these findings and determinations because the courts later reviewing them were not in the proverbial room to hear and observe the evidence firsthand. But a habeas court's summary of the trial record or its commentary about the relative weakness of evidence based on that record is not something that the court observed firsthand, and such a summary or commentary is not a finding that can be reviewed in any meaningful way for substantial evidence or subjected to the standards for assessing credibility determinations. This mismatch supports the notion that such a summary of or commentary on the trial record is not itself a "factual finding."

Third and lastly, treating a habeas court's summary or commentary about the trial record as "factual findings" or "credibility determinations" would make them "binding" on the Board, yet the Board is explicitly tasked with considering *new and additional evidence*. If commentary about evidence in the trial record being "weak" proof on a particular issue were binding, then the introduction of new evidence on that issue in the Board proceedings would be pointless, thereby rendering the evidentiary provisions in the compensation statutes governing the Board's proceedings superfluous. Our task, however, is to give effect to those provisions—not to nerf them. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1173 (conc. & dis. opn. of Corrigan, J.); see also *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1214 [rules governing interpretation of statutes also apply to regulations].)

Gonzales urges us to treat *every* comment a habeas court makes as binding because that is the only way to ensure

consistency between the rulings of the court and the Board. For support, he relies on *Madrigal*, *supra*, 6 Cal.App.5th 1108. To be sure, *Madrigal* held that a habeas court's "characteriz[ations of] the relative strength of the defense and prosecution evidence" at trial constituted "factual findings" that were "binding" on the Board. (*Id.* at pp. 1118-1119.) *Madrigal* cited two reasons for its holding—namely, that (1) nothing in section 4903 expressly says that "factual findings" do *not* reach so far, and (2) giving the term an expansive ruling more broadly ensures consistency between the habeas court's ruling and the Board's ruling. (*Ibid.*) We are unpersuaded by the first reason because *Madrigal* did not examine any of the considerations about the general concept of "factual findings" we have set forth above; from our perspective, nothing in section 4903 expressly shows an intent to adopt a definition of "factual finding" that so vastly deviates from the general concept. We are unpersuaded by the second reason as well because section 4903 did not purport to adopt a consistency-at-all-costs rule; had it wanted to, our Legislature could have declared "*all* findings" or "all observations" or "all commentary" to be binding. Instead, it limited its rule—and the consistency demanded by that rule—to ultimate findings of fact and to subsidiary "factual findings and credibility determinations." We decline to rewrite the statute to reach a broader universe of findings (*Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 392), and accordingly and respectfully part ways with *Madrigal*.

2. *Did the Board give "binding" effect to any "factual findings" or "credibility determinations" of the Ninth Circuit?*

(i) Analysis

We conclude that the Board treated as "binding" the Ninth Circuit's "factual findings" and "credibility determinations" as we have defined them above. That is because the Board treated as binding the Ninth Circuit's finding that there was legally insufficient evidence to convict Gonzales of attempted premeditated murder and shooting a firearm from a vehicle and because the Ninth Circuit's further summary of and commentary on the trial record do not constitute "factual findings." Gonzales resists this latter conclusion, urging that the Ninth Circuit's summary and commentary should be accorded the status of "factual findings" because the Ninth Circuit's detailed, "piece-by-piece" summary and commentary was a "rarity" that went "above and beyond" the typical analysis. But the scarcity or depth of a habeas court's summary and commentary on the trial record does not somehow transmute such summary and commentary into binding "factual findings."

But even if we were to apply *Madrigal*'s more expansive definition of "factual findings," we still conclude that the Board treated the Ninth Circuit's summary of and commentary on the trial record as "binding." The Ninth Circuit's summary and commentary on the trial record can be grouped into three categories:

- *Ninth Circuit's summary of evidence <u>not</u> presented at trial.* The Ninth Circuit commented that no witness identified Gonzales or any occupant of the Cadillac from which the shots were fired (as its "[f]irst" reason), that no witness testified that

the shooter wore a baseball cap that matched the Pirates cap Gonzales wore that night (as part of its "[s]econd" reason), that no witness testified that anyone with Gonzales's moniker "Knuckles" was "connected with the shooting" (as another part of its "[s]econd" reason), that Gonzales denied being the shooter (as part of its "[t]hird" reason), and that police never found any firearms or firearm paraphernalia at Gonzales's house (as its "[s]ixth" reason). This commentary summarizes the absence of any *direct* evidence of Gonzales's involvement with the crimes. The Board at no point indicated that any direct evidence tied Gonzales to the shooting; instead, the Board relied solely on the circumstantial evidence that refuted Gonzales's claim of factual innocence. Accordingly, the Board treated this commentary of the Ninth Circuit as binding.

- *Ninth Circuit's commentary that certain pieces of circumstantial evidence, when examined individually, did not tie Gonzales to the crime(s).* The Ninth Circuit also commented that Gonzales's "gang affiliation" with the Playboyz and donning a baseball cap with the Playboyz's self-appropriated logo did not by itself "distinguish [Gonzales] from other people present on the night of the shooting" (as part of its "[s]econd" reason), that the witnesses' description of the *color* of the Cadillac from which shots were fired did not by itself mark Gonzales as the shooter because that description did not match Gonzales's reporting of the color of the Cadillac in which he was a passenger (as part of its "[t]hird" reason), and that the presence of two particles of gunshot residue on Gonzales's right hand did not by itself establish that Gonzales used or was near a firearm that night because that small amount of residue was "just as likely" the result of touching a surface contaminated with gunshot residue

(as its "[f]ifth reason"). This commentary set forth the Ninth Circuit's view that each of these items of circumstantial evidence were not, by themselves, sufficient to tie Gonzales to the crimes. The Board at no point indicated to the contrary; instead, the Board accepted that commentary but went on to reason that Gonzales's gang affiliation and wearing of gang attire, his admitted presence in the backseat of a newer model Cadillac with rims at the very same time and location of the shooting, and the presence of gunshot residue that was equally likely to be caused by his firing a gun as by other causes refuted Gonzales's claim of factual innocence *when that evidence was considered collectively*.

• *Ninth Circuit's summary of evidence that was superseded by additional evidence presented to the Board.* The Ninth Circuit also commented that Gonzales "did not clearly admit" during his post-arrest interview that he exchanged words with the men on the street corner prior to the shooting (as its "[f]ourth reason"). The Board acknowledged that the Ninth Circuit's commentary was correct *on the trial record considered by the Ninth Circuit*, and accepted that commentary as binding. But, consistent with the evidentiary procedures used in compensation proceedings, the People introduced to the Board an enhanced audio file of Gonzales's recorded post-arrest interview, which (contrary to Gonzales's representation at oral argument in this case) was not in the trial record before the Ninth Circuit, in which Gonzales *did* clearly admit that he asked those men, "Oh, where are you fools from, dawg?"—which is what witnesses heard the shooter ask those men before opening fire. And when confronted with this new evidence, Gonzales admitted during his testimony before the Board that the enhanced audio file accurately recorded what he told the police. Because, as noted

above, the compensation hearing procedure *contemplates* the introduction of new evidence before the Board, the Board did not err in giving effect to this uncontroverted new evidence over the Ninth Circuit's finding, which was based, by definition, on a different and more limited record.

(ii) Gonzales's argument

Gonzales nevertheless maintains that the Board gave the Ninth Circuit's commentary "lip service." More specifically, Gonzales argues that the Ninth Circuit made factual findings that the gunshot residue on his right hand, that he was wearing a baseball cap, that he was a gang member, and that he was present at the party were "not evidence of his guilt" *and* that the Ninth Circuit made a factual finding "that no other evidence connected [him] to the shooting." These findings, Gonzales continues, obligated the trial court—and obligates us—to review the Board's ruling not for substantial evidence but rather "through the lens of the [Ninth Circuit] that reversed [his] conviction."

We reject Gonzales's argument because its central premise is invalid. Contrary to what Gonzales repeatedly says in his briefs, the Ninth Circuit did *not* hold that the individual pieces of circumstantial evidence it addressed were "not evidence of his guilt." Rather, it held that each piece did not by itself tie Gonzales to the crimes. In other words, the Ninth Circuit "found" that these individual pieces of circumstantial evidence were not, on their own, *dispositive*; it never "found" that they were *irrelevant*. Nor could it. Gang affiliation by itself is not enough to convict, but it is certainly *relevant* because it is evidence of motive. (*People v. Duong* (2020) 10 Cal.5th 36, 64; *People v. Holmes* (2022) 12 Cal.5th 719, 772.) Along the same lines, mere

presence at the scene of a crime is not enough to convict, but it is certainly relevant as evidence of opportunity. (See *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [aiding and abetting].) The Board could and did logically treat as binding the Ninth Circuit's commentary about each individual piece of evidence while at the same time concluding that, collectively, they refuted Gonzales's claim of factual innocence because innocence—like guilt—is a function of the collective impact of the *totality* of the evidence, not the impact of each individual piece considered in isolation. (See *People v. Diaz* (1992) 3 Cal.4th 495, 537 [item of evidence, though susceptible to a possible innocent explanation, was "link in the circumstantial chain of evidence" that, "considered in its entirety," "pointed unerringly to" defendant's guilt].)

C. *Did the Board commit other procedural errors?*

Gonzales argues that the Board erred by making two further procedural errors.

First, Gonzales urges that the Board held him to a higher burden of proof than preponderance of the evidence because, at one point in its 31-page ruling, the Board stated that "ample circumstantial evidence in the administrative record nevertheless suggests that Gonzales *might be guilty*." (Italics added.) This argument is frivolous. Even if we assume that the Board's comment that Gonzales "might be guilty" is a different standard than whether he was "more likely than not" factually innocent, the Board elsewhere in its ruling repeatedly (that is, no fewer than five other times) cited this proper standard. In these instances, we may—and do—comfortably conclude that the Board applied the proper standard of proof. (*People v. Mayfield* (1993) 5 Cal.4th 142, 196 [where "[t]he record . . . as a whole" indicates

that the "court" "applied the proper concept," "isolated" "misstate[ments of] the applicable standard" are to be disregarded].)

Second, Gonzales asserts that the Board improperly gave binding effect to the San Bernardino County Superior Court's finding that he was *not* factually innocent, even though section 4903, subdivision (b), only gives binding effect to the "grant[]" of a petition for factual innocence and section 1485.55, subdivision (d), prohibits giving any effect to the denial of such a petition. The Board did state that it was treating the San Bernardino County Superior Court's finding as "binding." This is not surprising, as both parties—including Gonzales—urged the Board to do so. Even if we overlook that this error was apparently invited by Gonzales, the Board's actions ended up speaking louder than its words: Although the Board *stated* it was treating the San Bernardino County Superior Court's denial of the factual innocence petition as binding, it did not actually do so. Instead, it examined the original trial record, the evidence presented to the San Bernardino County Superior Court, and the evidence presented to the hearing officer and independently examined whether that evidence satisfied Gonzales's burden of showing his factual innocence by a preponderance of the evidence.

D. *Does substantial evidence support the Board's ruling that Gonzales failed to establish his factual innocence by a preponderance of the evidence?*

Because we have concluded that none of Gonzales's preliminary objections to the Board's analysis have merit, we turn to the ultimate question presented in this appeal: Does substantial evidence in the administrative record support the

Board's ruling that Gonzales failed to prove his factual innocence by a preponderance of the evidence?

We independently agree with the trial court that the answer is "yes."

Deferring to the Board's findings based on the evidence and its credibility determinations, substantial evidence supports the Board's conclusion that Gonzales did not carry his burden of proving his factual innocence by a preponderance of the evidence. To be sure, there was no direct evidence tying him to the shooting. But the sum total of circumstantial evidence is sufficient to support a finding that he was not likely factually innocent. The evidence showed that Gonzales was at the location where the shooting occurred *when it occurred*; that he was the backseat passenger in a newer model Cadillac with rims like the one from which witnesses saw shots fired; that he had particles of gunshot residue on his hand that indicated he came in contact with a discharged firearm;[11] that he was at a minimum affiliated

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11 Gonzales is incorrect in his repeated characterization of the trial record as establishing that the particles of gunshot residue "more than likely" came from him touching a surface contaminated with gunshot residue rather than from him discharging a firearm. The technician who analyzed the gunshot residue kit testified at the 2009 jury trial that Gonzales either "fired a firearm, handled a firearm, ha[d] been in close proximity of [a] discharged firearm, [or] contacted a surface that contain[ed] gunshot residue," but the technician could not "tell" "which of those four options [was] in play" in this case. The Ninth Circuit's summary of the trial evidence—that any one of those options was "just as likely" the cause as the others—is consistent with that testimony. Thus, it was Gonzales's burden to put on new evidence before the Board substantiating his theory—contrary to

or aligned with the Playboyz street gang and wearing their gang-themed attire, and that victims were wearing clothing affiliated with a different street gang; and that Gonzales asked the victims gang-related questions ("Oh, where are you fools from, dawg?") after they "talk[ed] shit" to him, as witnesses had heard the shooter ask. Although Gonzales told police in his post-arrest interview that the Cadillac *he* was in was "red" "like a fire truck" or "light red" (rather than "black" or some other "dark" color as reported by witnesses), although Gonzales repeated that statement during his testimony before the San Bernardino County Superior Court and the Board, and although Gonzales's friend Herrada submitted a declaration indicating the same, it is not unreasonable for a red car to appear "dark" when driving by during a nighttime exchange. Plus, the Board found Gonzales's testimony and Herrada's declaration to be not credible—a finding to which we must defer and a finding that is also amply supported by the sheer number of times Gonzales changed his story. Gonzales's ever-changing statements are also reasonably viewed as circumstantial evidence of consciousness of guilt, which adds further weight to the Board's determination that Gonzales did not establish his factual innocence by a preponderance of the evidence.

Gonzales objects that the Board should not be able to make its own credibility determinations (and, relatedly, that the Board must defer to the Ninth Circuit's "de facto" finding that *he* was credible), but Gonzales is wrong.[10] The Board considered *new* evidence,[11] and is within its rights to evaluate whether that evidence is credible. And the Ninth Circuit made no credibility

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the trial record—that the particles "more than likely" came from an innocent source.

finding about Gonzales: The Ninth Circuit *could not* find Gonzales's trial testimony credible because Gonzales did not testify at his trial, and the Ninth Circuit *did not* find his post-arrest statements credible (and instead commented on the inconsistency between his statements when accepted at face value and what other witnesses said about the color of the Cadillac). Gonzales additionally faults the Board's finding that he was "not credible" because it relied on inconsistencies made during his post-arrest interview because, according to Gonzales, such interviews are inherently coercive and his interview specifically was coercive given he was 17 years old at the time, but Gonzales ignores that he repeated many of his inconsistencies during his subsequent two stints on the witness stand (when he voluntarily testified at ages 26 and 27 years old and with the assistance of counsel) and ignores that we are not in a position to independently reweigh his credibility. Gonzales additionally asserts that his lack of credibility is not enough to conclude that he was not factually innocent. Gonzales is absolutely right: It is inappropriate to take a "divide-and-conquer" approach that looks only at each piece of evidence in isolation. (*United States v. Arvizu* (2002) 534 U.S. 266, 274; *People v. Barnes* (1986) 42 Cal.3d 284, 305 [looking to the "totality" of the evidence].) But the Board did not take that approach; instead, it examined the totality of the circumstantial evidence as well as its determinations about Gonzales's and Herrada's credibility, and found that—collectively—this evidence did not establish that Gonzales was more likely than not factually innocent.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

APPENDIX B

Court of Appeal, Second Appellate District, Division Two - No. B323360

S283777

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSHUA ZAMORA GONZALES, Petitioner and Appellant,

v.

CALIFORNIA VICTIM COMPENSATION BOARD, Defendant and Respondent;

THE PEOPLE, Real Party in Interest.

The petition for review is denied.

GUERRERO

Chief Justice

APPENDIX B

Appellate Courts Case Information

Supreme Court

Change court

Docket (Register of Actions)

GONZALES v. CALIFORNIA VICTIM COMPENSATION BOARD (PEOPLE)
Division SF
Case Number S283777

Date	Description	Notes
02/13/2024	Received untimely petition for review	Petitioner and Appellant: Joshua Zamora Gonzales Pro Per
02/13/2024	Application for relief from default filed	Joshua Zamora Gonzales, Petitioner and Appellant Pro Per
02/13/2024	Petition for review filed with permission	Petitioner and Appellant: Joshua Zamora Gonzales Pro Per
02/13/2024	Record requested	
02/13/2024	Received Court of Appeal record	
03/08/2024	Received additional record	One file jacket.
04/03/2024	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including May 13, 2024, or the date upon which review is either granted or denied.
04/03/2024	Received:	Joshua Gonzales Old Address: P.O. Box 872 Fresno, CA 93712 New Address: Central Valley Annex P.O. Box 637 McFarland, CA 93250
04/15/2024	Note: Mail returned and re-sent	Order filed on April 3, 2024 to petitioner. Envelope indicated "Return to sender, attempted- not known, unable to forward." Re-sent to: Central Valley Annex, P.O. Box 637, McFarland, CA 93250
04/17/2024	Petition for review denied	
04/18/2024	Returned record	petition for review, 1 file jacket
04/22/2024	Note: Mail returned (unable to forward)	Order filed on 04/03/2024 to petitioner. Envelope indicated: "Detainee not in custody, Return to sender, not deliverable as addressed, unable to forward."

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA JOEL ZAMORA GONZALES, Petitioner - Appellant, v. CONNIE GIPSON, Warden, Respondent - Appellee.	No. 13-56498 D.C. No. 5:12-CV-00862-BRO-PLA AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Beverly Reid O'Connell, District Judge, Presiding

Argued and Submitted December 7, 2015
Pasadena, California

Before: PREGERSON, D.W. NELSON, and CALLAHAN, Circuit Judges.

Joshua Joel Zamora Gonzales ("Gonzales") appeals the district court's denial of his federal habeas petition, challenging his conviction for three counts of attempted murder and one count of shooting from a motor vehicle on insufficiency of the evidence grounds. With respect to each of these counts, the jury found true

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

APPENDIX C

that Gonzales "personally and intentionally discharged a firearm, a handgun, which caused great bodily injury to" the victims. The jury also found that he committed the crimes within the meaning of California's gang enhancement statute. The trial court sentenced Gonzales, who was just 17 years old when the crimes were committed, to an aggregate term of 86 years and 8 months to life in state prison.

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review the district court's decision to grant or deny the habeas petition de novo, *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000) (per curiam), and the last-reasoned state court's adjudication of the habeas claim for whether it was contrary to or an unreasonable application of clear Supreme Court precedent, *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011). We reverse the district court and grant Gonzales's petition for habeas relief.

"To prevail on an insufficiency of evidence claim, a habeas petitioner must show that 'upon the record evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Briceno v. Scribner*, 555 F.3d 1069, 1078 (9th Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (alteration in original)). Because the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to this petition, "we owe a 'double dose of deference'" to the state court's judgment. *Long v. Johnson*, 736 F.3d 891, 896 (9th

Cir. 2013) (quoting *Boyer*, 659 F.3d at 964). To grant habeas relief, we therefore must also conclude that "the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." *Boyer*, 659 F.3d at 965. While this is an "extremely high bar" to overcome, the bar "is not insurmountable." *O'Laughlin v. O'Brien*, 568 F.3d 287, 304 (1st Cir. 2009). Indeed, we have an "obligation under *Jackson* to identify those rare occasions in which 'a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]'" *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (quoting *Jackson*, 443 U.S. at 317 (alterations in original)).

"Although our sufficiency of the evidence review is grounded in the Fourteenth Amendment, we undertake the inquiry with reference to the elements of the criminal offense as set forth by state law." *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) (citing *Jackson*, 443 U.S. at 324 n.16). Here, the attempted murder convictions required proof that Gonzales: (1) had the specific intent to kill; and (2) committed a direct but ineffectual act toward accomplishing this goal. *People v. Millbrook*, 166 Cal. Rptr. 3d 217, 229 (Cal. Ct. App. 2014); *see also* Cal. Penal Code §§ 187, 664. The shooting from a motor vehicle conviction required

proof that Gonzales: (1) willfully and maliciously discharged a firearm from a motor vehicle (2) at another person other than an occupant of a motor vehicle. Cal. Penal Code § 26100(c).

The evidence against Gonzales consisted of the following: Gonzales wore a baseball cap to a party, where he introduced himself as "Knuckles" and associated with members of the Playboyz gang. After the party ended, shots were fired from a dark colored vehicle that was leaving the area. Three victims were wounded. Witnesses recalled seeing two shooters, one shooting from the backseat of the dark colored vehicle and the other over the hood. No witness could identify the shooters, but at least one believed the shooter in the backseat wore a baseball cap. Gonzales admitted to hearing men on the street "talking shit" and to hearing shots as he was leaving the party in the backseat of his friend's light red Cadillac, but witnesses testified that many cars were leaving the area at the time of the shooting. Although the record does not reflect what prompted police to investigate Gonzales as a suspect, police arrived at Gonzales's house the following day and arrested him. They found no weapons in his home or on his person. After a prolonged interrogation at the police station, where Gonzales likely contacted numerous contaminated surfaces, a gunshot residue test revealed only two gunshot residue particles on Gonzales's right hand.

