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

9 In the Matter of the Claim of:

10 **Kenneth Marsh**

11 Claim No. G 550140

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

12 A hearing on this claim was held December 5 through 8, 2005, in Sacramento, California,
13 by Kyle Hedum, Hearing Officer, who was assigned to hear this matter by the Executive Officer of the
14 Victim Compensation and Government Claims Board (Board).
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16 Attorneys Donnie Cox, Dennis Atchley, Thor Emblem, and Tracy Emblem represented
17 claimant Kenneth Marsh (Marsh.)

18 Deputy Attorney General James Dutton represented the California Attorney General (AG).

19 **History**

20 The Buell and Marsh families were close friends and lived next door to each other. Marsh
21 separated from his wife in May of 1982. When Marsh separated from his wife, their kids stayed with
22 their mother. Brenda Buell (Brenda) separated from her husband in August of 1982. Marsh and
23 Brenda began seeing each other socially and Marsh moved into her home, with her two children, in mid
24 to late-October, 1982. During the time that Marsh and Brenda were living together, Brenda worked
25 days while Marsh worked nights at a Coca-Cola bottling plant. While Brenda was at work, Marsh would
26 awaken at about 8:30 a.m. to take care of children Phillip and Jessika.
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1 Phillip A. Buell (Phillip) was born on July 15, 1980, and died on April 28, 1983. Phillip's death
2 was attributed to trauma to the head resulting in massive cerebral edema. He was two years, nine
3 months of age.

4 On June 30, 1983, Marsh was charged with violation of Penal Code section 187. On November
5 28, 1983, Marsh was convicted of second-degree murder. He was sentenced on March 2, 1984. On
6 November 2, 1995, the Superior Court of San Diego County issued an order denying Marsh's petition
7 for writ of habeas corpus. The court found that submitted evidence did serve to generate further
8 controversy about the cause of Phillip's death but did not point unerringly to Marsh's innocence. At
9 most, it conflicted with the evidence presented at trial on the issue of the cause of Phillip's death. The
10 superior court denied the petition on the basis of the pleadings, without the necessity of an evidentiary
11 hearing.
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13 On October 2, 2002, a second petition for writ of habeas corpus was filed. One hundred
14 twenty-two exhibits were filed with this second petition.

15 On August 4, 2004, the San Diego County District Attorney's Office requested that the trial court
16 grant Marsh a new trial based on the findings of Dr. Sam Gulino, a forensic pathologist from Florida
17 who was retained by the district attorney to re-evaluate the evidence.
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19 On September 3, 2004, the San Diego County District Attorney filed a motion to dismiss the
20 case against Marsh because, "based on Dr. Sam Gulino's findings, we now believe there is insufficient
21 evidence to meet our heavy burden of proof beyond a reasonable doubt." The motion was granted.
22 Marsh was released from custody on August 10, 2004, having served 7,569 days incarceration
23 subsequent to his conviction.

24 The Victim Compensation and Government Claims Board received Marsh's claim for
25 compensation pursuant to Penal Code sections 4900 et seq. on October 6, 2004.
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Events of April 27, 1983

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2 The San Diego Fire Department received a dispatch as to Phillip's injuries at 11:00 a.m. on April
3 27, 1983. The fire department responded at approximately 11:03 a.m. Paramedics arrived three or
4 four minutes after the fire department personnel. Marsh told fire department personnel that he thought
5 that Phillip had fallen off the couch onto the fireplace hearth, but he had not seen it happen because he
6 was in another room at the time.

7
8 Marsh subsequently told law enforcement that Phillip wanted a book that had fallen behind the
9 couch. Marsh moved the couch to get the book and noticed debris and other toys behind the couch.
10 Marsh left the room to get a vacuum cleaner. He was in another room when he heard glass break.
11 Marsh retrieved the vacuum cleaner and returned to the living room within 10 to 15 seconds. Marsh
12 stated that he saw Phillip lying on his left side in front of the fireplace. Marsh noticed that Phillip had
13 choppy breathing, his heart was pounding, and when Marsh put his hand to the back of Phillip's neck, it
14 felt soft. Marsh placed Phillip on the dining room floor with a towel under his head and went to the
15 phone to call for assistance. Phillip was transported to Alvarez Hospital and then to Children's Hospital,
16 where he ultimately died on April 28, 1983.

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18 Marsh first noticed the broken glass (ashtray) around the fireplace area when he picked up
19 Phillip. The ashtray had been on top of the speaker next to the couch. He also noticed that a flower
20 vase that was on top of the speaker had fallen to the floor. After the firemen/paramedics left, but before
21 police arrived 20 to 30 minutes later, Marsh picked up the larger pieces of glass because he was
22 concerned for Jessika's safety. He put the glass in the kitchen trash and vacuumed in front of the
23 fireplace. He also placed the flower vase back onto the speaker.

24
25 Fire department personnel reportedly did not see any blood in the living room except on the
26 towel that was under Phillip's head. The paramedics also did not observe any blood in the living room.
27 Sergeant Hughes, San Diego Police Department, testified at trial that he observed a small amount of
28 blood on the fireplace. Evidence Technician Start examined the speaker, couch, fireplace, and the
29 living room carpet around the hearth and did