Considering "the record evidence adduced at the trial," *Jackson*, 443 U.S. at 324, we conclude that that evidence is constitutionally insufficient to support Gonzales's convictions.

"First, no eyewitness testified that Gonzales was the shooter or could identify any of the occupants of the vehicle from which the shots were fired. One witness explicitly stated that Gonzales was not the person who "gave the heads up or what's up" to the victims and that he was *not* the shooter. Two others specifically testified that they did not see Gonzales in the car from which the shots were fired, let alone see him with a gun.

Second, testimony concerning Gonzales's baseball cap and gang affiliation does not distinguish him from other people present on the night of the shooting. Various witnesses testified that many people (one witness thought it was 100) attended the party. No witness testified that the shooter wore a baseball cap that matched the one Gonzales wore that night. The evidence did not establish that a person known as "Knuckles" was connected with the shooting, nor that the victims were shot to benefit the Playboyz gang specifically. Evidence of gang affiliation alone cannot constitute sufficient grounds for conviction. *See United States v. Garcia*, 151 F.3d 1243, 1244 (9th Cir. 1998).

Third, witnesses' descriptions of the car from which the shots were fired did not match descriptions of the car in which Gonzales claimed he was a passenger. All witnesses stated that the vehicle from which the shots were fired was black or dark colored, but Gonzales consistently stated that he left the party in his friend's light red Cadillac. He also repeatedly denied ever shooting a gun or seeing anyone fire a gun from the car he was in.

Fourth, although Gonzales stated during his police station interview that he was the rear passenger in a car that drove by some men on the street who were "talking shit" and that he later heard gunshots, he did not clearly admit that he exchanged words with or motioned to anyone from the backseat of his friend's light red Cadillac. At one point during the interview, Gonzalez explicitly denied saying anything to the men on the street. Further, witnesses testified that numerous cars passed by the victims before the shooting occurred.

Fifth, the two particles of gunshot residue on Gonzales's right hand do not connect him to any gun fired on the night of the shooting. The police never located a gun matching the shell casings found at the scene of the shooting. Further, the lead detective used a gunshot residue test kit to collect the particles of gunshot residue from Gonzales 12 hours after the shooting - after police allowed Gonzales to go to the bathroom and wash his hands when he arrived at the police station.

The prosecution's expert (who was not the one who administered the gunshot residue test) expressed surprise that the particles survived, testifying that he "would expect the 12 hours . . . to remove all of [the particles] and washing at that point to kind of finish the job." The expert also testified that it was just as likely the particles came from contacting a surface contaminated with gunshot residue as from firing a firearm, handling a firearm, or being in close proximity to a discharged firearm.

Sixth, despite a thorough search, police officers found no weapons, bullets, gun magazines, gun cleaning devices, or other firearm paraphernalia at Gonzales's home.

"In conducting our inquiry, we are mindful of the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review." *Juan H.*, 408 F.3d at 1275 (citations and internal quotation marks omitted). However, "[o]ur deference . . . is not without limit." *Id.* "We have held, for example, that evidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case[.]" *Nevils*, 598 F.3d at 1167; *see also O'Laughlin*, 568 F.3d at 301 ("A reviewing court should not give credence to evidentiary interpretations and

illations that are unreasonable, insupportable, or overly speculative." (citation and alterations omitted)).

"Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. However, mere suspicion or speculation cannot be the basis for creation of logical inferences." *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986) (citations omitted); *see also Juan H.*, 408 F.3d at 1279 ("Speculation and conjecture cannot take the place of reasonable inferences and evidence . . . ."). Such is the case here. Even resolving all conflicting factual inferences in favor of the prosecution, as we must do under *Jackson*, 443 U.S. at 326, the evidence does not permit any rational trier of fact to conclude that Gonzales was guilty beyond a reasonable doubt.

Gonzales's convictions rest on a speculative and weak chain of inferences that he was the shooter and that he personally discharged a firearm. As the California Court of Appeal explained:

> [W]itnesses testified that the rear passenger in a moving car shot at them. Furthermore, although the victims could not identify defendant as the shooter, another witness . . . identified defendant as the person who introduced himself to her as "Knuckles" at the . . . party and who was dressed like a Playboyz gang member and associating with other gang members. In conjunction with [this witness's] testimony are defendant's admissions to the police that he attended the party, dressed as she described him, and that he was in a car, passing by a group of men on the street at the time of the shooting. The foregoing evidence, combined with defendant's

> positive gunshot residue test, is sufficient to establish . . . defendant's identity as the shooter.

Taken individually or collectively, these pieces of circumstantial evidence do not establish the inference that Gonzales was the shooter beyond a reasonable doubt. We hold that the California Court of Appeal unreasonably determined that a rational jury could have found sufficient evidence of guilt.

The evidence in this case is not merely "far from overwhelming," as the magistrate judge observed. Rather, it is constitutionally insufficient. Accordingly, viewing the evidence in the light most favorable to the prosecution as required by *Jackson*, and with deference to the state court decision as required by AEDPA, we hold that no rational trier of fact could have found proof of Gonzales's guilt beyond a reasonable doubt and that the California Court of Appeal's conclusion that the circumstantial evidence was sufficient to support Gonzales's convictions was objectively unreasonable.

We reverse the judgment of the district court and remand the case to the district court with instructions to grant the petition for a writ of habeas corpus.

REVERSED and **REMANDED.**

Gonzales v. Gipson, No. 13-56498

CALLAHAN, J., dissenting.

In finding the evidence constitutionally inadequate to sustain Joshua Gonzales's convictions for attempted murder and shooting from a motor vehicle, the majority improperly substitutes its view of the evidence for that of the California Court of Appeal. In doing so, the majority commits the exact error for which the Supreme Court has repeatedly chastised us. *See Davis v. Ayala*, 135 S. Ct. 2187, 2202 (2015) (reminding us that "[t]he role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems, not to apply *de novo* review of factual findings and to substitute its own opinions . . . .") (citation and quotation omitted)). I therefore respectfully dissent.

In refusing to defer to the Court of Appeal, the majority pays only lip service to the "double dose of deference" required under the AEDPA standard of review. Under AEDPA, a sufficiency of the evidence claim "face[s] a high bar in federal habeas proceedings because [it is] subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2062 (2012) (per curiam). "First, on direct appeal, 'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.'" *Id.*

(quoting *Cavazos v. Smith*, 565 U.S. 1, 132 S. Ct. 2, 4 (2011) (per curiam)). This inquiry requires "viewing the evidence in the light most favorable to the prosecution . . . ." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.'" *Coleman*, 132 S. Ct. at 2062 (quoting *Cavazos*, 565 U.S. at 4).

The evidence of Gonzales's guilt is more than sufficient to support the jury's conclusion that Gonzales was guilty of attempted murder and shooting from a vehicle. The jury heard evidence that:

- Gonzales and two other individuals were in a car in the area at the time of the shooting.
- Gonzales was seated in the backseat of the car in which he was a passenger.
- Gonzales told the police that he saw some men on the street "talking shit" and "mad[-dogging] some other fool" when a car backed up toward them.
- Gonzales exchanged some words with the men on the street, who began to approach the car he was in.
- Gonzales claimed that he heard shooting as the car he occupied drove away, but denied that any shots were fired from his car.
- One person shot from the back seat of the car in question, and a front passenger got out of the car and fired a handgun from over the hood.

- Two different caliber shell casings were found at the scene.
- Prior to the shooting, a person in the vehicle asked the victims for their gang affiliation.
- On the night in question, Gonzales as wearing a baseball cap featuring the Pirates "P" logo in support of the Playboyz gang.
- A person in the backseat of the car from which shots were fired was wearing a baseball cap.
- At the party, there was a dispute that may have been gang-related, and Gonzales was "mingled" in with its participants.
- Gonzales tested positive for gunshot residue during his interview with police the next day.
- In his interview with the police, Gonzales continually denied participation in the shooting, while at the same time expressing his fear of retaliation.

There may be alternative explanations for what happened the night of the shootings and for the presence of gunshot residue on Gonzales's hands. But, faced with these facts, it can hardly be said that "no rational trial of fact could have found proof of guilt beyond a reasonable doubt." *Briceno v. Scribner*, 555 F.3d 1069, 1078 (9th Cir. 2009) (quoting *Jackson*, 443 U.S. at 324). Indeed, the California Court of Appeal stated:

> [I]t is undisputed that someone committed a crime by firing a gun from a car at the three wounded victims. The witnesses testified that the rear passenger in a moving car shot at them. Furthermore, although the victims could not identify defendant as the shooter, another witness, Yesenia, identified defendant as the person who introduced himself to her as "Knuckles" at the Colton party and who was dressed like a Playboyz gang member and associating with other gang members. In conjunction with Yesenia's testimony are defendant's admissions to the police that he attended the party, dressed as she described him, and that he was in a car, passing by a

> group of men on the street at the time of the shooting. The foregoing evidence, combined with defendant's positive gunshot residue test, is sufficient to establish the corpus delicti of defendant's four crimes and defendant's identity as the shooter. Similarly, substantial evidence supports the jury's finding that defendant was an occupant of the car from which the shots were fired. Sufficient evidence supports defendant's three convictions for attempted murder and one conviction for shooting from a motor vehicle.

This determination is not "objectively unreasonable."[1] *Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011). Rather than come to grips with what the prosecution's evidence against Gonzales *was* and the Court of Appeal's reasons for finding it constitutionally sufficient, the majority, engaging in a de novo review, finds fault in what the evidence against Gonzales *was not*. *See* Mem Dispo at 5–7. For example, the majority looks to the testimony of the gunshot residue expert to dismiss the significance of the presence of two particles of gunshot residue on Gonzales's hands. This view of the evidence directly conflicts with the repeated direction that our task is not to determine "whether the evidence excludes every hypothesis except that of guilt . . . ." *United States v. Nevils*, 598 F.3d 1158, 1165 (9th Cir. 2010). Viewed in the light most favorable to the prosecution, the

[1] To the contrary, not only did twelve jurors find Gonzales guilty beyond a reasonable doubt based on these facts, five judges—three Justices of the California Court of Appeal, the Magistrate Judge, and the District Judge—have all agreed that this evidence was sufficient to permit a "rational trial of fact [to find] proof of guilt beyond a reasonable doubt." *Briceno*, 555 F.3d at 1078.

presence of gunshot residue on Gonzales's hands the morning following the shooting is strong evidence of his guilt.

The majority further errs in faulting the evidence supporting Gonzales's conviction as resting on a "speculative and weak chain of inferences." *See* Mem Dispo at 7–8. This conclusion requires turning a blind eye to the direct evidence of Gonzales's guilt, which includes not only Gonzales's own admission to the police that he was at the scene of the shooting, but also eye-witness testimony about the shooting and the shooter's appearance.[2] The majority further ignores that, even if the evidence *was* only circumstantial, such evidence and the "inferences drawn from it may be sufficient to sustain a conviction." *Ngo v. Giurbino*, 651 F.3d 1112, 1114 (9th Cir. 2011) (quoting *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995)). It is therefore the majority's decision, and not Gonzales's conviction, that is grounded in "mere suspicion or speculation." *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986). This is exactly what AEDPA prohibits.

Applying the AEDPA standard of review, as directed by the Supreme Court, I would find that the Court of Appeal's determination that a rational trier of fact could agree with the jury was objectively, and eminently, reasonable. *See*

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[2] The majority's discussion of the inferences that may be drawn when the evidence of guilt is only circumstantial is therefore inapposite. *See* Mem Dispo at 8 (citing *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986)).

Coleman, 132 S. Ct. at 2062. This conclusion is inescapable when the evidence presented at trial is viewed—as it must be—in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319. Both a magistrate judge and a district judge, applying the correct AEDPA standard of review, so found. In reversing the district court's decision, the majority allows Gonzales—a defendant found guilty of attempted murder beyond a reasonable doubt—to walk free.

I respectfully dissent from the majority's decision to reverse the district court and grant Gonzales's petition for a writ of habeas corpus.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA JOEL ZAMORA GONZALES, Petitioner-Appellant, v. CONNIE GIPSON, Warden, Respondent-Appellee.	No. 13-56498 D.C. No. 5:12-cv-00862-BRO-PLA Central District of California, Riverside ORDER AMENDING MEMORANDUM AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: PREGERSON, D.W. NELSON, and CALLAHAN, Circuit Judges.

The unpublished memorandum disposition filed on April 18, 2017 and available at *Gonzales v. Gipson*, No. 13-56498, 2017 WL 1381125, at *1 (9th Cir. Apr. 18, 2017), is AMENDED as follows:

1. Delete the final sentence of the paragraph ending on page 8 (beginning with "Where a defendant's conduct . . ."), including the citation sentence.

2. Delete the first sentence of the paragraph following the block quote on page 9 (beginning with "This evidence is not inconsistent . . ."), delete the first word of the second sentence of the same paragraph ("However,"), and capitalize the first letter of "taken" such that the first sentence of that paragraph begins: "Taken individually . . . ."

APPENDIX D

With the memorandum disposition so amended, Judges Pregerson and Nelson voted to deny the petition for rehearing and recommended denial of the petition for rehearing en banc. Judge Callahan voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are **DENIED**. No further petitions for rehearing by the panel or en banc will be entertained.

APPENDIX E

13-56498

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA GONZALES,

Petitioner–Appellant,

v.

CONNIE GIPSON, Warden,

Respondent–Appellee.

On Appeal from the United States District Court
for the Central District of California

No. EDCV 12-00862-BRO (PLA)
The Honorable Beverly Reid O'Connell, Judge

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INTRODUCTION

Shortly after midnight on October 5, 2008, Petitioner–Appellant Joshua Joel Zamora Gonzales, a member of the Playboyz criminal street gang, shot at several individuals from the backseat of a car. A jury found Gonzales guilty of three counts of attempted murder and one count of discharging a firearm from a motor vehicle, and also found true several firearm and gang enhancements. The trial court sentenced Gonzales to state prison for a total of 86 years and 8 months.

The California state courts affirmed the judgment, and the United States District Court for the Central District of California denied his petition for writ of habeas corpus.

In the present matter, Gonzales appeals the District Court's judgment denying his federal habeas petition. Gonzales alleges there is insufficient evidence to support his convictions. However, viewing the evidence in the light most favorable to the prosecution, the record shows that the prosecution presented more than sufficient evidence to support Gonzales's convictions for attempted murder and discharging a firearm from a motor vehicle.

The United States Supreme Court has held that federal habeas relief is unavailable if a fair-minded jurist could reasonably agree with the result

reached by the state courts. *Harrington v. Richter*, 562 U.S. 86, 101–03, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In other words, if *any* fair-minded jurist could find that sufficient evidence was presented to support Gonzales's convictions, his appeal must be denied.

The record shows that a fair-minded jurist applying the law as set forth by the United States Supreme Court could agree with the result reached by the California state courts regarding the sufficiency of the evidence in this matter. Accordingly, the District Court's rejection of Gonzales's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. This Court should therefore affirm the District Court's denial of habeas relief.

STATEMENT OF JURISDICTION

This appeal is from the July 19, 2013 order and judgment of the Honorable Beverly Reid O'Connell, United States District Court Judge for the Central District of California, adopting the June 21, 2013 report and recommendation of United States Magistrate Judge Paul L. Abrams and

denying Gonzales's petition for writ of habeas corpus. (1 SER 253.)[1] The District Court had jurisdiction to deny Gonzales's petition pursuant to 28 U.S.C. § 2254. The denial of a petition for writ of habeas corpus in federal district court is subject to appeal pursuant to 28 U.S.C. §§ 1291 and 2253. On July 19, 2013, the District Court granted Gonzales's request for a certificate of appealability on the issue of whether the evidence was sufficient to support his convictions of attempted murder and shooting from a vehicle. (1 SER 254–55.) Gonzales filed his notice of appeal with this Court on August 9, 2013. (1 SER 256.)

STATEMENT OF THE ISSUE

The District Court granted a certificate of appealability on a single issue: Whether there was sufficient evidence to support Gonzales's convictions for attempted murder and shooting from a vehicle. (1 SER 255.)[2]

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[1] "SER" refers to Appellee's Supplemental Excerpts of Record. Respondent-appellee refers to Appellee's Supplemental Excerpts of Record in this supplemental briefing for purposes of consistency, and because they contain materials not included in Appellant's Excerpts of Record.

[2] Because Gonzales raises many of the same allegations in his opening brief and his supplemental opening brief, respondent-appellee's supplemental briefing serves as a consolidated response to each of Gonzales's opening briefs.

STATEMENT OF FACTS[3]

A. The Shootings

Gonzales was a member of the Playboyz criminal street gang. On October 4, 2008, Gonzales and some other Playboyz gang members attended a party in Colton. Gonzales wore a black shirt and a Pirates "P" baseball cap. The initial "P" also signifies the Playboyz gang. At the party, Gonzales introduced himself as "Knuckles."

Anthony Santoscoy and Michael Santoscoy (Anthony and Michael) also attended the party in Colton with their brother, Richard, their cousin, and some friends, including two other brothers, Bryan Padilla and John Padilla (Bryan and John), Jose Arreola (Arreola), and Omar Vargas (Vargas).

At one point in the evening, there was some conflict with the Playboyz gang members which eventually subsided after Noberto Razo, a security guard, intervened. Anthony and Michael did not remember any problems at the party.

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[3] The Statement of Facts is taken from the California Court of Appeal's opinion in Case No. E050175, adopted by the District Court. (1 SER 226–28.) The Court of Appeal's Statement of Facts is presumed to be correct. *Pollard v. Galaza*, 290 F.3d 1030, 1035 (9th Cir. 2002); *see also* 28 U.S.C. § 2254(e)(1). The Court of Appeal's tentative opinion contains specific cites to the record. (1 SER 107–22.)

When the party ended shortly after midnight on October 5, 2008, the attendees left. Anthony was waiting on a street corner with Michael, Bryan, John, Arreola, and Vargas. As a black car drove by, a passenger in the backseat, wearing a baseball cap, nodded and stared in an unfriendly manner. Then the car stopped and reversed. The rear passenger asked the men on the corner, "Where are you from," referring to their gang affiliation. None of the men on the street had threatened the car occupants or committed any type of provocation.

A car occupant pulled out a gun and began shooting. When Anthony first saw the gun, he said, "[O]h, it's going to be like that?" Anthony thought there could have been two or three guns. In particular, Anthony saw the backseat passenger point a gun from behind the driver. John told a police detective he saw the front passenger get out of the black car and fire a silver .22–caliber handgun over the car's hood while another man fired from the rear driver's side window. No one could identify the car occupants.

Anthony and Michael and their companions ran away, trying to escape as the gunshots continued. Vargas, Arreola, and Bryan were injured and Anthony helped drive them to the hospital.

Vargas was shot in the abdomen, the right thigh, and the right ankle. Vargas was hospitalized for ten days and had surgery to remove part of his

colon. Vargas suffered nerve damage and chronic pain and continued to experience trouble eating. Bryan was shot twice in the leg and once in the hip. Arreola was hospitalized overnight for injuries to his lower back, thigh, and knee.

The record does not establish how the police identified Gonzales as being involved in the shooting. The police apparently located Gonzales from a photograph on MySpace. On the morning of October 5, 2008, the police contacted Gonzales at his residence and, with the consent of Gonzales and his mother, Gonzales accompanied a detective to the police station. The police interviewed Gonzales beginning at 12:35 p.m., which was about twelve hours after the shooting.

Gonzales claimed he left the party as a backseat passenger in a red Cadillac. He saw some men on the street "saying stuff," "talking shit," and "mad [-dogging] some other fool" when a car backed up toward them. Gonzales exchanged some words with the men on the street, who began to approach the car he was in. Gonzales heard shooting as the car he occupied drove away. Gonzales thought the men on the street had guns and were firing at his car. Gonzales denied that any shots were fired from his car.

The police detective pressed Gonzales, saying "even if somebody was shooting in the car—even if you had to defend yourself, we need to know."

Gonzales responded, "I can't snitch on no one." Gonzales elaborated: "[I]f I tell you like oh, it [the shooting] did come from the car. And then it's going to be on me. And then if I like go back out there like I'm—I'm gonna get hit. You know what I'm saying? Like they're going to kill me for telling you, oh, yeah, it came from our car." The detective repeated his advice to Gonzales, "All you have to do is be honest and tell us what happened. If it was self-defense or anything like that, fine. That stuff happens." Even after speaking on the telephone with his mother, Gonzales continued to deny that he participated in the shooting while simultaneously expressing his fear of retaliation.

During the interview, the detective performed a gunshot residue test on Gonzales. Gonzales said that the last time he washed his hands since leaving the party was when he used the restroom before the interview. Gonzales's hands tested positive for gunshot residue. A police expert testified it was "unexpected, but not completely unreasonable" to have a positive test under those circumstances.

The police found blood spatter and two different types of shell casings—.32–caliber and .40–caliber—at the scene of the shooting. The police did not locate a gun matching the shell casings.

B. Gonzales's Gang Membership and Motive

Gonzales admitted being an active member of the Playboyz criminal street gang and being a passenger in a car as it drove by the victims. Officer Michael Collins, the prosecution's gang expert, testified, based on a hypothetical, that Gonzales's crimes were committed to benefit the Playboyz gang because a gang member must respond to a challenge by retaliating or risk losing respect for himself and the gang. The fear and respect that a gang engenders in a community allows it to operate more effectively in conducting its criminal enterprises. An individual who is willing to commit crimes openly for the gang increases the gang's status, as well as his own stature and level of respect within the gang.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

A Riverside County jury convicted Gonzales of the attempted murder of Jose Arreola (Cal. Penal Code § 664/187(a)—Count 1), the attempted murder of Omar Vargas (Cal. Penal Code § 664/187(a)—Count 2), the attempted murder of Adam Padilla (Cal. Penal Code § 664/187(a)—Count 3), and shooting a firearm from a motor vehicle (Cal. Penal Code § 12034(c)—Count 4). The jurors also found true as to counts 1 through 4 that Gonzales personally and intentionally discharged a firearm, causing great bodily

injury (Cal. Penal Code § 12022.53(b)–(d)), and that Gonzales acted for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (Cal. Penal Code § 186.22(b)(1)(C)). They further found true as to counts 1 through 3 that Gonzales discharged a firearm from a motor vehicle (Cal. Penal Code § 12022.55). (1 SER 1–3.) The trial court sentenced Gonzales to 86 years and eight months to life in prison. (1 SER 124.)

Gonzales appealed his convictions to the California Court of Appeal in case number E050175. In his opening brief, Gonzales claimed, among other things, that there was insufficient evidence to connect him to the shooting. He relatedly asserted that his conviction was in violation of the corpus delecti principle, as the only evidence linking him to the shooting included the inferences to be drawn from his statements to the police. (1 SER 44–54.)

On June 3, 2011, the California Court of Appeal affirmed the judgment in its entirety. The court first noted that the corpus delecti principle requires only that the prosecution present sufficient evidence of the injuries alleged and the existence of a criminal agency as the cause of those injuries. In this regard, the court found that it was undisputed that someone committed a crime by firing a gun from a car at the victims. The corpus delecti having

been established, the prosecution was thus free to rely on Gonzales's statements and the other evidence presented at trial to argue that Gonzales was the shooter. (1 SER 132–33.)[4]

In finding sufficient evidence to support Gonzales's convictions, the court explained that the witness testimony and Gonzales's statements to the police showed that Gonzales was on the scene with his fellow Playboyz gang members prior to the shooting. The evidence also showed that Gonzales was on the scene in a vehicle when the shooting took place, and Gonzales testified positive for gunshot residue during his interview at the police station twelve hours after the shooting. (1 SER 132–34.)

Gonzales filed a petition for review with the California Supreme Court on July 14, 2011. In that petition, Gonzales alleged, among his other claims, that there was insufficient evidence to support the jury's finding that he was in the car from which the victims were shot. (1 SER 145–46, 151–53.) The California Supreme Court denied Gonzales's petition on September 21, 2011. (1 SER 164.)

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[4] In *McDaniel v. Brown*, 558 U.S. 120, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010), the United States Supreme Court held that a reviewing court assessing the sufficiency of the evidence must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously. *Id.* at 131.

B. Proceedings in the District Court

Gonzales filed a petition for writ of habeas corpus on May 30, 2012. (1 SER 170.) Gonzales contended, among his other claims, that there was insufficient evidence to support his convictions of attempted murder and shooting from a vehicle. (1 SER 178.) After briefing (1 SER 180–224), the magistrate judge issued a report and recommendation recommending that Gonzales's petition be dismissed with prejudice. With respect to the sufficiency issue certified by the District Court here, the magistrate judge found that the state courts' resolution of Gonzales's claim was neither contrary to United States Supreme Court precedent nor an unreasonable determination of the facts in light of the evidence presented at trial. (1 SER 239–43.)

In denying Gonzales's claim, the magistrate judge discussed the evidence presented at trial. Consistent with the witness testimony describing the shooter, Gonzales was wearing a ball cap and sitting in the backseat of a vehicle when the shooting took place. Gonzales was a known gang member, and the shooter asked the victims about their gang affiliation before firing on them. Especially in light of Gonzales's positive gunshot residue test, such evidence was sufficient for the jurors to find that Gonzales committed the charged offenses. (1 SER 242–45.) The judge concluded in relevant part:

"in respecting the province of the jury to resolve evidentiary conflicts and draw reasonable inferences from the evidence, and assuming that the jury resolved all conflicts in a manner that supports the verdict, the Court must conclude that the state court's denial was not contrary to, nor an unreasonable application of, [federal law]." (1 SER 242.)

On July 19, 2013, the District Court, in accepting and adopting the magistrate judge's report and recommendation, denied Gonzales's petition and dismissed the action with prejudice. (1 SER 253.) On that same date, the District Court granted Gonzales's request for a certificate of appealability on the single issue of whether the evidence was sufficient to support his convictions for attempted murder and shooting from a vehicle. (1 SER 255.) Gonzales filed a notice of appeal with this Court on August 9, 2013. (1 SER 256.)

SUMMARY OF ARGUMENT

The District Court properly denied habeas relief on Gonzales's claim that there was insufficient evidence to support his convictions for attempted murder and discharging a firearm from a vehicle. A review of the record in the light most favorable to the prosecution as required by United States Supreme Court precedent establishes that more than sufficient evidence was

presented for a rational jury to have found beyond a reasonable doubt that Gonzales was guilty of the charged offenses.

In accordance with the percipient witness testimony describing the shooter, Gonzales admitted being in the backseat of a vehicle and wearing a ball cap. The record also reveals that Gonzales had a gang-based motive for carrying out the shooting, and that he still had gunshot residue on his hand the following morning. In light of such evidence, the California courts' rejection of Gonzales's claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Accordingly, because a fair-minded jurist could reasonably agree with the result reached by the state courts, the judgment denying Gonzales's habeas petition should be affirmed. *See Harrington v. Richter*, 562 U.S. at 101–02.

STANDARD OF REVIEW

A court of appeals reviews de novo a district court's decision denying a petition for federal habeas corpus. *Williams v. Taylor*, 529 U.S. 362, 384, 120 S. Ct. 1495, 146 L. Ed. 2d 289 (2000); *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001); *see Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). However, the reviewing court adopts the district court's findings of fact irrespective of the evidentiary source, and it may only set aside the

factual findings of the lower court if they are "clearly erroneous." Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); *see also Spain v. Rushen*, 883 F.2d 712, 717 (9th Cir. 1989) (reviewing court must accord "special deference" to credibility findings of the lower court).

The review of a habeas petition is guided by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, a federal court may overturn a state conviction on a question of law or a mixed question of law and fact only where the last reasoned state court decision[5] was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. [Citations]." *Weaver v. Palmateer*, 455 F.3d 958, 963 n. 6 (9th Cir. 2006). In undertaking this analysis, the federal court must remain "particularly deferential" to the decision of the state court. *Id.* (quoting *Taylor v. Maddox,* 366 F.3d 992, 999–1000 (9th Cir. 2004)).

In addressing the AEDPA standard, the United States Supreme Court has emphasized the deference that must be accorded to the decisions of state

[5] The last reasoned state court decision here is the California Court of Appeal's decision in Case No. E050175. (1 SER 123–37.)

courts. In *Harrington v. Richter*, 562 U.S. 101–02, the Supreme Court explained:

> A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004). And as this Court has explained, "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.*
>
> ....
>
> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Whether a fair-minded jurist could conclude that the arguments or theories supporting the state court's decision were consistent with the holdings in prior Supreme Court decisions is "'the only question that matters under § 2254(d)(1).'" *Id.*

Under AEDPA, the federal court must affirmatively account for all "arguments that would otherwise justify the state court's result," measured against the "limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of [the Supreme Court]." *Harrington v. Richter*, 562 U.S. at 102. "[E]ven a strong case for

relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The standard enshrined in AEDPA was intended to be difficult to meet, stopping just short of imposing a complete bar on the relitigation of claims already rejected by state courts. *Id.* Accordingly, an essential element of a petitioner's proof is a showing "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

Where the state court recognizes the correct legal standard and applies that standard, unreasonableness cannot be found merely because the federal court disagrees with the state court's ultimate result. *Rice v. Collins*, 546 U.S. 333, 342, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006). It is not enough that the federal court might have entertained a reasonable doubt were it to have sat in the role of the jury, or that it might have found the evidence insufficient if it sat in the role of the court on direct appeal. *Long v. Johnson*, 736 F.3d 891, 896–97 (9th Cir. 2013). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when

there could be no reasonable dispute that they were wrong." (*Woods v. Donald*, No. 14–618, 2015 WL 1400852, at *3 (U.S. Mar. 30, 2015).)

ARGUMENT

I. THE CALIFORNIA COURTS CORRECTLY REJECTED GONZALES'S CLAIM THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTIONS, AND GONZALES IS NOT ENTITLED TO FEDERAL HABEAS RELIEF

Gonzales claims that the evidence of his guilt presented at trial was insufficient to support the jury's finding that he committed attempted murder and shot at the victims from a vehicle. Specifically, Gonzales alleges that the California Court of Appeal's decision finding sufficient evidence to support his convictions was based on an unreasonable application of *Jackson*.[6] (*See* AOB at 40–41, 54; SAOB 12–25.)[7] However, because a fair-minded jurist could agree with the result reached by the California Court of Appeal and likewise conclude that there was substantial evidence from which the jurors could find that Gonzales shot the victims from the backseat of a car, the District Court's judgment denying Gonzales's habeas petition should be affirmed.

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[6] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

[7] "AOB" refers to Appellant's Opening Brief. "SAOB" refers to Appellant's Supplemental Opening Brief.

The standard for constitutional sufficiency of the evidence is set forth in *Jackson v. Virginia*, 443 U.S. at 319. A federal habeas court applying *Jackson* must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (quoting *Jackson v. Virginia*, 443 U.S. at 319). In cases where the evidence is unclear or would support conflicting inferences, "the federal court 'must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution.'" *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1993) (quoting *Jackson v. Virginia*, 443 U.S. at 326).

A reviewing court "'must respect the exclusive province of the [jury] to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts.'" *Long v. Johnson*, 736 F.3d at 896 (quoting *United States v. Archdale*, 229 F.3d 861, 867 (9th Cir. 2000)). It matters not that the evidence relied on by the jurors was circumstantial, as even a murder conviction "may rest solely on such evidence." *Id.*

Because this case involves a habeas petition filed after the enactment of AEDPA, this Court "owe[s] a 'double dose of deference'" to the state court. *Long v. Johnson*, 736 F.3d at 896 (quoting *Boyer v. Belleque*, 659 F.3d 957, 960 (9th Cir. 2011)). The pertinent inquiry is whether the decision of the state court reflected an "objectively unreasonable" application of the standard set forth in *Jackson*. *Id.*, *see Juan H. v. Allen*, 408 F.3d 1262, 1274–75 (9th Cir. 2005). The nature of constitutional sufficiency review in this case is therefore "'sharply limited.'" *Juan H.*, 408 F.3d at 1275 (quoting *Wright v. West*, 505 U.S. 277, 296–97, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (plurality)).

California courts use the *Jackson* standard when reviewing claims of insufficient evidence. *People v. Hatch*, 22 Cal. 4th 260, 272, 991 P.2d 165 (2000) (citing *Jackson v. Virginia*, 443 U.S. at 318–19). In this case, the California Court of Appeal set forth and applied the correct controlling federal standard. The state appellate court showed a detailed familiarity with the evidence of Gonzales's guilt, and it applied the proper sufficiency analysis set forth in *Jackson* as reflected in the California Supreme Court cases *People v. Maury*, 30 Cal. 4th 342, 403, 68 P.3d 1 (2003), *People v. Ochoa*, 6 Cal. 4th 1199, 1206, 864 P.2d 103 (1993), and *People v. Jones*, 51 Cal. 3d 294, 314, 792 P.2d 643 (1990), and the California Court of Appeal

decision in *People v. King*, 183 Cal. App. 4th 1281, 1320, 108 Cal. Rptr. 3d 333 (Ct. App. 2010). (1 SER 132–34.)

The record reveals that the state court specifically addressed Gonzales's constitutional argument and that its adjudication of the matter was neither contrary to nor an unreasonable application of Supreme Court precedent. The California Court of Appeal summarized the evidence presented at trial and reached its conclusion regarding the sufficiency of the evidence and the purported lack of corpus delecti as follows:

> Defendant challenges the sufficiency of the evidence against him for all four convictions because none of the witnesses who testified identified him as the shooter. He contends he was convicted based primarily on his admissions that he was a Playboyz gang member who attended the Colton party and he occupied a car which was driving by when the shooting occurred. We reject his challenge.
>
> "On review of a claim of insufficient evidence, we ask 'whether " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " [Citation.]' (*People v. Maury* (2003) 30 Cal.4th 342, 403, italics omitted.) The evidence upon which the judgment relies must be 'reasonable, credible, and of solid value.' (*People v. Jones* (1990) 51 Cal.3d 294, 314.) It is not our role to reweigh evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) When a verdict is supported by substantial evidence, we defer to the trial court's findings." (*People v. King* (2010) 183 Cal.App.4th 1281, 1320.)

Defendant attempts to evoke the corpus delicti rule in his favor. The corpus delicti of any crime is defined as the combination of (a) the fact of the injury, loss, or harm, and (b) the existence of a criminal agency as its cause. "In essence, '[t]he corpus delicti ... consists of at least slight evidence that somebody committed a crime.' (*People v. Ochoa* (1998) 19 Cal.4th 353, 450.)" (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 734.) In a criminal prosecution, the corpus delicti of a crime "must be established independently of the extrajudicial statements, confessions or admissions of the defendant." (*People v. Towler* (1982) 31 Cal.3d 105, 115.) Because a defendant's identity is not an element of a crime, the corpus delicti rule does not preclude identity being established by a defendant's statements alone. (*Malfavon*, at p. 734.) Therefore, the corpus delicti rule does not operate here in favor of defendant's arguments. Instead, we conclude the record contains sufficient evidence to show the corpus delicti of defendant's four crimes and to establish his identity as the shooter.

As to the fact of the injury and the existence of a criminal agency as its cause, it is undisputed that someone committed a crime by firing a gun from a car at the three wounded victims. The witnesses testified that the rear passenger in a moving car shot at them. Furthermore, although the victims could not identify defendant as the shooter, another witness, Yesenia, identified defendant as the person who introduced himself to her as "Knuckles" at the Colton party and who was dressed like a Playboyz gang member and associating with other gang members. In conjunction with Yesenia's testimony are defendant's admissions to the police that he attended the party, dressed as she described him, and that he was in a car, passing by a group of men on the street at the time of the shooting. The foregoing evidence, combined with defendant's positive gunshot residue test, is sufficient to establish the corpus delicti of defendant's four crimes and defendant's identity as the shooter. Similarly, substantial evidence supports the jury's finding that defendant was an occupant of the car from which the shots were fired. Sufficient evidence supports defendant's

> three convictions for attempted murder and one conviction for shooting from a motor vehicle.

(1 SER 132–34.)

The California Court of Appeal's decision thus shows that the court reviewed the evidence using the proper standard and that it unanimously found sufficient evidence to support Gonzales's convictions. On appeal, Gonzales contended that there was insufficient evidence from which the jurors could find that he was in the car from which the victims were shot. (1 SER 44–54.) However, the Court of Appeal properly rejected this claim.

As the Court of Appeal noted, Gonzales was a self-admitted member of the Playboyz criminal street gang. (2 SER 270; 3 SER 601.) While at the party the night of the shooting, Gonzales introduced himself under his gang moniker, and he boasted that he was from the Playboyz gang. (2 SER 270, 329-330.) During the party, there was an argument between two groups—one of which yelled something along the lines of "Playboyz." (2 SER 332–33.) Rather than avoid this fight, Gonzales was "mingled in the crowd, the groups." (2 SER 333.)

Anthony, Michael, Vargas, Arreola, and Bryan also attended the party. (2 SER 342.) As they were leaving, a Hispanic male wearing a ball cap in the backseat of a passing vehicle asked them about their gang affiliation. (2

SER 345, 347–348, 353-355, 439.) The vehicle continued driving down the street for a bit, came to a stop, and then drove back. (2 SER 354-55, 419.) The passenger in the backseat and someone on the other side of the car proceeded to shoot multiple rounds at Anthony and his companions. (2 SER 348–50, 422–23.)

About twelve hours later, officers located Gonzales and brought him to the police station, where he agreed to be interviewed. (2 SER 258–293, 402, 482–483.) Gonzales acknowledged attending the party and wearing a hat emblazoned with the letter "P" to represent his Playboyz gang membership. (2 SER 264.)

After initially denying having firsthand information of the shooting, Gonzales eventually admitted that he was in the backseat of a vehicle that night. (2 SER 259, 266.) He explained that as he and his friends were driving away from the party, some people from another gang were "talking shit." (2 SER 270–72.) Consistent with the witness testimony introduced at trial, Gonzales confessed that he and his friends drove back to their location, where an argument ensued. (2 SER 270–72.) Although Gonzales denied shooting anyone, his right hand tested positive for gunshot residue. (2 SER 290–91; 3 SER 533.)

At trial, a gang expert testified that the shooting was consistent with conduct intended to benefit a criminal street gang. (3 SER 605–10.) He explained that gangs equate fear with respect, and that more violent crimes result in more respect. (3 SER 607.) He added that a gang member who does not attack an individual who disrespects him will be perceived as "weak." (3 SER 609.) However, if a gang member attacks the person who disrespected him, it will raise his level of respect "significantly." (3 SER 609.)

In light of such evidence, the District Court correctly found that nothing about the decisions of the California courts was contrary to, or involved an unreasonable application of, *Jackson*. (1 SER 245)

A. The Arguments Raised in Gonzales's Opening Brief and Repeated in His Supplemental Opening Brief Fail to Demonstrate That the California Courts Unreasonably Applied Governing Supreme Court Precedent in Denying Gonzales's Claim of Insufficient Evidence

In his original opening brief, Gonzales argues that *Jackson* "compels" a finding that there was insufficient evidence to support his convictions for attempted murder and discharging a firearm from a vehicle. (AOB 54.) First, Gonzales suggests that the Court of Appeal erred in failing to appreciate the witness testimony that Gonzales was not in the backseat of the

car from which the victims were shot. (AOB 42.) In so arguing, Gonzales relies on the testimony of Anthony, Michael, and John. (AOB 42.)

Gonzales misstates the evidence, as none of the witnesses that he mentions testified that Gonzales "was not the person who fired the gun from the car at them." (AOB 42.) Instead, the witnesses testified that they could not see the person who shot at them, thereby rendering them unable to recognize Gonzales at trial.[8] Anthony testified that it was dark out and that the car from which the victims were shot had tinted windows. He said that he could not see anything inside of the car, and he was therefore unable to determine whether Gonzales was in the backseat of the vehicle. (2 SER 359–61.) Michael similarly testified that could not recall seeing the face of anyone inside of the car, and that he ran away once he heard gunfire. (2 SER 368.) And John asserted that after he saw the two guns he "hit the ground" and ran. John was therefore unable to see the face of anyone who was in the car. (2 SER 423–24.)

Gonzales next asserts that he could not have been the shooter because he denied his guilt during a police interview the day after the shooting.

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[8] That the witnesses did not identify Gonzales at trial indicated a fear of retaliation. Gonzales was a member of a gang known for engaging in murder, assault with a deadly weapon, and shooting at inhabited dwellings. (3 SER 593.)

(AOB 43.) However, a review of Gonzales's statements to the police only further underscores the appropriateness of his convictions. The jurors were entitled to credit Gonzales's admissions that he was at the scene in the backseat of a car, and that he was involved in a gang-related altercation that resulted in gunfire. They were further permitted to disregard Gonzales's transparent effort to misdirect the police by insisting that he was not the shooter.

Initially, Gonzales lied and said that he was not at the scene during the shooting. (2 SER 259.) However, when the interviewing detective confronted Gonzales with witness testimony otherwise, Gonzales changed his story accordingly. (2 SER 266.) Gonzales now said he heard a gunshot as he was leaving, but he was unsure where it came from. (2 SER 266–67.)

When the interviewing detective presented Gonzales with evidence of his gang membership, Gonzales admitted that while at the party, he told people that he was from the Playboyz gang. (2 SER 270.) There were other Playboyz members at the party, and there were also members of the "LA" gang. (2 SER 270.)[9]

[9] Gonzales stated in relevant part: "And then these, they're banging LA, I guess, because they're all dressed in LA." (2 SER 270.) Anthony testified that he was from the city of L.A. (2 SER 347.)

As Gonzales and his friends David and Anthony were driving away from the party, the LA gang members started "talking shit." (2 SER 260–261, 270–71.) Gonzales admitted that he and his companions drove back and confronted them. (2 SER 270.)[10] Gonzales was in the backseat of the car. (2 SER 266.) The LA gang members said something along the lines of, "Fuck, homie, woo, woo, woo. Like what you looking at?" (2 SER 271–72.) Gonzales "was like, fuck, dawg, you know." (2 SER 271.) Gonzales did not deny asking the LA gang members where they were from. (2 SER 271–72.)[11]

After confessing that he was at the scene and involved in a gang-related altercation, Gonzales attempted to distance himself from the shooting.

[10] The interviewing detective told Gonzales, "You were in the car. We know you were in the back seat. You know the car went up the street here and then they said something and you backed up or whoever was driving, right?" Gonzales responded, "I guess." The interviewing detective said, "No, you know. Don't guess. Right?" Gonzales nodded his head in the affirmative, and proceeded to describe what happened once he and his friends drove by. (2 SER 270–71.)

Gonzales's admission was consistent with the witness testimony describing the movement of the shooter's car. (2 SER 354–55, 419.)

[11] The interviewing detective stated, "Somebody in the car asked where they were from. Was that you?" (2 SER 271.) After initially responding that someone else "was talking shit first," Gonzales explained, "I don't know what they said they said LA-something. I don't know where they were from." (2 SER 272.)

Gonzales suggested that the rival gang members were responsible for the gunfire, and that he and his friends drove off to avoid being hit. (2 SER 272, 276, 278.) Gonzales also said he did not know whether any of his companions shot from the car. (2 SER 275.) But when the interviewing detective told Gonzales that he faced three counts of attempted murder, and after the detective swabbed Gonzales's hands for gunshot residue, Gonzales again changed his story. (2 SER 277–80.)

Gonzales now suggested that he knew who the shooter was, but he was afraid of telling the police the "truth." (2 SER 280–81.) To avoid having to disclose the purported shooter's identity, Gonzales said he did not know where the shooter lived, and he insisted that he did not want to be a snitch. (2 SER 291, 293.)

At the close of the interview, Gonzales said he did not want to go to jail. (2 SER 290.) As he was being prepared for transportation to juvenile hall, Gonzales attempted to retract his previous statements that the gunfire may have originated from his car. (2 SER 291.)[12] He also claimed for the first

[12] Gonzales previously said he was unsure of whether his companions shot from the car. (2 SER 275, 281 ("I don't know someone in my car shot, sir"; "I don't think no one in my car shot, sir"; "I don't know [whether two people were shooting from the car], sir").) Gonzales now asserted, "It didn't come from our car." (2 SER 291.)

time that "[t]here were other people that rolled up with us, too." (2 SER 291.) He did not provide their names. (2 SER 291–93.)

Contrary to Gonzales's assertion, that he provided self-serving statements to the police does not render the California Court of Appeal's decision in conflict with clearly-established federal law as set forth by the Supreme Court. It was within the province of the jurors to determine Gonzales's credibility, resolve evidentiary conflicts, and draw reasonable inferences from the totality of the facts presented at trial. *See Long v. Johnson*, 736 F.3d at 896. The Court of Appeal was required to uphold the jury's finding of guilt as long as "*any*" trier of fact could have found Gonzales guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319.

In evaluating the facts of the case, the jurors were thus free to disregard Gonzales's effort to conceal his role in the crime, and instead find that his protestations of innocence were false measures intended to mask his guilt. *See United States v. Nevils*, 598 F.3d 1158, 1169–70 (9th Cir. 2010) (en banc) (quoting *Shlup v. Delo*, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review.")). For example, the jurors could readily identify Gonzales's claim that he did not want to

"snitch" on the actual shooter as a desperate ploy to frustrate the police investigation and cast suspicion elsewhere. Meanwhile, the jurors were entitled to credit Gonzales's admissions that he was involved in a gang-related altercation and sitting in the backseat of the car—the same location from which the gunfire originated.

As the District Court explained, a rational juror could have found Gonzales guilty beyond a reasonable doubt based on the evidence that he was in the backseat of the car during the shooting, his wearing of a ball cap like one of the reported shooters, and the gunpowder that remained on his hand around twelve hours later. (1 SER 242–43.) That Gonzales claimed that he did not play a role in the shooting fails to render the jury's verdict "so unsupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, __ U.S. __, 132 S. Ct. 2060, 2065, 182 L. Ed. 2d 978 (2012).

Gonzales further states that his conviction was in violation of *Jackson* because he said he washed his hands before he submitted to the gunshot residue test. Gonzales argues that the residue on his hands "could" have come from a source other than a gun. (AOB 47 (also noting that a positive gunshot residue test does not "necessarily" mean that the suspect fired a

gun).)[13] Again, however, the jurors were tasked with assessing the credibility of the witnesses and resolving any conflicts in the evidence, and they were entitled to conclude that the gunshot residue was highly probative of Gonzales's guilt.

As a threshold matter, the gunshot residue analysis expert did not testify that Gonzales could not test positive for gunshot residue if he washed his hands after the shooting. The expert testified that it might be "a bit unexpected" for a suspect to test positive twelve hours after a shooting if he washed his hands. However, the expert explained that a positive test would not be "completely unreasonable." (3 SER 534.)

In applying AEDPA, a court must resolve doubts about the evidence in favor of the prosecution. *Long v. Johnson*, 736 F.3d at 896; *Coleman v. Johnson*, 132 S. Ct. at 2064–65. In considering the gunshot residue evidence, the jurors could have reasonably disbelieved Gonzales's claim that he washed his hands prior to the residue testing. The jurors could have also

[13] Gonzales raises the same argument in his supplemental opening brief. (*See* SAOB 17.)

concluded that Gonzales only washed his hands in a cursory fashion, and that he therefore failed to remove the entirety of the residue.[14]

The jurors could have also reasonably found that since Gonzales went to his mother's house after the shooting (*see* 2 SER 402), Gonzales was more likely to have gunshot residue on his hands than if had he engaged in other, more rigorous activities. Further, the jurors may have determined that even if Gonzales washed his hands, he presumably had so much gunshot residue on his hands as a result of the shooting that merely washing them a single time could not remove it all. Such a finding would have been amply supported by the testimony at trial, which indicated that several rounds were fired at the victims.

The evidence thus supported a finding that the residue particles came from the gun Gonzales used during the shooting rather than some other source. Under AEDPA, the fact that any rational trier of fact could have so found renders Gonzales's argument without merit. *Harrington v. Richter*, 131 S. Ct. at 785–86; *Long v. Johnson*, 736 F.3d at 896.

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[14] If the jurors believed that Gonzales washed his hands, they could have reasonably deduced that the timing of Gonzales's decision to do so—right before his interview—was not mere happenstance, and instead reflected his consciousness of guilt.

Finally, in his opening brief, Gonzales relies heavily on the pre-AEDPA case of *Mikes v. Borg*, 947 F.2d 353 (9th Cir. 1991) to argue there was insufficient evidence of his guilt. (*See* AOB 20–22.) His reliance is misplaced, as *Mikes* is inapposite.

In *Mikes*, the defendant's fingerprints were found on three turnstile posts, one of which was identified as a murder weapon. While recognizing that fingerprint evidence alone might be sufficient to support a conviction under certain circumstances, the *Mikes* court explained:

> in fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. In order to meet this standard the prosecution must present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the commission of the crime.

Mikes v. Borg, 947 F.2d at 356–57 (internal citations and footnotes omitted).

Because the victim purchased the posts from a hardware store four months prior to his murder, the *Mikes* court found that it was possible that Mikes placed his fingerprints on the posts prior to their purchase. The court also found that it was possible Mikes placed his fingerprints on the posts while the turnstile was still in use. *Id.* at 358–59.

Mikes is not applicable here. That case was decided before AEDPA, which requires a reviewing court to accord a "double dose of deference" to the state court's decision rather than to conduct a de novo review. *Long v. Johnson*, 736 F.3d at 896. Likewise, under AEPDA, the relevant question is whether the state court's decision was contrary to a clearly established holding of the Supreme Court—not whether it was contrary to the holding of an intermediate appellate court. *Marshall v. Rodgers*, __ U.S. __, 133 S. Ct. 1446, 1450–51, 185 L. Ed. 2d 540 (2013).

Moreover, this case does not involve fingerprint evidence, and the prosecution did not rely on a single item of circumstantial evidence to establish Gonzales's guilt. As discussed *ante*, the evidence placed Gonzales at the party, where he and his fellow gang members were involved in a conflict.[15] (2 SER 329–33.) It also placed Gonzales on the scene of the shooting in the backseat of a car as he and his companions became involved in a gang-related altercation. (2 SER 269–71) Gonzales, like one of the reported shooters, wore a ball cap (2 SER 263–64, 329, 355–56), and he

[15] In his supplemental opening brief, Gonzales claims that there was "no testimony" that he was involved in a gang-related conflict at the party. (SAOB 21.) However, Yesenia Castaneda testified that there was a fight between two groups, one of which yelled something that sounded like "Playboyz." (2 SER 332.) Castaneda testified that during the fight, Gonzales was "mingled in the crowd, the groups." (2 SER 333.)

tested positive for gunshot residue about twelve hours after the shooting (3 SER 533). Further, the prosecution's gang expert explained Gonzales's motive; Gonzales and his companions shot the victims as a means of promoting the Playboyz street gang and furthering the gang's reputation. (3 SER 670–82.) As the District Court and state courts reasonably found, the totality of the evidence supported the jury's conclusion that Gonzales committed attempted murder when he fired a gun from the backseat of the car. (1 SER 242–43.)

B. The New Arguments Raised in Gonzales's Supplemental Opening Brief Are Without Merit And Gonzales Remains Unable to Demonstrate That the California Courts Unreasonably Applied Governing Supreme Court Precedent in Denying His Claim of Insufficient Evidence

In his supplemental opening brief, Gonzales relies on two additional cases to argue that the California courts unreasonably applied *Jackson* in denying his claim of insufficient evidence. (SAOB 18–20.) However, Gonzales's reliance on *Juan H. v. Allen*, 408 F.3d 1262 and *Mitchell v. Prunty* 107 F.3d 1337 (9th Cir. 1997) is misplaced. Not only are those cases inapposite, but as this Court has explained, "'only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied.' [Citation.]" *Murray v. Schriro*, 745 F.3d 984, 997 (9th

Cir. 2014) ("A state-court decision that we determine to be inconsistent with our cases is not necessarily 'objectively unreasonable'").

In *Juan H. v. Allen*, 408 F.3d 1262, Juan argued that there was insufficient evidence to support his juvenile delinquency petition, which alleged that he aided and abetted in the first degree murder of one victim and the attempted murder of another. *Id.* at 1275–79. The evidence admitted at trial showed that Juan's brother, Felix Merendon, was responsible for both shootings. Although present during the shootings, Juan did not say anything, did not make any gestures, and did not otherwise encourage Merendon. *Id.* at 1267. After the shootings, Merendon ran to his car, whereas Juan ran to his family's trailer. *Id.* Merendon described the incident to a friend "using the first-person singular," and he did not mention that Juan was present. *Id.* During a police interview, Juan maintained that he was inside his trailer with his family during the shooting. *Id.*

To the extent *Juan H.* is relevant here, it is only because the dearth of evidence presented in that case stands in stark contrast to the ample evidence that supported Gonzales's conviction. Gonzales was found with gunpowder residue on his hand within hours of the shooting. Witnesses described the shooter as wearing a hat and sitting in the backseat of the vehicle that opened fire. Gonzales matched this description.

Gonzales's admissions to the police only further established his guilt. Gonzales, an admitted member of the Playboyz street gang, told the police that as he and his friends were in their car leaving the party, members of another gang started "talking shit." Consistent with the witness testimony, Gonzales confessed that he and his friends drove back and confronted them. (2 SER 270–71.) Gonzales went so far as to acknowledge that this argument led to the firing of weapons, although Gonzales insisted that he was not the shooter. (2 SER 271–72, 275–76.) The jurors, however, were able to see through this self-serving claim.

Also unavailing is Gonzales's reliance on *Mitchell v. Prunty*, 107 F.3d 1337. There, the victim was shot twice and eventually run over. *Id.* at 1338–39. Mitchell was found guilty of second degree murder. *Id.* at 1342. However, the jury rejected a special finding that Mitchell ran over the victim, and there was no evidence that Mitchell instigated, encouraged, or assisted the driver in crushing the victim. *Id.* at 1339, 1342. The only evidence supporting the jury's finding that Mitchell was guilty of second degree murder included testimony that Mitchell and the principals were fellow gang members, and that Mitchell was present when the victim was shot. *Id.* at 1342. The *Mitchell* court found this evidence insufficient under *Jackson*. *Id.* at 1342–43.

As an initial matter, the *Mitchell* court expressly stated that it was conducting a de novo review of the evidence. *Mitchell*, 107 F.3d at 1340. The court explained that it was not required to apply the deferential AEDPA standard that must be applied in this case, as Mitchell's case was pending at the time AEDPA was enacted. *Id.* at 1339, fn. 3. The court also admitted its unfamiliarity with the contours of the AEDPA standard. *Id.* Since *Mitchell* was decided, however, that matter has been resolved—a finding must be "so unsupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S. Ct. at 2065.

In any event, unlike in *Mitchell*, the evidence here amply supported Gonzales's convictions. On the night of the shooting, Gonzales boasted of his Playboyz membership. Like the shooter, Gonzales wore a cap and sat in the backseat of a car. Gonzales confessed that he got into a gang-related altercation while in the vehicle, and he tested positive for gunshot residue around twelve hours later. Based on the entirety of the evidence admitted at trial, the jurors could readily conclude that Gonzales attempted to commit murder in order to enhance his own reputation and the reputation of his gang.

In his supplemental opening brief, Gonzales also suggests that there was insufficient evidence to support his convictions under a theory of aiding and abetting. (SAOB 22–23.) He further argues that membership in a gang

is insufficient, by itself, to establish a defendant's guilt. (SAOB 23–24.) Neither assertion constitutes a meritorious claim for relief.

As to his first contention, Gonzales concedes that the jurors found him guilty of shooting at the victims from the vehicle (*see* SAOB 22–23); the jurors did not find him guilty under a theory of aiding and abetting. (1 SER 2–3.) Gonzales's discussion of the adequacy of the evidence to support his convictions under a theory of aiding and abetting is therefore not relevant.

As to Gonzales's discussion of gang evidence, it is not in dispute whether evidence of a defendant's gang membership alone may be sufficient to establish his guilt. Gonzales's gang membership was admissible evidence of his motive. *United States v. Santiago*, 46 F.3d 885, 889 (9th Cir. 1995). Gonzales's liability was further established by the positive gunshot residue test, the witness testimony describing the shooter, and Gonzales's own incriminating statements to the police. The jurors were entitled to consider the entirety of this evidence in assessing appellant's guilt. *See Long v. Johnson*, 736 F.3d at 896.

C. Gonzales Cannot Demonstrate That the California Courts' Rejection of His Claim Was Contrary to, or Involved An Unreasonable Application of, Clearly Established Federal Law, And He Is Not Entitled to Any Relief

As set forth above, Gonzales can obtain relief only if the decision of the California Court of Appeal denying his claim of insufficient evidence was contrary to, or involved an unreasonable application of, clearly established precedent of the United States Supreme Court. This limitation comes from the now-familiar provision of AEDPA, codified at 28 U.S.C. § 2254(d), which establishes a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). The standard is rigorous, and "reflects the view that habeas corpus is 'a guard against extreme malfunctions in the state criminal justice system,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. at 101–03. If a fair-minded jurist could agree with the result reached by the state court in this case, federal habeas relief is unavailable. *Id.* at 101–02.

The applicable Supreme Court authority on the issue of the sufficiency of the evidence is both clear and broad. Evidence is sufficient to support a conviction "if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt.'" *Coleman v. Johnson*, 132 S. Ct. at 2064 (quoting *Jackson v. Virginia*, 443 U.S. at 319). The California Court of Appeal applied this standard to Gonzales's claim and found that the prosecution presented sufficient evidence for a rational jury to find that Gonzales was guilty of attempted murder and shooting a gun from a motor vehicle. (1 SER 132–34.) A fair-minded jurist could reasonably agree with this conclusion. *Harrington v. Richter*, 562 U.S. 101–03.

Therefore, in accordance with United States Supreme Court authority and the deference principle required under AEDPA, the California courts' rejection of Gonzales's claim was neither contrary to nor involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court. The rejection of Gonzales's claim resulted from a reasonable assessment of the evidence presented during the state court proceeding. 28 U.S.C. § 2254(d)(1)–(2). Accordingly, this Court should deny Gonzales's appeal.

CONCLUSION

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that sufficient evidence supported Gonzales's convictions for attempted murder and discharging a firearm from a motor vehicle. Because it was not objectively unreasonable for the state courts to reach this conclusion, the District Court's decision to deny Gonzales's habeas petition should be affirmed.

Dated: April 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 13-56498

I certify that: (check (x) appropriate option(s))

[ ] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[x] Proportionately spaced, has a typeface of 14 points or more and contains 9,912 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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☐ 4. **Amicus Briefs.**

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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April 23, 2015
Dated

s/ Sean M. Rodriquez
Sean M. Rodriquez
Deputy Attorney General

9th Circuit Case Number(s) 13-56498

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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APPENDIX F

to do and perform all other acts and things necessary to a full and fair hearing and determination of the case. *(Enacted in 1872.)*

Cross References

Pleading to return to warrant, see Penal Code § 1500.
Suspension of writ of habeas corpus, see Cal. Const. Art. 1, § 11.

Research References

6 Witkin, California Criminal Law 4th Criminal Writs § 84 (2019), In General.
6 Witkin, California Criminal Law 4th Criminal Writs § 90 (2019), Where Return is Filed in Reviewing Court.
6 Witkin, California Criminal Law 4th Criminal Writs § 91 (2019), Nature.
6 Witkin, California Criminal Law 4th Criminal Writs § 97 (2019), In General.

§ 1485. Discharge of person in custody; grounds

If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such Court or Judge must discharge such party from the custody or restraint under which he is held. *(Enacted in 1872.)*

Research References

6 Witkin, California Criminal Law 4th Criminal Writs § 10 (2019), Nature and Purpose.
6 Witkin, California Criminal Law 4th Criminal Writs § 96 (2019), Party Entitled to Discharge.

§ 1485.5. Stipulation to or no contest of allegations underlying grounds for granting writ of habeas corpus or motion to vacate judgment; facts binding on Attorney General, factfinder, and California Victim Compensation Board; notice of stipulation of facts; express factual findings, including credibility determinations, to be binding

(a) If the district attorney or Attorney General stipulates to or does not contest the factual allegations underlying one or more of the grounds for granting a writ of habeas corpus or a motion to vacate a judgment, the facts underlying the basis for the court's ruling or order shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board.

(b) The district attorney shall provide notice to the Attorney General prior to entering into a stipulation of facts that will be the basis for the granting of a writ of habeas corpus or a motion to vacate a judgment.

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

(d) For the purposes of this section, "express factual findings" are findings established as the basis for the court's ruling or order.

(e) For purposes of this section, "court" is defined as a state or federal court. *(Added by Stats.2013, c. 800 (S.B.618), § 2. Amended by Stats.2014, c. 28 (S.B.854), § 73, eff. June 20, 2014; Stats.2016, c. 31 (S.B.836), § 244, eff. June 27, 2016; Stats.2016, c. 785 (S.B.1134), § 2, eff. Jan. 1, 2017.)*

Cross References

Indemnity for persons erroneously convicted and pardoned, factual findings and credibility determinations as basis for granting application for certificate of factual innocence to be binding on Attorney General, factfinder, and board, see Penal Code § 4903.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.

§ 1485.55. Contested proceedings; granting writ of habeas corpus, judgment vacated, and finding of factual innocence; finding binding on California Victim Compensation Board; payment of claim; petition for finding of factual innocence by preponderance of evidence; presumptions

(a) In a contested proceeding, if the court has granted a writ of habeas corpus or when, pursuant to Section 1473.6, the court vacates a judgment, and if the court has found that the person is factually innocent, that finding shall be binding on the California Victim Compensation Board for a claim presented to the board, and upon application by the person, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

(b) In a contested or uncontested proceeding, if the court has granted a writ of habeas corpus or vacated a judgment pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, the person may move for a finding of factual innocence by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner.

(c) If the court makes a finding that the petitioner has proven their factual innocence by a preponderance of the evidence pursuant to subdivision (b), the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(d) A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to subdivision (b).

(e) If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904. *(Added by Stats.2013, c. 800 (S.B.618), § 3. Amended by Stats.2016, c. 31 (S.B.836), § 245, eff. June 27, 2016; Stats.2016, c. 785 (S.B.1134), § 3, eff. Jan. 1, 2017; Stats.2019, c. 473 (S.B.269), § 1, eff. Jan. 1, 2020.)*

Cross References

Indemnity for persons erroneously convicted and pardoned, application of provisions of this section, see Penal Code § 4902.
Indemnity for persons erroneously convicted and pardoned, hearing on claim, see Penal Code § 4903.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.
3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 1486. Remand of person in custody; grounds

The Court or Judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody:

1. By virtue of process issued by any Court or Judge of the United States, in a case where such Court or Judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent Court of criminal jurisdiction, or of any process issued upon such judgment or decree. *(Enacted in 1872.)*

APPENDIX F

their art or profession on the person of another. *(Added by Stats.1941, c. 106, p. 1129, § 15. Amended by Stats.1987, c. 828, § 143.)*

Cross References

Civil rights of prisoners, see Penal Code §§ 2600, 2601.
Conviction of crime as grounds for suspension or revocation of license as a private investigator, see Business and Professions Code § 7561.1.
Impeachment of witness for felony conviction, effect of pardon, see Evidence Code § 788.
Indemnity for persons erroneously convicted and pardoned, see Penal Code § 4900 et seq.
Rights restored on granting a full and unconditional pardon based on certificate of rehabilitation, see Penal Code § 4852.17.
Similar provisions as to practice of profession, see Penal Code § 4852.15.

Research References

3 Witkin, California Criminal Law 4th Punishment § 830 (2019), In General.
3 Witkin, California Criminal Law 4th Punishment § 837 (2019), Effect of Certificate and Pardon.

§ 4854. Firearms; restoration of rights; exceptions

In the granting of a pardon to a person, the Governor may provide that the person is entitled to exercise the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 17800 and 23510 and Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6 shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon. *(Added by Stats.1968, c. 878, p. 1668, § 1. Amended by Stats.1987, c. 828, § 144; Stats.2010, c. 178 (S.B.1115), § 86, operative Jan. 1, 2012; Stats.2011, c. 296 (A.B.1023), § 219.)*

Law Revision Commission Comments

Section 4854 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons. [38 Cal.L.Rev.Comm. Reports 217 (2009)].

Cross References

Felonies, definition and penalties, see Penal Code §§ 17, 18.

Research References

3 Witkin, California Criminal Law 4th Punishment § 830 (2019), In General.

CHAPTER 5. INDEMNITY FOR PERSONS ERRONEOUSLY CONVICTED AND PARDONED

Section

§ 4900. Claim against state; persons authorized to present; presentation

Any person who, having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison or incarcerated in county jail pursuant to subdivision (h) of Section 1170 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 in state prison or incarcerated in county jail, may, under the conditions provided under this chapter, present a claim against the state to the California Victim Compensation Board for the pecuniary injury sustained by him or her through the erroneous conviction and imprisonment or incarceration. *(Added by Stats.1941, c. 106, p. 1130, § 15. Amended by Stats.2006, c. 538 (S.B.1852), § 513; Stats.2013, c. 800 (S.B.618), § 4; Stats.2016, c. 31 (S.B.836), § 250, eff. June 27, 2016.)*

Cross References

California Victim Compensation and Government Claims Board (formerly State Control Board), see Government Code § 13900 et seq.
Felony defined, see Penal Code § 17.
Prison or state prison defined for purposes of this Code, see Penal Code § 6081.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.
3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 4901. Claim against state; time for presentation; time for filing claim under Section 4900

(a) A claim under Section 4900, accompanied by a statement of the facts constituting the claim, verified in the manner provided for the verification of complaints in civil actions, is required to be presented by the claimant to the California Victim Compensation Board within a period of 10 years after judgment of acquittal, dismissal of charges, pardon granted, or release from custody, whichever is later.

(b) For purposes of subdivision (a), "release from custody" means release from imprisonment from state prison or from incarceration in county jail when there is no subsequent parole jurisdiction exercised by the Department of Corrections and Rehabilitation or postrelease jurisdiction under a community corrections program, or when there is a parole period or postrelease period subject to jurisdiction of a community corrections program, when that period ends.

(c) A person may not file a claim under Section 4900 until 60 days have passed since the date of reversal of conviction or granting of the writ, or while the case is pending upon an initial refiling, or until a complaint or information has been dismissed a single time. *(Added by Stats.1941, c. 106, p. 1130, § 15. Amended by Stats.2006, c. 538 (S.B.1852), § 514; Stats.2009, c. 432 (A.B.316), § 5; Stats.2013, c. 800 (S.B.618), § 5; Stats.2016, c. 31 (S.B.836), § 251, eff. June 27, 2016; Stats.2019, c. 473 (S.B.269), § 2, eff. Jan. 1, 2020.)*

Cross References

Presentment of claims,
Against public entities and employees, see Government Code § 900 et seq.
Not otherwise provided for by law, see Government Code § 905.2.
To Controller, see Government Code § 925.4.
Verification of pleadings, see Code of Civil Procedure §§ 446, 2009.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.

3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 4902. Application of provisions of Sections 851.865 or 1485.55; calculation of compensation and recommendation for payment; response by Attorney General to claim if provisions do not apply; hearing; notice

(a) If the provisions of Section 851.865 or 1485.55 apply in any claim, the California Victim Compensation Board shall, within 30 days of the presentation of the claim, calculate the compensation for the claimant pursuant to Section 4904 and recommend to the Legislature payment of that sum. As to any claim to which Section 851.865 or 1485.55 does not apply, the Attorney General shall respond to the claim within 60 days or request an extension of time, upon a showing of good cause.

(b) Upon receipt of a response from the Attorney General, the board shall fix a time and place for the hearing of the claim, and shall mail notice thereof to the claimant and to the Attorney General at least 15 days prior to the time fixed for the hearing. The board shall use reasonable diligence in setting the date for the hearing and shall attempt to set the date for the hearing at the earliest date convenient for the parties and the board.

(c) If the time period for response elapses without a request for extension or a response from the Attorney General pursuant to subdivision (a), the board shall fix a time and place for the hearing of the claim, mail notice thereof to the claimant at least 15 days prior to the time fixed for the hearing, and make a recommendation based on the claimant's verified claim and any evidence presented by him or her. *(Added by Stats.1941, c. 106, p. 1130, § 15. Amended by Stats.2006, c. 538 (S.B.1852), § 515; Stats.2013, c. 800 (S.B.618), § 6; Stats.2014, c. 54 (S.B.1461), § 14, eff. Jan. 1, 2015; Stats.2016, c. 31 (S.B.836), § 252, eff. June 27, 2016.)*

Cross References

Action by board on claims against state, procedure, see Government Code § 912.8.

Attorney General, generally, see Government Code § 12500 et seq.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.

3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 4903. Hearing on claim; introduction of evidence; proof; binding findings and credibility determinations; denial of payment

(a) Except as provided in Sections 851.865 and 1485.55, the board shall fix a time and place for the hearing of the claim. At the hearing the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto. The claimant shall prove the facts set forth in the statement constituting the claim, including the fact that the crime with which they were charged was either not committed at all, or, if committed, was not committed by the claimant, and the injury sustained by them through their erroneous conviction and incarceration.

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

(c) The board shall deny payment of any claim if the board finds by a preponderance of the evidence that a claimant pled guilty with the specific intent to protect another from prosecution for the underlying conviction for which the claimant is seeking compensation. *(Added by Stats.1941, c. 106, p. 1130, § 15. Amended by Stats.2009, c. 432 (A.B.316), § 6; Stats.2013, c. 800 (S.B.618), § 7; Stats.2019, c. 473 (S.B.269), § 3, eff. Jan. 1, 2020.)*

Cross References

Action by board on claims against state, procedure, see Government Code § 912.8.

Attorney General, generally, see Government Code § 12500 et seq.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.

3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 4904. Report of findings to Legislature; recommendation; limitation on amount of recovery

If the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant, and that the claimant has sustained injury through his or her erroneous conviction and imprisonment, the California Victim Compensation Board shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The amount of the appropriation recommended shall be a sum equivalent to one hundred forty dollars ($140) per day of incarceration served, and shall include any time spent in custody, including in a county jail, that is considered to be part of the term of incarceration. That appropriation shall not be treated as gross income to the recipient under the Revenue and Taxation Code. *(Added by Stats.1941, c. 106, p. 1131, § 15. Amended by Stats.1969, c. 704, p. 1370, § 1; Stats.2000, c. 630 (A.B.1799), § 1; Stats.2006, c. 538 (S.B.1852), § 516; Stats.2009, c. 432 (A.B.316), § 7; Stats.2013, c. 800 (S.B.618), § 8; Stats.2015, c. 422 (S.B.635), § 1, eff. Jan. 1, 2016; Stats.2016, c. 31 (S.B.836), § 253, eff. June 27, 2016.)*

Cross References

Action by Board on claims against state, procedure, see Government Code § 912.8.

Arrest, declaration of factual innocence as sufficient grounds for payment of compensation for claim pursuant to this section, see Penal Code § 851.865.

California Victim Compensation and Government Claims Board (formerly State Control Board), see Government Code § 13900 et seq.

Exclusions from gross income, see Revenue and Taxation Code § 17157.

Writ of habeas corpus, contested proceedings, granting writ of habeas corpus, judgment vacated, and finding that new evidence points to innocence, see Penal Code § 1485.55.

Research References

1 Witkin California Criminal Law 4th Introduction to Crimes § 123 (2019), Compensation of Persons Erroneously Convicted.

3 Witkin, California Criminal Law 4th Punishment § 831 (2019), Indemnity for Person Pardoned.

§ 4905. Submission of statement of recommendations for appropriations to Controller

The California Victim Compensation Board shall make up its report and recommendation and shall give to the Controller a statement showing its recommendations for appropriations under this chapter, as provided by law in cases of other claimants against the state for which no appropriations have been made. *(Added by Stats.1941, c. 106, p. 1131, § 15. Amended by Stats.2006, c. 538 (S.B.1852), § 517; Stats.2016, c. 31 (S.B.836), § 254, eff. June 27, 2016.)*

Cross References

Approval of claim and drawing of warrant, see Government Code §§ 925.6, 925.8.

Presentation of claims to State Controller, see Government Code § 925 et seq.

SB-446 Factual innocence. (2021-2022)

Date Published: 10/05/2021 09:00 PM

Senate Bill No. 446

CHAPTER 490

An act to amend Sections 1485.5, 1485.55, 4900, 4902, 4903, and 4904 of the Penal Code, relating to criminal procedure.

[Approved by Governor October 04, 2021. Filed with Secretary of State October 04, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 446, Glazer. Factual innocence.

Existing law authorizes a person who has been convicted and incarcerated for a felony and later pardoned on the basis of innocence or found to be factually innocent of that crime, as specified, to present a claim against the state to the California Victim Compensation Board for the pecuniary injury sustained by the person through the erroneous conviction and incarceration. Existing law requires the board to recommend to the Legislature that an appropriation be made and the claim paid if a court has made a finding that the person is factually innocent or if the person proves to the board that they are factually innocent. Existing law specifies that there is no presumption in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to these provisions. Existing law establishes the process and timeframes for the Attorney General to respond to a claim and for the board to set a hearing and make a recommendation on the claim. Under existing law, the person is considered factually innocent if the crime with which they were charged was either not committed at all, or if committed, was not committed by that person.

This bill would revise and recast these provisions to instead require the board, upon application by a person whose writ of habeas corpus was granted in state or federal court, or whose motion to vacate the charges was granted by a state court and the charges were dismissed, or if the person was acquitted of the charges on retrial, to recommend to the Legislature that an appropriation be made without a hearing, unless the Attorney General establishes that the claimant is not entitled to compensation. The bill would require the Attorney General, for claims brought under specified provisions, to establish by clear and convincing evidence that the claimant committed the acts constituting the offense in order to establish that the claimant is not entitled to compensation. The bill would prohibit the Attorney General, from relying solely on the trial record of a conviction that has been reversed or dismissed to establish that the claimant is not entitled to compensation. This bill would specify that no res judicata or collateral estoppel finding can be made in any other proceeding for failure to make a motion or obtain a favorable ruling under these provisions.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1485.5 of the Penal Code is amended to read:

1485.5. (a) If the district attorney or Attorney General stipulates to or does not contest the factual allegations underlying one or more of the grounds for granting a writ of habeas corpus or a motion to vacate a judgment, the facts underlying the basis for the court's ruling or order shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board.

(b) The district attorney shall provide notice to the Attorney General prior to entering into a stipulation of facts that will be the basis for the granting of a writ of habeas corpus or a motion to vacate a judgment.

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

(d) For the purposes of this section, "express factual findings" are findings established as the basis for the court's rulings or orders.

(e) For purposes of this section, "court" is defined as a state or federal court.

SEC. 2. Section 1485.55 of the Penal Code is amended to read:

1485.55. (a) In a contested or uncontested proceeding, if the court has granted a writ of habeas corpus or when, pursuant to Section 1473.6, the court vacates a judgment, and if the court has found that the person is factually innocent, under any standard for factual innocence applicable in those proceedings, that finding shall be binding on the California Victim Compensation Board for a claim presented to the board, and upon application by the person, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

(b) In a contested or uncontested proceeding, if the court has granted a writ of habeas corpus or vacated a judgment pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, the person may move for a finding of factual innocence by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner.

(c) If the court makes a finding that the petitioner has proven their factual innocence by a preponderance of the evidence pursuant to subdivision (b), the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(d) A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to subdivisions (a) and (b). No res judicata or collateral estoppel finding in any other proceeding shall be made for failure to make a motion or obtain a favorable ruling pursuant to subdivision (a) or (b) of this section.

(e) If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(f) For the purposes of this section, unless otherwise stated, "court" is defined as a state or federal court.

SEC. 3. Section 4900 of the Penal Code is amended to read:

4900. (a) Any person who, having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison or incarcerated in county jail pursuant to subdivision (h) of Section 1170 for that conviction, is granted a pardon by the Governor for the reason that the crime with which they were charged was either not committed at all or, if committed, was not committed by the person, or who, being innocent of the crime with which they were charged for either of those reasons, shall have served the term or any part thereof for which they were imprisoned in state prison or incarcerated in county jail, may, under the conditions provided under this chapter, present a claim against the state to the California Victim Compensation Board for the injury sustained by the person through the erroneous conviction and imprisonment or incarceration.

(b) If a state or federal court has granted a writ of habeas corpus or if a state court has granted a motion to vacate pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, and the charges were subsequently dismissed, or the person was acquitted of the charges on a retrial, the California Victim Compensation Board shall, upon application by the person, and without a hearing, recommend to the Legislature

that an appropriation be made and the claim paid pursuant to Section 4904, unless the Attorney General establishes pursuant to subdivision (d) of Section 4902, that the claimant is not entitled to compensation.

SEC. 4. Section 4902 of the Penal Code is amended to read:

4902. (a) If the provisions of Section 851.865 or 1485.55 apply in any claim, the California Victim Compensation Board shall, within 30 days of the presentation of the claim, calculate the compensation for the claimant pursuant to Section 4904 and recommend to the Legislature payment of that sum. As to any claim to which Section 851.865 or 1485.55 does not apply, the Attorney General shall respond to the claim within 60 days or request an extension of time, upon a showing of good cause.

(b) Upon receipt of a response from the Attorney General, the board shall fix a time and place for the hearing of the claim, and shall mail notice thereof to the claimant and to the Attorney General at least 15 days prior to the time fixed for the hearing. The board shall use reasonable diligence in setting the date for the hearing and shall attempt to set the date for the hearing at the earliest date convenient for the parties and the board.

(c) If the time period for response elapses without a request for extension or a response from the Attorney General pursuant to subdivision (a), the board shall fix a time and place for the hearing of the claim, mail notice thereof to the claimant at least 15 days prior to the time fixed for the hearing, and make a recommendation based on the claimant's verified claim and any evidence presented by the claimant.

(d) If subdivision (b) of Section 4900 applies in any claim, the California Victim Compensation Board shall calculate the compensation for the claimant pursuant to Section 4904 and recommend to the Legislature payment of that sum, unless the Attorney General objects in writing, within 45 days from when the claimant files the claim, with clear and convincing evidence that the claimant is not entitled to compensation. The Attorney General may request a single 45-day extension of time, upon a showing of good cause. If the Attorney General declines to object within the allotted period of time, then the board shall issue its recommendation pursuant to Section 4904 within 60 days thereafter. Upon receipt of the objection, the board shall fix a time and place for the hearing of the claim, and shall mail notice thereof to the claimant and to the Attorney General at least 15 days prior to the fixed time for the hearing. At a hearing, the Attorney General shall bear the burden of proving by clear and convincing evidence that the claimant committed the acts constituting the offense. If the Attorney General fails to meet this burden, the board shall recommend to the Legislature payment of the compensation sum calculated pursuant to Section 4904.

SEC. 5. Section 4903 of the Penal Code is amended to read:

4903. (a) Except as provided in Sections 851.865 and 1485.55, and in subdivision (b) of Section 4900, the board shall fix a time and place for the hearing of the claim. At the hearing the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto. The claimant shall prove the facts set forth in the statement constituting the claim, including the fact that the crime with which they were charged was either not committed at all, or, if committed, was not committed by the claimant, and the injury sustained by them through their erroneous conviction and incarceration.

(b) For claims falling within subdivision (b) of Section 4900 in which the Attorney General objects to the claim pursuant to subdivision (d) of Section 4902, the board shall fix a time and place for the hearing of the claim. At the hearing, the Attorney General shall bear the burden of proving by clear and convincing evidence that the claimant committed the acts constituting the offense. The claimant may introduce evidence in support of the claim.

(c) In a hearing before the board, the factual findings and credibility determinations establishing the court's basis for writ of habeas corpus, a motion to vacate pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, or an application for a certificate of factual innocence as described in Section 1485.5 shall be binding on the Attorney General, the factfinder, and the board.

(d) A conviction reversed and dismissed is no longer valid, thus the Attorney General may not rely on the fact that the state still maintains that the claimant is guilty of the crime for which they were wrongfully convicted, that the state defended the conviction against the claimant through court litigation, or that there was a conviction to establish that the claimant is not entitled to compensation. The Attorney General may also not rely solely on the trial record to establish that the claimant is not entitled to compensation.

(e) The board shall deny payment of any claim if the board finds by a preponderance of the evidence that a claimant pled guilty with the specific intent to protect another from prosecution for the underlying conviction for

which the claimant is seeking compensation.

(f) A presumption does not exist in any other proceeding if the claim for compensation is denied pursuant to this section. No res judicata or collateral estoppel finding shall be made in any other proceeding if the claim for compensation is denied pursuant to this section.

SEC. 6. Section 4904 of the Penal Code is amended to read:

4904. If the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant, or for claims pursuant to subdivision (b) of Section 4900, the Attorney General's office has not met their burden of proving by clear and convincing evidence that the claimant committed the acts constituting the offense, and the California Victim Compensation Board has found that the claimant has sustained injury through their erroneous conviction and imprisonment, the California Victim Compensation Board shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The amount of the appropriation recommended shall be a sum equivalent to one hundred forty dollars ($140) per day of incarceration served, and shall include any time spent in custody, including in a county jail, that is considered to be part of the term of incarceration. That appropriation shall not be treated as gross income to the recipient under the Revenue and Taxation Code.

APPENDIX G

Larsen v. California Victim Comp. Bd.

Court of Appeal of California, Second Appellate District, Division Five

May 11, 2021, Opinion Filed

B297857

Reporter
64 Cal. App. 5th 112 *; 278 Cal. Rptr. 3d 566 **; 2021 Cal. App. LEXIS 394 ***; 2021 WL 1884016

DANIEL LARSEN, Plaintiff and Appellant, v. CALIFORNIA VICTIM COMPENSATION BOARD, Defendant and Respondent.

Notice: THE SUPREME COURT OF CALIFORNIA HAS GRANTED REVIEW, (see *Cal. Rules of Court 8.1105(e)(1)(B)* and *8.1115(e)* and corresponding Comment, par. 2, concerning *rule 8.1115(e)(3)*) June 23, 2021, S269406.

Subsequent History: Modified by *Larsen v. California Victim Comp. Bd., 2021 Cal. App. LEXIS 465, 2021 WL 2200489 (Cal. App. 2d Dist., June 1, 2021)*

Time for Granting or Denying Review Extended *Larsen v. California Victim Compensation Bd., 2021 Cal. LEXIS 5919 (Cal., Aug. 5, 2021)*

Review granted by, Review pending at *Larsen v. California Victim Compensation Bd., 282 Cal. Rptr. 3d 637, 493 P.3d 194, 2021 Cal. LEXIS 6075, 2021 WL 3776287 (Cal., Aug. 25, 2021)*

Review dismissed by *Larsen v. California Victim Compensation Bd., 298 Cal. Rptr. 3d 649, 516 P.3d 878, 2022 Cal. LEXIS 5666, 2022 WL 4371550 (Cal., Sept. 21, 2022)*

Prior History: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BS170693, James C. Chalfant, Judge.

Larsen v. Victim Comp. & Gov't Claims Bd., 2019 Cal. Super. LEXIS 12337 (Cal. Super. Ct., Mar. 25, 2019)
Larsen (Daniel) on H.C., 2007 Cal. LEXIS 7917 (Cal., July 25, 2007)

Disposition: Reversed and remanded with directions.

Core Terms

innocence, actual innocence, knife, recommend, habeas corpus relief, habeas corpus petition, factual innocence, credible, reasonable doubt, district court, habeas corpus, new evidence, convict, reasonable juror, appropriation, guilt, preponderance of evidence, constitutional error, proceedings, writ of habeas corpus, magistrate judge, sentenced, binding, gateway, merits, shirt, throw, commission of a crime, federal court, trial court

Case Summary

Overview

HOLDINGS: [1]-The California Victim Compensation Board should have automatically recommended compensation for plaintiff as a wrongfully convicted person, and should not have held a hearing, because the federal court's Schlup finding and grant of habeas relief that resulted in plaintiff's release from prison without retrial for a felony charge of carrying a dirk or dagger amounted to a finding of factual innocence that was binding. A habeas corpus petitioner who makes a showing of actual innocence strong enough to convince a court to entertain an otherwise procedurally barred collateral attack on a final judgment and who then wins permanent release from prison on a writ of habeas corpus has been found factually innocent by a preponderance of the evidence. Under *Pen. Code, § 1485.55, subd. (a)*, the board should have deferred to the federal court findings.

Outcome
Reversed and remanded with directions.

LexisNexis® Headnotes

APPENDIX G
1

Governments > State & Territorial
Governments > Legislatures

HN1[↓] State & Territorial Governments, Legislatures

A person may present a claim to the California Victim Compensation Board for the pecuniary injury sustained by him or her through erroneous conviction and imprisonment or incarceration when the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant. *Pen. Code, §§ 4900, 4904.* If the evidence shows the claimant has sustained injury through his or her erroneous conviction and imprisonment, the Board shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The findings made by a court granting habeas relief determine both whether a board hearing is necessary and the scope of the board's duties.

Governments > State & Territorial
Governments > Finance

HN2[↓] State & Territorial Governments, Finance

Pen. Code, § 1485.55, describes the circumstances under which court findings in postconviction litigation are binding on the California Victim Compensation Board and require an automatic recommendation for compensation to the Legislature. Under subdivision (a) of the statute, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid when in a contested proceeding the court has granted a writ of habeas corpus and has found that the person is factually innocent.

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > State & Territorial
Governments > Claims By & Against

HN3[↓] Burdens of Proof, Preponderance of Evidence

Under *Pen. Code, § 1485.55, subd. (a)*, a court finding of factual innocence must be made by at least a preponderance of the evidence and must reflect a determination that the person charged and convicted of an offense did not commit the crime.

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > Legislation > Interpretation

HN4[↓] Burdens of Proof, Preponderance of Evidence

When a statute is silent on the standard of proof, the preponderance of the evidence standard ordinarily applies. Courts should strive to harmonize statutory sections relating to the same subject to the extent possible.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Interpretation

HN5[↓] Effect & Operation, Amendments

The court presumes the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted. The Legislature is presumed to be aware of judicial decisions already in existence, and to have enacted or amended a statute in light thereof.

Governments > State & Territorial
Governments > Claims By & Against

Governments > Legislation > Interpretation

HN6[↓] State & Territorial Governments, Claims By & Against

For purposes of *Pen. Code, § 1485.55, subd. (a)*, the Legislature's concept of factual innocence encompasses a Schlup innocence finding, i.e., that the person charged probably did not commit the crime and hence no juror would convict him or her.

Evidence > Weight & Sufficiency

Governments > State & Territorial
Governments > Claims By & Against

HN7 **Evidence, Weight & Sufficiency**

A court's Schlup finding coupled with a permanent release from custody pursuant to a writ of habeas corpus satisfies the requirements of *Pen. Code, § 1485.55, subd. (a)*.

Governments > Local Governments > Employees & Officials

HN8 **Local Governments, Employees & Officials**

A compensation recommendation without a California Victim Compensation Board hearing under *Pen. Code, § 1485.55, subd. (a)*, is required by a grant of habeas corpus relief following a Schlup finding.

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > State & Territorial
Governments > Claims By & Against

HN9 **Burdens of Proof, Preponderance of Evidence**

A habeas corpus petitioner who makes a showing of actual innocence strong enough to convince a court to entertain an otherwise procedurally barred collateral attack on a final judgment and who then wins permanent release from prison on a writ of habeas corpus has been found factually innocent by a preponderance of the evidence for purposes of *Pen. Code, § 1485.55, subd. (a)*.

Headnotes/Summary

Summary
[*112]

A federal district court made a finding of actual innocence as to plaintiff's felony conviction for carrying a dirk or dagger and granted his petition for writ of habeas corpus, triggering his release from prison after 13 years of confinement. The California Victim Compensation Board denied plaintiff's claim of compensation as a wrongfully convicted person, and the trial court upheld the board's decision. (Superior Court of Los Angeles County, No. BS170693, James C. Chalfant, Judge.)

The Court of Appeal reversed the judgment and remanded with directions. The board should have automatically recommended compensation for plaintiff as a wrongfully convicted person, and should not have held a hearing, because the federal court's *Schlup* finding and grant of habeas corpus relief that resulted in plaintiff's release from prison without retrial amounted to a finding of factual innocence that was binding under *Pen. Code, § 1485.55, subd. (a)*. A habeas corpus petitioner who makes a showing of actual innocence strong enough to convince a court to entertain an otherwise procedurally barred collateral attack on a final judgment and who then wins permanent release from prison on a writ of habeas corpus has been found factually innocent by a preponderance of the evidence. (Opinion by Baker, J., with Rubin, P. J., and Moor, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) **(1)**

Habeas Corpus § 9—Factual Innocence—Compensation.

A person may present a claim to the California Victim Compensation Board for the pecuniary injury sustained by him or her through erroneous conviction and imprisonment or incarceration when the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant (*Pen. Code, §§ 4900, 4904*). If the evidence shows the claimant has sustained injury through his or her erroneous conviction and imprisonment, the board shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The findings made by a court granting habeas corpus relief determine both whether a board hearing is necessary and the scope of the board's duties. *Pen. Code, § 1485.55*, describes the circumstances under which court findings in postconviction litigation are binding on the California

Victim Compensation Board and require an automatic recommendation for compensation to the Legislature. Under subdivision (a) of the statute, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid when in a contested proceeding the court has granted a writ of habeas corpus and has found that the person is factually innocent.

CA(2)[↓] (2)

Habeas Corpus § 9—Factual Innocence—Standard.

Under *Pen. Code, § 1485.55, subd. (a)*, a court finding of factual innocence must be made by at least a preponderance of the evidence and must reflect a determination that the person charged and convicted of an offense did not commit the crime.

CA(3)[↓] (3)

Statutes § 49—Construction—Standard of Proof—Same Subject Matter.

When a statute is silent on the standard of proof, the preponderance of the evidence standard ordinarily applies. Courts should strive to harmonize statutory sections relating to the same subject to the extent possible.

CA(4)[↓] (4)

Statutes § 24—Construction—Presumptions—Existing Judicial Decisions.

The court presumes the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted. The Legislature is presumed to be aware of judicial decisions already in existence, and to have enacted or amended a statute in light thereof.

CA(5)[↓] (5)

Habeas Corpus § 9—Factual Innocence—Compensation—Schlup Innocence Finding.

For purposes of *Pen. Code, § 1485.55, subd. (a)*, the [*114] Legislature's concept of factual innocence encompasses a *Schlup* innocence finding, i.e., that the person charged probably did not commit the crime and hence no juror would convict him or her.

CA(6)[↓] (6)

Habeas Corpus § 9—Factual Innocence—Compensation—Schlup Innocence Finding.

A habeas corpus petitioner who makes a showing of actual innocence strong enough to convince a court to entertain an otherwise procedurally barred collateral attack on a final judgment and who then wins permanent release from prison on a writ of habeas corpus has been found factually innocent by a preponderance of the evidence for purposes of *Pen. Code, § 1485.55, subd. (a)*. That is what plaintiff did, and the Legislature intended the board to defer to the considered court findings that led to this point. It was error to hold a hearing when compensation should have been recommended automatically.

[*Erwin et al., Cal. Criminal Defense Practice (2021) ch. 105, § 105.07.*]

Counsel: Singleton Schreiber McKenzie & Scott, Benjamin I. Siminou; Thorsnes Bartolotta McGuire, Brett J. Schreiber; California Innocence Project and Katherine N. Bonaguidi for Plaintiff and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Defendant and Respondent.

Judges: Opinion by Baker, J., with Rubin, P. J., and Moor, J., concurring.

Opinion by: Baker, J.

Opinion

[568]** **BAKER, J.**—After a federal district court granted a petition for writ of habeas corpus triggering plaintiff Daniel Larsen's release from prison after 13 years of confinement, Larsen filed a claim with the California Victim Compensation Board (the Board)[1] seeking compensation as a wrongfully convicted

[1] Until 2016, the California Victim Compensation Board was known as the California Victim Compensation and Government Claims Board. (Stats. 2016, ch. 31, § 103.)

person. The Board denied Larsen's claim, concluding it was entitled to make its own determination of whether Larsen was factually innocent because the district court's finding that no reasonable [***2] juror would convict Larsen did not predetermine the question and obviate the need for a Board hearing. Larsen then sought mandamus relief in the trial court, and the [*115] court upheld the Board's determination. We consider whether the Board was entitled to hold a hearing on Larsen's compensation claim, which leads us to opine on what qualifies as a finding of "factual innocen[ce]" under the pertinent statutory provision.

I. BACKGROUND

As we shall explain in more detail, in 1999 a jury convicted Larsen of a felony violation of Penal Code[2] former section 12020, subdivision (a), which prohibited carrying a concealed dirk or dagger. Larsen [**569] admitted he sustained three prior felony convictions and the trial court sentenced him to 28 years to life in prison. Larsen's direct appeal and state court habeas corpus petitions were unsuccessful, but in 2010, the United States District Court for the Central District of California made an actual innocence finding (the particulars of which we will describe) and granted his petition for writ of habeas corpus, which led to his release from custody.

A. *Larsen's Criminal Trial*

The prosecution called three Los Angeles Police Department witnesses at Larsen's trial: officers [***3] Thomas Townsend and Michael Rex and detective Kenneth Crocker. Larsen's attorney put on no defense case.

Officer Townsend testified he and his partner, Officer Rex, responded to a report of shots fired at the Gold Apple bar around 1:00 a.m. on June 6, 1998. The reporting party claimed the shooter was a man with a long ponytail wearing a green flannel shirt.

When they arrived at the bar's parking lot, Officer Townsend immediately focused on "a person with a green flannel," who was later identified by the officer as Larsen. Officer Townsend and his partner were standing 20 to 30 feet from Larsen, and because Officer Townsend believed Larsen might be armed, he initially had "tunnel vision" and focused his gaze on Larsen's hands.

Officer Townsend testified he saw Larsen crouch and reach beneath his untucked shirt to remove an object from his waistband that he then tossed under a nearby vehicle. According to Officer Townsend, he saw where the object landed and found in that location a knife with a double-edged blade and a "finger guard." Officer Townsend also found a short copper bar wrapped in cloth tape nearby, but in the opposite direction from that where he saw Larsen throw the knife. [***4] Officer Townsend testified he did not see anyone throw the copper bar.
[*116]

On cross-examination, Officer Townsend acknowledged he was mistaken when he previously testified Officer Rex was driving the patrol car that night. Officer Townsend also conceded he did not mention in previous testimony that the knife was concealed. Although the knife was extremely sharp and Larsen did not have anything on him to sheath the knife when he was arrested, Officer Townsend did not recall any cuts to Larsen's body or clothing.

Similar to Officer Townsend, Officer Rex testified he focused on Larsen when arriving at the bar because Larsen resembled the description of the reported gunman. Officer Rex testified he saw Larsen reach under his green flannel shirt, pull a shiny metal object from his waistband, and toss the object beneath the vehicle next to him. While Larsen and others were being taken into custody, Officer Rex kept an eye on the object Larsen threw under the vehicle to "mak[e] sure nobody walked up and discarded" it. Officer Rex then saw Officer Townsend retrieve the item, which turned out to be a knife. Officer Rex did not see anyone throw the copper bar Officer Townsend found, and Officer Rex [***5] was certain the bar was not the object he saw Larsen throw because it was wrapped in tape and would not have reflected his patrol car's spotlights as the knife did.

Detective Crocker testified Larsen was originally booked into custody under a false name and that the knife was not examined for fingerprints.

During a hearing to determine whether certain prior convictions could be used to impeach Larsen if he decided to testify, Larsen's trial counsel made an offer of proof that Larsen would testify the copper [**570] bar was in his pocket and he discarded it when the police arrived.

B. *Direct Appeal and State Court Habeas Corpus Petitions*

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[2] Undesignated statutory references that follow are to the Penal Code.

On direct appeal of his conviction at trial, Larsen challenged certain evidentiary rulings, a jury instruction regarding consciousness of guilt, and his sentence. The Court of Appeal affirmed the judgment, and our Supreme Court denied review. Larsen's efforts to obtain habeas corpus relief in state court were unsuccessful.

C. *Larsen's Federal Habeas Corpus Petition*

1. *The court's actual innocence finding permitting consideration of the procedurally barred petition*

In 2008, Larsen filed a petition for writ of habeas corpus in federal district court contending his trial attorney was constitutionally **[***6]** ineffective for (among **[*117]** other things) failing to present testimony from two eyewitnesses who would have said he was not the one who threw the knife. The Attorney General moved to dismiss the petition because it was untimely under the *Antiterrorism and Effective Death Penalty Act of 1990 (Pub.L. No. 104-132 (Apr. 24, 1996) 110 Stat. 1214)*, which establishes a one-year statute of limitations running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." (*28 U.S.C. § 2244(d)(1)(A)*.)

Procedural limitations on habeas corpus relief like this timely filing rule will not prevent a federal court from deciding the merits of a habeas corpus petition if the petitioner presents evidence (e.g., "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence") that establishes "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" (*Schlup v. Delo (1995) 513 U.S. 298, 324, 327 [130 L. Ed. 2d 808, 115 S. Ct. 851]* (*Schlup*).) The magistrate accordingly held an evidentiary hearing to determine whether Larsen's petition could be considered on the merits under *Schlup*. Larsen called three witnesses: James McNutt (Mr. McNutt), Elinore McNutt (Mrs. McNutt), and Brian McCracken. Larsen also presented declarations from two other witnesses: **[***7]** William Hewitt and Jorji Owen.

Mr. McNutt, a former police chief in North Carolina, testified he accompanied his wife to the Gold Apple bar to meet his stepson, Daniel, on the night of Larsen's arrest. Mr. McNutt parked his vehicle near Daniel and observed two men, Larsen and a man he heard Daniel call "Bunker" (Hewitt's moniker), arguing with Daniel. Mr. McNutt approached and "had words with" Hewitt from about two feet away. Hewitt wore a loose, short-sleeved shirt. After about two minutes, when Mr. McNutt heard someone yell the police had arrived, Mr. McNutt saw Hewitt throw something—an object he characterized as "probably" a knife—under a vehicle parked next to Daniel. The item was 10 to 12 inches long and made a "light metallic sound" when it hit the ground. When asked whether the item could have been a "copper weight," Mr. McNutt testified a copper weight would have made a different sound. Larsen, according to Mr. McNutt, "just went ahead, turned around, [and] walked normal" when the police arrived.[3]

Mrs. McNutt testified that as she and Mr. McNutt walked from their truck to the bar, she saw Larsen and a man she knew as Bunker approaching Daniel's car. She did not **[***8]** know Larsen, but she knew Hewitt's moniker because he had "come to the **[**571]** house" a week or two earlier. Hewitt was wearing a baggy Hawaiian shirt. Mrs. McNutt saw Larsen and Hewitt **[*118]** "hurrying" in a manner that "didn't look right" and she told Mr. McNutt something was "going on." Mrs. McNutt waited near her truck as Mr. McNutt approached Daniel's car. When someone yelled that the police had arrived, Mrs. McNutt saw Hewitt throw something under a car. She was not certain it was a knife, but it made a "metal, clank, skidding ... noise." Larsen, on the other hand, "just stood there, kind of, dumbfounded" and turned and walked away. Mrs. McNutt testified she did not see anything in Larsen's hands.

McCracken testified he was seated inside the bar before the incident in the parking lot. He knew Larsen and did not see Larsen with a knife that evening. But a different man, who McCracken did not know, approached him at the bar and they "had some words." The man flashed a knife and threatened McCracken. McCracken testified he had a "really clear" recollection of the knife and it looked "pretty similar" to a photo of a knife found in Larsen's trial attorney's file.

Hewitt's 2001 declaration, which **[***9]** was part of the evidence presented to the federal magistrate judge, admitted the knife found by the police was his. Owen's declaration (she was Hewitt's girlfriend at the time) averred Hewitt told her that Larsen was arrested for possession of Hewitt's knife and Hewitt sold his motorcycle to raise funds for Larsen's bail because he felt responsible for Larsen being in jail.

The magistrate judge's report and recommendation to

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[3] Police handcuffed Mr. McNutt but released him without asking what he had seen when they discovered he was a retired police officer.

the district court concluded Larsen satisfied the *Schlup* standard to have his petition considered on the merits. Among other things, the magistrate judge found the McNutts and McCracken to be credible witnesses. The judge found the McNutts were standing "at least as close, if not closer" to Larsen than Officers Townsend and Rex were, and "it appear[ed] that Mr. McNutt was standing between [Larsen] and the police officers." Moreover, unlike Officers Townsend and Rex, "who were looking through a chain link fence," the McNutts had an "unobstructed" view of Larsen and Hewitt. The McNutts both testified "unequivocally that it was [Hewitt], not [Larsen], who threw something metallic sounding under a nearby car." The magistrate judge found: "[H]ad the jury been able to **[***10]** consider this same evidence, 'no reasonable juror would [have found [Larsen]] guilty beyond a reasonable doubt.'"

The district court adopted the magistrate judge's findings, conclusions, and recommendations, which meant Larsen's petition would be considered on the merits.

2. *Habeas corpus relief and Larsen's release from custody*

The magistrate judge held a second evidentiary hearing on the merits of Larsen's petition. Among other things, Larsen's trial attorney testified Larsen **[*119]** told him, after conviction but before sentencing, that the McNutts were witnesses to what happened on the night in question. The trial attorney, who was disbarred in 2008, decided not to contact the McNutts and move for a new trial because he felt the trial judge was "pro prosecution" and worried that he might "screw up any chance [Larsen] ha[d] on appeal."

The magistrate judge found Larsen's trial counsel performed deficiently by failing to investigate and locate exculpatory witnesses. Specifically, the judge found counsel should have interviewed Daniel, a known witness who likely would have directed the attorney to his parents (the McNutts), and should have, in any event, moved for a new trial when Larsen later **[***11]** **[**572]** told him about the McNutts.[4] The magistrate judge further found Larsen was prejudiced by his attorney's ineffective assistance based on the judge's earlier analysis of the Attorney General's motion to dismiss the habeas corpus petition as untimely. The judge wrote: "[D]emonstrating prejudice under *Strickland [v. Washington] [(1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052]]* requires a lesser showing than that required to pass through the *Schlup* actual innocence gateway. As this court has already found that [Larsen] meets the more stringent *Schlup* test, it necessarily follows that he also satisfies the prejudice test under *Strickland*."

The district court adopted the magistrate judge's findings, conclusions, and recommendations; granted Larsen's petition; and ordered Larsen to be retried or released within 90 days. The Ninth Circuit Court of Appeals affirmed the district court's ruling in a published opinion and Larsen was released from prison in March 2013 without being retried.

D. *Larsen's Civil Suit*

In 2012—after the district court granted his habeas corpus petition but before he was released from custody—Larsen sued the City of Los Angeles, Officer Townsend, Officer Rex, and Detective Crocker for violating his civil rights. Larsen alleged the officers arrested him without **[***12]** probable cause and knowingly presented false evidence.

At trial on the civil complaint, Officers Townsend and Rex both maintained they saw Larsen with a knife. Neither recalled seeing anyone who looked like **[*120]** Mr. McNutt, who is six feet seven inches tall. Officer Rex did not recall seeing any women in the area. The deputy district attorney testified her office decided not to retry Larsen after his habeas corpus petition was granted because he had already served a longer sentence than could be imposed under existing law.

Hewitt testified he was using various narcotics around the time of Larsen's arrest in 1998 and had no memory of that night because he was high. He did, however, "always ha[ve] a weapon on [him]" during this period. Hewitt claimed he was "super high" when he signed his 2001 declaration and did not read it.

Larsen testified he was standing a few feet from Hewitt as he argued with Daniel, whom Larsen had met a

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[4] The magistrate judge rejected the Attorney General's contention that the McNutts' testimony was not credible. Discrepancies regarding the time at which the incident occurred, the judge reasoned, were "unremarkable" given that more than a decade had passed. The fact that the McNutts' testimony conflicted with Larsen's trial attorney's proffer that Larsen would testify that he threw the copper bar did not mitigate the prejudice to Larsen because it would be "unreasonable to assume [Larsen's trial attorney] would have made such an offer of proof knowing that the McNutts planned to offer testimony that apparently conflicted with it."

couple times. Hewitt was wearing a flannel shirt and had his hair pulled back in a ponytail. Larsen maintained he did not throw anything, but he saw Hewitt throw something when the police arrived. Larsen acknowledged he belonged to a gang at the time.

Mr. McNutt's account of **[***13]** the incident was substantially similar to his and Mrs. McNutt's testimony in the habeas corpus proceedings, with perhaps two noteworthy variances. He testified Hewitt threw a knife (as opposed to an object that was "probably" a knife) and he testified, for the first time, that Hewitt wore his hair in a ponytail (contradicting earlier testimony by Mrs. McNutt that Hewitt's hair was short).

The civil trial jury returned a complete defense verdict.

[573]** E. *Motion for a Finding of Factual Innocence*

In 2015, while his claim for compensation was pending before the Board, Larsen filed in federal district court a document styled as a "Motion/Request for Finding of Innocence." Citing *Douglas v. Jacquez (9th Cir. 2010) 626 F.3d 501, 504* and other authorities, the same magistrate judge that heard Larsen's habeas corpus petition ruled it had no jurisdiction to make such a finding notwithstanding a provision of California law that contemplated a court might make such a finding.

The magistrate judge also rejected Larsen's alternative proposal to construe his motion as a *Federal Rules of Civil Procedure, rule 60(b)(6) (28 U.S.C.)* request to clarify its previous order granting his habeas corpus petition. (The rule allows a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any **[***14]** "reason that justifies relief." (*Fed. Rules Civ. Proc., rule 60(b)(6), 28 U.S.C.*) The magistrate judge opined, "There was nothing vague or ambiguous about the Court's prior decisions in **[*121]** this matter." The court also remarked its *Schlup* order did not reach an "affirmative[] conclu[sion] that [Larsen] was actually innocent of possessing a dagger" and cited authority holding *Schlup* "'does not require absolute certainty about the petitioner's guilt or innocence.'"

The district court again accepted the magistrate judge's recommendation and denied Larsen's motion.

F. *The Board's Denial of Larsen's Claim*

In 2014, Larsen filed his claim for wrongful felony conviction and imprisonment, seeking compensation for 4,963 days in prison. The Board, believing itself unconstrained by several aspects of the federal court habeas corpus proceedings, denied Larsen's claim.

The Board first rejected Larsen's most consequential argument, i.e., that it must recommend compensation without holding a hearing of its own because the federal habeas corpus proceedings resulted in a determination of factual innocence. In the Board's view, no such finding was ever made because the pertinent California statute, *section 1485.55*, requires an affirmative finding of factual innocence and the *Schlup* ***[***15]*** finding that no reasonable juror would have convicted Larsen is "not at all equivalent to finding him innocent."

The Board additionally believed it was not bound by all the factual and witness credibility determinations made during the federal habeas corpus proceedings. The Board concluded it could not disregard the district court's finding that the McNutts provided credible testimony, but the Board believed it was bound only by the district court's findings in support of its order granting Larsen's habeas corpus petition—not the findings made when determining the untimely petition could proceed under *Schlup*. Thus, in practical terms, the Board accepted the district court's finding that "'the McNutts were credible and persuasive witnesses' whose informal statements and formal testimony 'maintained a consistent version of events,'" but the Board disregarded "the [court's] findings when ruling on *Schlup* that the McNutts had 'no apparent reason to perjure themselves,' they both 'had unobstructed views of [Hewitt] and [Larsen], unlike Townsend and Rex,' that Mr. McNutt 'was standing only two feet from [Hewitt] when [Hewitt] threw the object[,'] and it was 'unbelievable' that the McNutts would fly across **[***16]** the country 'to give perjurious testimony on behalf of [Larsen], with whom they have no ties.'"

The Board did recognize it was bound by the district court's finding that **[**574]** McCracken credibly testified that someone other than Larsen threatened him with a knife, but the Board emphasized this did not preclude a finding that **[*122]** Larsen possessed the knife (or a different knife) later that evening. The Board determined the district court made no findings as to the credibility of Hewitt's and Owen's declarations and, based on Hewitt's testimony at the civil trial, found neither declaration provided credible evidence of Larsen's innocence. The district court's only binding credibility finding as to Larsen himself, in the Board's view, related to his assertion that he learned of the McNutts' identities after his conviction.

The Attorney General also submitted exhibits in the Board proceedings including prison records and criminal history reports for Larsen, Hewitt, and Alfred, another son or stepson of the McNutts. These indicated, among other things, that Larsen and Alfred both had ties to neo-Nazi gangs. (Hewitt admitted he previously belonged to the same gang as Larsen in a 2015 deposition.) Although **[***17]** the allegation could not be corroborated, Alfred was investigated for allegedly directing an associate to solicit Larsen and Hewitt to kill two police officers in 1998. The Board stated it considered this evidence "solely ... to the extent it show[ed] that Larsen ran in the same social circles" as Hewitt, Alfred, and others.

Weighing the evidence, the Board found the McNutts must have been mistaken about who threw the knife because Officers Townsend and Rex had a compelling reason to focus on Larsen, whose shirt matched the description of the reported gunman. The officers were unlikely to have mistaken Larsen for Hewitt, the Board believed, because both McNutts testified Hewitt wore a different style of shirt. The Board also reasoned the officers, who had been partners for only a short time, did not know Larsen and had no motive to "frame" him. Additionally, the Board highlighted several other considerations to "bolster[]" its conclusion: (1) the prosecutor intended to retry Larsen but for a change in the law, (2) the jury appeared to have found the officers more credible than Mr. McNutt in the civil litigation, (3) Hewitt's association with Larsen made it "unlikely" Hewitt would **[***18]** have remained silent on the night of Larsen's arrest if the knife had been his, and (4) Larsen's account of the events preceding his arrest contradicted the credible testimony of other witnesses in several respects.

G. *Petition for Writ of Mandate*

Larsen challenged the Board's denial of compensation via a petition for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. The trial court found the Board erred in concluding it was not bound by the district court's *Schlup* findings because the district court's order granting Larsen's habeas corpus petition "essentially incorporated" those findings. The trial court determined the error was harmless, however, because even if the McNutts and McCracken testified credibly, Officers Townsend's **[*123]** and Rex's testimony established Larsen threw the knife. The trial court further reasoned that Larsen waived his argument that the Board's decision was not supported by substantial evidence and the argument lacked merit in any event.

II. DISCUSSION

As we shall discuss, the trial court should have granted Larsen's mandamus petition because the federal court's *Schlup* finding and the later grant of habeas corpus relief that resulted in Larsen's release from prison without retrial by **[***19]** the state amount to a finding of factual innocence that the Legislature intended to be binding, and to **[**575]** preclude holding a Board hearing.[5] In concluding otherwise, the Board did not accord the *Schlup* finding the significance it deserves and the Board construed section 1485.55, subdivision (a) (hereafter section 1485.55(a)) in a manner that undermines the Legislature's intent and effectively renders the statutory provision inoperative in practice.

A. *California's Exonerated Inmate Compensation Statutes*

"California has long had a system for compensating exonerated inmates for the time they spent unlawfully imprisoned." (People v. Etheridge (2015) 241 Cal.App.4th 800, 806 [194 Cal. Rptr. 3d 308].) The Board "is vested with the power to recommend to the Legislature that an inmate be compensated if it finds the inmate eligible under the statutory scheme." (*Ibid.*)

HN1[↑] CA(1)[↑] **(1)** A person may present a claim to the Board "for the pecuniary injury sustained by him or her through ... erroneous conviction and imprisonment or incarceration" when "the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant." (*§ 4900*; see also *§ 4904*.) If the evidence shows the claimant "has sustained injury through his or her erroneous conviction and imprisonment, the **[***20]** [Board] shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The amount of the appropriation recommended shall **[*124]** be a sum equivalent to one

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[5] Although Larsen made this argument to the Board and in his writ petition commencing the mandamus proceedings, he did not raise it in his trial brief and the trial court did not consider it in its ruling. We believe the point was sufficiently raised to permit appellate review. It is also a purely legal issue involving a matter of public interest that we would have discretion to resolve. (Bialo v. Western Mutual Ins. Co. (2002) 95 Cal.App.4th 68, 73 [115 Cal. Rptr. 2d 3]; Nguyen v. Applied Medical Resources Corp. (2016) 4 Cal.App.5th 232, 258 [209 Cal. Rptr. 3d 59].)

hundred forty dollars ($140) per day of incarceration served ... ."[6] (*§ 4904.*) As we next discuss, the findings made by a court granting habeas corpus relief determine both whether a Board hearing is necessary and the scope of the Board's duties.

HN2[↑] Section 1485.55 describes the circumstances under which court findings in postconviction litigation are binding on the Board and require an automatic recommendation for compensation to the Legislature. Under subdivision (a) of the statute—the key provision for our purposes[7]—the Board "shall, without a hearing, recommend to the Legislature that an appropriation **[**576]** be made and the claim paid" when "[i]n a contested proceeding ... the court has granted a writ of habeas corpus ... and ... has found that the person is factually innocent."[8] (§ 1485.55(a); see also § 4902, subd. (a).)

In all other cases—i.e., in the absence of a court finding of factual innocence—a hearing is required. (§ 4903, subd. (a).) Certain findings made in earlier court proceedings are still **[***21]** binding on the Board at such a hearing, but the Board is not bound to recommend compensation. (See, e.g., §§ 4903, subd. (b) ["In a hearing before the [B]oard, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus ... shall be binding on the Attorney General, the factfinder, and the [B]oard"], 1485.5, subd. (c) ["In a contested or uncontested proceeding, the express factual findings made by the court [meaning a state or federal court (§ 1485.5, subd. (e))], including credibility determinations, in considering a **[*125]** petition for habeas corpus ... shall be binding on the Attorney General, the factfinder, and the ... Board"].)

B. Schlup *and Innocence*

The resolution of this appeal turns on two questions: (1) what does Schlup, supra, 513 U.S. 298 require a federal court to find to avoid an otherwise applicable procedural bar to a habeas corpus petition and (2) does that finding satisfy what the Legislature meant by "factually innocent" in section 1485.55(a)? We begin with the first of these two, carefully parsing *Schlup* and briefly discussing its progeny.

As a general rule, claims that are forfeited under state law or are otherwise procedurally barred "may support federal habeas corpus relief only if the prisoner demonstrates **[***22]** cause for the default and prejudice from the asserted error." (House v. Bell (2006) 547 U.S. 518, 536 [165 L. Ed. 2d 1, 126 S. Ct. 2064] (House); see also Schlup, supra, 513 U.S. at pp. 318–319.) An exception to the general rule applies, however, when a petitioner "falls within the 'narrow class of cases ... implicating a fundamental miscarriage of justice.'" (Schlup, supra, at pp. 314–315.) The high court in *Schlup* considered whether a "claim of innocence" by the habeas corpus petitioner in that case was sufficient to satisfy the fundamental miscarriage of justice standard and thereby permit a federal court to decide his ineffective assistance of counsel and Brady v. Maryland (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194] claims of constitutional error even though he did not raise them in an earlier filed habeas corpus petition. (Schlup, supra, at pp. 301, 314.)

Schlup presented evidence he was "actually innocent" of the prison murder for which he had been found guilty and sentenced to death. (Schlup, supra, 513 U.S. at p. 307 [referencing, among other things, "numerous

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[6] Board recommendations for compensation are just that, recommendations. Legislators can—and do—vote against bills making appropriations for the payment of such claims, as evidenced by two votes cast against a recent appropriations bill. (Sen. Bill No. 417 (2019–2020 Reg. Sess.) [bill appropriating $5,087,040 to seven claimants passed by vote of 31 to two in the Senate].)

[7] Another subdivision, section 1485.55, subdivision (e), makes specific reference to habeas corpus proceedings in federal court: "If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the [B]oard shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to ***Section 4904***." We invited the parties to address, in supplemental briefing, whether subdivision (e) is the governing statutory provision in this case. The parties agree it is not.

[8] Section 1485.55, subdivision (b) separately permits a habeas corpus petitioner, when "the court has granted a writ of habeas corpus," to "move for a finding of factual innocence by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner." Subdivision (b) applies to contested and uncontested habeas corpus proceedings (whereas subdivision (a) applies only to contested proceedings) and subdivision (b) includes the "preponderance of the evidence" language that subdivision (a) does not. A finding of factual innocence under subdivision (b) is binding on the Board and requires a recommendation for compensation just as a subdivision (a) finding does. (§ 1485.55, subd. (c).)

affidavits from inmates attesting to Schlup's innocence"].) The district court evaluating the habeas corpus petition applied a stringent standard for evaluating Schlup's actual innocence showing **[**577]** —the so-called *Sawyer*[9] standard that requires clear and convincing proof—and the principal issue the United States Supreme Court resolved was whether the district court should have used that standard or a lower **[***23]** standard espoused in another precedent, *Murray v. Carrier (1986) 477 U.S. 478 [91 L. Ed. 2d 397, 106 S. Ct. 2639]* (*Carrier*).

The high court held the district court erred and should have used the *Carrier* standard of proof, namely, whether a "'constitutional violation has **[*126]** probably resulted in the conviction of one who is actually innocent.'" (*Schlup, supra, 513 U.S. at pp. 326–327*, quoting *Carrier, supra, 477 U.S. at p. 496*; *Schlup, at p. 332* [remanding for further factual development].) "To establish the requisite probability," the Supreme Court held, "the [habeas corpus] petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence [of actual innocence]." (*Schlup, supra, at p. 327*; see also *ibid.* ["To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"].) Significantly for our purposes, the *Schlup* court treated the *Carrier* standard it adopted to govern actual innocence claims like Schlup's as functionally equivalent to the standard applied in *Kuhlmann v. Wilson (1986) 477 U.S. 436 [91 L. Ed. 2d 364, 106 S. Ct. 2616]*—a companion case decided on the same day as *Carrier* that used the term "colorable claim of factual innocence" rather than *Carrier*'s "actually innocent" terminology. (*Schlup, supra, at p. 322* ["The *Kuhlmann* plurality, though using the term 'colorable **[***24]** claim of factual innocence,' elaborated that the petitioner would be required to establish, by a '"fair probability,"' that '"the trier of the facts would have entertained a reasonable doubt of his guilt"'"].)

The *Schlup* court additionally clarified that the *Carrier* standard does not require, or permit, a district court to make its own "independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." (*Schlup, supra, 513 U.S. at p. 329*; see also *ibid.* ["The meaning of actual innocence as formulated by *Sawyer* and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that *no reasonable juror would have found the defendant guilty*" (italics added)].) The *Schlup* court further explained—and this is again important for our purposes—that the reasonable doubt focus of *Carrier*'s actual innocence standard "reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt." (*Schlup, supra, at p. 328*; *ibid.* ["Thus, whether a court is assessing **[***25]** eligibility for the death penalty under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under *Carrier*, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence"]; see also *id. at p. 328, fn. 47* ["Actual innocence, of course, does not require innocence **[**578]** in the broad sense of having led an entirely blameless life"].)

The high court in *Schlup* also distinguished its adoption of the *Carrier* standard from a different standard of actual innocence discussed in another of its precedents, *Herrera v. Collins (1993) 506 U.S. 390 [122 L. Ed. 2d 203, 113 S. Ct. 853] (Herrera)*. In that case, the high court assumed habeas corpus **[*127]** relief may be available for a defendant sentenced to death after "entirely fair and error[-]free" criminal proceedings if the defendant could nevertheless show by new evidence that he or she were actually innocent of the crime. (*Schlup, supra, 513 U.S. at p. 314*; see also *House, supra, 547 U.S. at p. 554*; *Herrera, supra, at p. 417* ["We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas corpus relief if there were no state avenue open to process such a claim"].)

The Supreme **[***26]** Court explained a *Herrera*-based claim and a claim of the type presented by Schlup both require presentation of evidence of actual innocence that is distinct from asserted legal error at trial. (*Schlup, supra, 513 U.S. at p. 324* [a credible *Schlup*-type claim of actual innocence "requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence,

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[9] *Sawyer v. Whitley (1992) 505 U.S. 333, 336 [120 L. Ed. 2d 269, 112 S. Ct. 2514]* (*Sawyer*) [a petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"].

trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial"]; *id. at p. 316* ["[I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims"].) But the court contrasted Schlup's "procedural" claim of innocence (i.e., a showing to enable review of his claims of constitutional error at trial) with the "substantive" claim of innocence discussed in *Herrera* (a showing assuming trial and sentencing were free from prejudicial error) and explained evidence of innocence adduced by a petitioner like Schlup "need **[***27]** carry less of a burden." (*Id. at pp. 314–316.*) Specifically, the Supreme Court explained a *Herrera*-type claim would have to fail unless a federal habeas corpus court is convinced that new facts "unquestionably establish ... innocence" while a *Schlup*-type innocence showing is evaluated using the aforementioned *Carrier* standard: whether it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. (*Id. at p. 317* ["[I]f the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims"].)

Though the high court explained a *Schlup*-type innocence showing is not so high as a *Herrera* "unquestionabl[e]," "extraordinarily high" showing (*Schlup, supra, 513 U.S. at pp. 316, 317*; see *Herrera, supra, 506 U.S. at [*128] p. 417*), the Supreme Court repeatedly emphasized the *Carrier*-based requirement for a claim of actual innocence like Schlup's is still quite demanding—so much so that substantial claims of such innocence are rarely advanced and even more rarely successful. (*Schlup, supra, at p. 321* ["[H]abeas corpus petitions **[***28]** that advance a substantial claim of actual innocence are **[**579]** extremely rare. Judge Friendly's observation a quarter of a century ago that 'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime' remains largely true today" (fn. omitted)]; *id. at p. 321, fn. 36* ["Indeed, neither party called our attention to any decision from a Court of Appeals in which a petitioner had satisfied any definition of actual innocence. Though some decisions exist [citations], independent research confirms that such decisions are rare"]; *id. at p. 324* [because new, reliable evidence of actual innocence "is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful"].) In light of the observed rarity of substantial claims of actual innocence like Schlup's, the Supreme Court was unconcerned with threats to judicial resources, finality, and comity that collateral attacks on state court judgments might otherwise pose. (*Id. at p. 324.*)

United States Supreme Court cases following *Schlup* continued to emphasize the demanding nature of the actual innocence showing that case requires and the rarity with which such showings are made. (*McQuiggin v. Perkins (2013) 569 U.S. 383, 386 [185 L. Ed. 2d 1019, 133 S. Ct. 1924] (McQuiggin)* [the "convincing showing of actual **[***29]** innocence" required under *Schlup* is a "'demanding'" standard and "tenable actual-innocence gateway pleas are rare"]; *House, supra, 547 U.S. at p. 522* [*Schlup* permits merits review of procedurally barred claims in "certain exceptional cases involving a compelling claim of actual innocence"]; *Bousley v. United States (1998) 523 U.S. 614, 623 [140 L. Ed. 2d 828, 118 S. Ct. 1604]* (*Bousley*).) At the same time, the cases also recognize that "conclusive exoneration" is not required. (See, e.g., *House, supra, at p. 553.*) Rather, under *Schlup*, a petitioner must demonstrate it is "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt" (*House, supra, at p. 538*), and such a finding demarcates the legal boundary between guilt and innocence (*Schlup, supra, 513 U.S. at p. 328*).

C. *The Board Should Have Recommended Compensation Without a Hearing, and a Recent Case That Would Support a Contrary Conclusion Is Not Persuasive*

We come now to the second of the questions outlined earlier: whether a *Schlup* innocence finding as just described is tantamount to what the Legislature meant by "factually innocent" as used in *section 1485.55(a)*. To reiterate, that provision reads: "In a contested proceeding, if the court has granted a **[*129]** writ of habeas corpus ... and if the court has found that the person is factually innocent, that finding shall be binding on **[***30]** the ... Board for a claim presented to the [B]oard, and upon application by the person, the [B]oard shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to *Section 4904*."

CA(2)[↑] **(2)** Other subdivisions in *section 1485.55* use

the term "factually innocent" as well, and these subdivisions further specify that a court finding of factual innocence must be made by a preponderance of the evidence. (See, e.g., *§§ 1485.55, subd. (c)* ["If the court makes a finding that the petitioner has proven their factual innocence by a preponderance of the evidence pursuant to *subdivision (b)*, the [B]oard shall, without a hearing, recommend to the Legislature that an appropriation be made"], *1485.55, subd. (e)* ["If a federal court, after granting a writ of habeas corpus ... finds a petitioner factually innocent **[**580]** by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the [B]oard shall, without a hearing, recommend to the Legislature that an appropriation be made"].) ***HN3***[↑] Larsen not unreasonably argues the Legislature's use of somewhat different language in *section 1485.55(a)* is intentional and should be read to indicate *section 1485.55(a)* carries **[***31]** a different meaning, but we think the better view is that all the statutory subdivisions mean the same thing: a court finding of factual innocence must be made by at least a preponderance of the evidence and must reflect a determination that the person charged and convicted of an offense did not commit the crime. ***CA(3)***[↑] **(3)** (*Katie V. v. Superior Court (2005) 130 Cal.App.4th 586, 594 [30 Cal. Rptr. 3d 320]* ***HN4***[↑] ["When a statute is silent on the standard of proof, the preponderance of the evidence standard ordinarily applies," citing *Evid. Code, § 115*]; see also *Pasadena Police Officers Assn. v. City of Pasadena (1990) 51 Cal.3d 564, 575 [273 Cal. Rptr. 584, 797 P.2d 608]* [courts should strive to harmonize statutory sections relating to the same subject to the extent possible].) The question still remains, however, whether a *Schlup* innocence finding coupled with a later grant of habeas corpus relief that results in the permanent release of a prisoner from custody satisfies *section 1485.55(a)* as so understood.[10]

CA(4)[↑] **(4)** Pursuant to well-settled law, we presume the Legislature was aware of the high court's holding in *Schlup* (and its progeny) when it amended *section 1485.55* in 2016 to read (in pertinent part) as it does today. (*Leider v. Lewis (2017) 2 Cal.5th 1121, 1135 [218 Cal. Rptr. 3d 127, 394 P.3d 1055]* ***HN5***[↑] ["We presume the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted"]; *People v. Giordano (2007) 42 [*130] Cal.4th 644, 659 [68 Cal. Rptr. 3d 51, 170 P.3d 623]* ["The Legislature is presumed to be aware of '"judicial decisions already in existence, and to have enacted or **[***32]** amended a statute in light thereof."'"]; see also Stats. 2016, ch. 785, § 3.) That makes our job easier: we need only compare the text and history of *section 1485.55(a)* with a rigorous exegesis of *Schlup* to see if a *Schlup* finding is within the scope of what the Legislature intended as a court finding of factual innocence that would obviate the need for a Board hearing. For the reasons that immediately follow, it is; the *Schlup* standard and the text and history of *section 1485.55(a)* match remarkably well.

Beginning at just a surface level analysis, the high court itself in *Schlup* explains that the finding of "actual innocence" it requires to overcome an otherwise applicable procedural bar is functionally the same as a showing of "factual innocence." As highlighted in our earlier parsing of *Schlup*, the Supreme Court explained the *Carrier* standard of proof it adopted for claims of innocence like Schlup's was functionally no different than the "'colorable claim of factual innocence'" standard in the *Kuhlmann* case decided on the same day as *Carrier*. (*Schlup, supra, 513 U.S. at p. 322* ["In addition to linking miscarriages of justice to innocence, *Carrier* and *Kuhlmann* also expressed the standard of proof that should govern consideration of those claims. In *Carrier*, for **[***33]** example, the Court stated that the petitioner must show that the constitutional error 'probably' resulted in the conviction **[**581]** of one who was actually innocent. The *Kuhlmann* plurality, though using the term 'colorable claim of factual innocence,' elaborated that the petitioner would be required to establish, by a "'fair probability,"' that "'the trier of the facts would have entertained a reasonable doubt of his guilt'"']; see also *Bousley, supra, 523 U.S. at p. 623* ["'actual innocence' means factual innocence, not mere legal insufficiency"].) The Legislature therefore would have been aware that, as a matter of terminology, using "factually innocent" in *section 1485.55(a)* would not have meant something different than *Schlup*'s use of "actually innocent."

Proceeding beneath the surface, *Schlup*'s requirements for what a habeas corpus petitioner must do as a matter of practice to obtain relief closely resembles a preponderance of the evidence showing that the petitioner—factually—is not the person who committed the crime of conviction. Start, for instance, with the evidentiary burden. *Section 1485.55(a)* as we construe it requires a showing of innocence by a preponderance

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[10] By "permanent" we mean only that there is no subsequent conviction that results in the petitioner's reincarceration for the same conduct for which the petitioner was previously in custody.

of the evidence. The *Schlup* standard requires a petitioner to show a constitutional violation **[***34]** has "probably" resulted in the conviction of one who is actually innocent and this probability is measured by whether it is "more likely than not" (*Schlup, supra, 513 U.S. at p. 327*)—which is, of course, the preponderance of the evidence standard. In addition to this identical evidentiary burden, *Schlup* also makes clear that the requisite showing of innocence must be fact-based in the sense **[*131]** of being *separate from claims of legal error at trial* and grounded in new, reliable evidence. (*Schlup, supra, at p. 324* ["[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. [Citation.] To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial"].) This new, reliable evidence of innocence that is distinct from assertions of constitutional error must be so strong that "no reasonable juror" would have convicted the petitioner in light of the new evidence. (*Id. at p. 327*; see also *House, supra, 547 U.S. at p. 571* (dis. opn. of Roberts, J.) [under *Schlup*, "House must present such compelling evidence of **[***35]** innocence that it becomes more likely than not that no single juror, acting reasonably, would vote to convict him"].) Putting these elements together, a court making a *Schlup* finding determines that new facts (i.e., new, reliable evidence bearing on the crime of conviction) make it more likely than not that no reasonable juror would vote to convict. And importantly, *Schlup* explains that this juror-determination-based standard "reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt." (*Schlup, supra, at p. 328*.) The Legislature, aware of *Schlup* in enacting and amending *section 1485.55*, would have known this, and there is accordingly no reason to believe the Legislature intended to prevent a fact-based showing predicated on this firmly established legal boundary from answering the question of whether a former prisoner now released from custody committed the crime of conviction.[11]

[582]** Our conclusion that *HN7*[↑] a court's *Schlup* finding coupled with a permanent release from custody pursuant to a writ of habeas corpus satisfies the requirements of *section 1485.55(a)* is thus apparent on the face of the statute and *Schlup* itself. It also flows equally **[***36]** from the legislative history of Senate Bill No. 1134 (2015–2016 Reg. Sess.) (Senate Bill 1134) the bill that (1) amended *section 1485.55* as relevant for our purposes and (2) adopted a new standard for deciding habeas corpus petitions that seek relief based on new evidence.
[*132]

Prior to Senate Bill 1134's enactment, a prisoner in California could obtain state habeas corpus relief based on newly discovered evidence that "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." (*In re Hardy (2007) 41 Cal.4th 977, 1016 [63 Cal. Rptr. 3d 845, 163 P.3d 853]*; accord, *In re Lawley (2008) 42 Cal.4th 1231, 1238 [74 Cal. Rptr. 3d 92, 179 P.3d 891]*.) Former *section 1485.55(a)* mirrored this common law standard: "In a contested proceeding, if the court grants a writ of habeas corpus concerning a person who is unlawfully imprisoned or restrained, ... , and if the court finds that new evidence on the petition *points unerringly to innocence*, that finding shall be binding on the [Board] for a claim presented to the [B]oard, and upon application by the person, the [B]oard shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid ... ." (Stats. 2013, ch. 800, § 3, italics added.)

In addition to amending *section 1485.55(a)* in the manner relevant for our purposes, Senate Bill 1134 also codified a new standard to govern court determinations of whether habeas corpus relief **[***37]** should be granted. Specifically, Senate Bill 1134 amended the pertinent Penal Code provision to permit courts to grant habeas corpus petitions presenting "[n]ew evidence ... that is credible, material, presented without substantial delay, and of such decisive force and value that *it would have more likely than not changed the outcome at trial*." (*§ 1473, subd. (b)(3)(A)*, italics added.) In what legislative reports described as a "conforming" change

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[11] *CA(5)*[↑] **(5)** We of course have no quarrel with the general concept that a jury's acquittal of a defendant after considering evidence admitted during a criminal trial is not a determination that the defendant is innocent, only that he or she is "not guilty." But here we are concerned with the concept of innocence as used in a specialized area of the law—and, particularly, how the Legislature and the *Schlup* court understood "innocence" in postconviction litigation. *HN6*[↑] For purposes of *section 1485.55(a)*, and for the reasons already given, the Legislature's concept of factual innocence encompasses a *Schlup* innocence finding, i.e., that the person charged probably did not commit the crime and hence no juror would convict him or her.

(see, e.g., Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1134 (2015–2016 Reg. Sess.) Aug. 3, 2016, p. 3; Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1134 (2015–2016 Reg. Sess.) Apr. 5, 2016, p. 6), Senate Bill 1134 similarly replaced former section 1485.55(a)'s reference to a "find[ing] that new evidence ... points unerringly to innocence" with the current text that refers to a "[finding] that the person is factually innocent."

This history demonstrates the Legislature intended to lower the threshold at which a court finding would obviate the need for a Board hearing, to preserve the link between the test for granting habeas corpus relief based on new evidence on the one hand and entitlement to compensation without a Board hearing on the other, and to consider what a trial **[***38]** jury would do as the line demarcating guilt and innocence. (See, e.g., Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1134, *supra*, Apr. 5, 2016, p. 5 [author's statement that the bill was intended "to bring California's innocence standard into line with the vast majority of other states' standards, forty-three in total, and to **[**583]** bring it closer in line with other postconviction standards for relief such as ineffective assistance of counsel, or prosecutorial misconduct, and not so unreasonably high"]; Sen. Com. on Appropriations, Analysis of Sen. Bill No. 1134 (2015–2016 Reg. Sess.) Apr. 18, 2016, p. 1 [amendments to §§ 1473, subd. (b)(3) and 1485.55(a) would work in tandem because "[p]otential **[*133]** increases in the number of claims submitted for review [in light of the lower standard for new evidence-based habeas corpus relief] are estimated to be offset in whole or in part by the reduced workload resulting from potentially fewer required hearings in order to recommend an appropriation for claims prospectively"].) Treating a *Schlup* finding combined with later habeas corpus release from custody as satisfying the new Senate Bill 1134-created section 1485.55(a) threshold is fully consistent with the intent suggested by the legislative **[***39]** materials because a habeas corpus court's finding that new evidence "would have more likely than not changed the outcome at trial" under section 1473, subdivision (b)(3) is arguably a lesser showing than *Schlup*'s no reasonable juror would convict standard—and certainly no greater.

The realities of habeas corpus practice further cement our conclusion that HN8[↑] a compensation recommendation without a Board hearing under section 1485.55(a) is required by a grant of habeas corpus relief following a *Schlup* finding. As *Schlup* and subsequent cases repeatedly emphasize, it is "extremely rare" that a habeas corpus petitioner advances a substantial claim of innocence and rarer still that these actual innocence claims actually succeed. (*Schlup, supra, 513 U.S. at pp. 321 & fn. 36, 324*; accord, *McQuiggin, supra, 569 U.S. at p. 386* ["tenable actual-innocence gateway pleas are rare"]; see *House, supra, 547 U.S. at p. 538*.) If a Board hearing is nevertheless required even in the circumstance where a court concludes a habeas corpus petitioner has succeeded in making the extremely rare and demanding *Schlup* innocence showing, section 1485.55(a) is practically dead letter; we can fathom few if any circumstances in which a court in habeas corpus proceedings must make a more definitive pronouncement of innocence than the pronouncement *Schlup* requires. Indeed, a *Herrera, supra, 506 U.S. at p. 417* finding of "unquestionabl[e]" innocence **[***40]** is all that immediately comes to mind, but at least so far, *Herrera* innocence claims are legal unicorns: assumed for argument's sake to be viable by some courts (see, e.g, *McQuiggin, supra, 569 U.S. at p. 392*) but never seen as the ultimately successful predicate for the grant of habeas corpus relief.

Treating habeas corpus relief after a *Schlup* finding as insufficient to satisfy the factual innocence criterion in section 1485.55(a) accordingly makes no practical sense, especially in light of the already discussed evidence that the Legislature intended to broaden the circumstances in which a recommendation for compensation would be made without a Board hearing. In addition, concluding habeas corpus relief after a *Schlup* finding does not meet the section 1485.55(a) test is also inconsistent with the legislative intent, identified in *Madrigal v. California Victim Comp. & Government Claims Bd. (2016) 6 Cal.App.5th 1108 [212 Cal. Rptr. 3d 60]*, "to streamline the compensation **[*134]** process and ensure consistency between the Board's compensation determinations and earlier court proceedings related to the validity of a prisoner's conviction."[12] (*Madrigal, at p. 1118*.)

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[12] The magistrate judge's denial of Larsen's motion for a finding of innocence does not undermine the conclusion we reach. The court denied the motion because it had no jurisdiction to grant it, and without jurisdiction, the court had no proper basis to reach the merits of the motion. The magistrate judge also rejected Larsen's alternative request to "clarify" its previous order granting his habeas corpus petition so as to predetermine the then-pending claim for compensation before the Board, but this is no more than an unremarkable example of the cardinal principle of judicial restraint. (*PDK Laboratories Inc. v. United States Drug Enforcement Administration (D.C. Cir. 2004) 362 F.3d 786, 799* (conc. opn. of Roberts, J.) ["if it is

[584]** A recent Court of Appeal opinion, however, reaches a conclusion contrary to ours on the identical issue presented. (*Souliotes v. California Victim Comp. Bd. (2021) 61 Cal.App.5th 73 [275 Cal.Rptr.3d 489]* (*Souliotes*).) The *Souliotes* court determined the Board properly held a compensation hearing and denied **[***41]** compensation to a habeas corpus petitioner who succeeded in making a *Schlup* actual innocence showing in federal court and was later released from prison on a writ of habeas corpus. (*Id. at pp. 79–80*; but see *id. at p. 80* [explaining the petitioner, after the grant of habeas corpus relief, entered no contest pleas to involuntary manslaughter charges to avoid retrial].) The rationale animating the result reached in *Souliotes* is not persuasive.

Beginning where we agree, the *Souliotes* court concluded, after fairly lengthy discussion, that *section 1485.55(a)*'s "factually innocent" language means the same thing as the slightly different language that appears in other subdivisions of *section 1485.55* (i.e., that a petitioner was found by a preponderance of the evidence not to have committed the crime charged). (*Souliotes, supra, 61 Cal.App.5th at pp. 89–90.*) We have already explained that is indeed the best view of the statutory scheme. Apparently overlooked in *Souliotes*, however, are the features and implications of the *Schlup* opinion's analysis. The *Souliotes* court also casts aside good evidence of the Legislature's intent in amending *section 1485.55* without good reason. We will elaborate.

Souliotes rightly acknowledges that "the terms 'actual innocence' and 'factual innocence' are used interchangeably" **[***42]** (*Souliotes, supra, 61 Cal.App.5th at p. 76*), but it does not mention *Schlup* itself understands the **[*135]** two terms to be functionally equivalent, as evidenced by the discussion of *Kuhlmann* and *Carrier*. Though not alone dispositive, that is a significant point in favor of the conclusion we have already drawn, i.e., that *section 1485.55(a)*'s "factual innocence" requirement should not be read to exclude a *Schlup* "actual innocence" finding. The key reckoning with *Schlup* in *Souliotes* instead comes in two sentences and a single citation: "In other words, 'actual innocence' as used in a *Schlup* gateway finding is a finding that the petitioner could not be found guilty, beyond a reasonable doubt, of the crime in question and therefore is presumed innocent. But it is not a factual finding that the petitioner did not commit the crime in question. (See *House, supra, 547 U.S. at p. 538*[] [in determining whether to allow a petitioner to pass through the *Schlup* gateway, '[t]he court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors'].)" **[**585]** (*Souliotes, supra, at p. 88.*)

This reasoning, in our view, is flawed. As we have already explained, a *Schlup* innocence finding is a factual finding—it is separate from constitutional **[***43]** error asserted as the grounds for habeas corpus relief and it must be based on new, reliable evidence. It is also a fact-based finding that must clear a high threshold, namely, that it is more probable than not no juror aware of the new evidence would vote to convict. A court that makes such a determination of innocence does not "presume[]" the habeas corpus petitioner innocent. Rather, there already exists a judgment of conviction after a criminal trial and a court must decide whether the petitioner's *evidentiary* showing of innocence is sufficiently strong to overcome the interest in preserving the finality of that judgment via an otherwise procedurally barred habeas corpus petition.[13]

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not necessary to decide more, it is necessary not to decide more"].) The magistrate judge was required to decide—and did decide—whether *Schlup* permitted reaching Larsen's claims on the merits, but the judge abstained (appropriately) from deciding any more than necessary. As we have explained, what the court already had to decide and did decide was enough for *section 1485.55(a)* purposes. Further, even taking the magistrate judge's observations on their own terms, the judge rejected Larsen's motion apparently believing he was seeking an affirmative finding of innocence in the *Herrera* sense.

[13] *Souliotes*'s citation to *House* ***[***44]*** as authority for its contrary view is not convincing, as the weaker "see" signal tends to reveal. A reading of the full context for the quoted statement in *House* confirms that the Supreme Court was not saying courts do not make factual determinations about whether a habeas corpus petitioner committed the charged crime when confronted by a *Schlup* actual innocence claim. Rather, the high court was merely describing how *Schlup*'s high standard of proof should operate in practice, namely, a court should not decide itself whether the evidence of innocence is compelling but should instead consider whether any single juror could reasonably vote to convict after considering the new evidence. (*House, supra, 547 U.S. at pp. 537–538* ["Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider '"all the evidence,"' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.' [Citation.] Based on this total record, the

Particularly when "proof beyond a reasonable doubt **[*136]** marks the legal boundary between guilt and innocence" in postconviction litigation, a finding that evidence of the petitioner's innocence is so strong that it is more likely than not that no reasonable juror would vote to convict, when coupled with a habeas corpus petitioner's release from custody, is a more likely than not determination that the petitioner released did not commit the crime charged—as contemplated by the Legislature in section 1485.55(a).

Souliotes also treats as unconvincing the legislative history evidence we have already reviewed—in particular, the parallels between the changes to section 1473's standards for granting a habeas corpus petition based on new evidence and the "conforming" amendments made to section 1485.55(a). Souliotes's reasons for refusing to find this history illuminating are not sound.

Souliotes concedes there is "no doubt that the Legislature intended to broaden the class of innocence findings subject to section 1485.55(a)" but concludes it "goes too far" to "suggest[] that the amendment of that provision necessarily expands the class to include *Schlup* gateway findings." (Souliotes, supra, 61 Cal.App.5th at p. 92.) The argument appears to rest on the incomplete understanding of *Schlup* that we have already highlighted, and it does not reckon with one of the key points shown by Senate Bill 1134's simultaneous amendment of section 1473 and section 1485.55(a): factual innocence showings, including **[**586]** a demonstration of whether a compensation claimant committed the crime charged, are to be judged by reference to what a trial jury would do. (Stats. 2016, ch. 785, § 1 [amending § 1473, subd. (b)(3)(A) by replacing the former "points unerringly to innocence" language with language that only requires evidence to be "of such decisive force and value that **[***45]** it would have more likely than not changed the outcome at trial"]; Stats. 2016, ch. 785, § 3 [analogously striking former § 1485.55(a)'s reference to a "find[ing] that new evidence ... points unerringly to innocence" in favor of the current text that refers to a "[finding] that the person is factually innocent"].) That focus on what jurors would do in light of new evidence is fully consistent with, and satisfied by, what a court determines when concluding a *Schlup* innocence showing has been made.

Remarkably, the *Souliotes* court does recognize "the sponsors of [Senate Bill] 1134 may have intended the bill to amend section 1485.55 to require the Board, without holding a hearing, to recommend the grant of compensation for a *section 4900* claim to a person who had obtained a finding by a habeas court that it is more likely than not that a jury would not find the person guilty beyond a reasonable doubt," but the *Souliotes* court concludes Senate Bill 1134 "did not accomplish this" and reasons it is "bound by the *expressed* language of the Legislature's enactment." (Souliotes, supra, 61 Cal.App.5th at p. 93.) This "may have intended" reference is a significant understatement, but even on its own terms, the argument falters. The judiciary **[*137]** is a coordinate branch of government, not a bureau of **[***46]** exam proctors. The plain text of section 1485.55(a) does not foreclose the conclusion we reach, and if the intent of the Legislature can be discerned, which it can be here for the various reasons we have given—as even *Souliotes* seems to see, we do not disregard that intent because the Legislature did not accomplish its intention in the manner we deem best.

CA(6)[↑] **(6)** We are, in short, convinced the Legislature did not go to the trouble of enacting and amending section 1485.55(a) to require in habeas corpus proceedings an evidentiary showing so demanding and a court finding so rare as to be essentially impossible. Rather, returning to one point where we agree with *Souliotes*, "we have no doubt that the Legislature intended to broaden the class of innocence findings subject to section 1485.55(a)." (Souliotes, supra, 61 Cal.App.5th at p. 92.) HN9[↑] A habeas corpus petitioner who makes a showing of actual innocence strong enough to convince a court to entertain an otherwise procedurally barred collateral attack on a final judgment and who then wins permanent release from prison on a writ of habeas corpus has been found factually innocent by a preponderance of the evidence. That is what Larsen did here, and the Legislature intended the Board to defer to the considered court findings that led to this **[***47]** point. It was error to hold a hearing when compensation should have been recommended automatically.

DISPOSITION

The judgment is reversed and the matter is remanded to

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court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.' [Citation.] The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors"]; see also Bousley, supra, 523 U.S. at p. 623 ["'actual innocence' means factual innocence, not mere legal insufficiency"].)

the trial court to enter a new judgment reversing the Board's order denying Larsen's compensation claim and directing the Board to recommend, pursuant to *section 4904*, that an appropriation be made and Larsen's claim paid. Appellant shall recover his costs on appeal.

Rubin, P. J., and Moor, J., concurred.

On June 1, 2021, opinion was modified to read as printed above and respondent's petition for review by the Supreme Court was granted August 25, 2021, S269406. On September 21, 2022, review was dismissed.

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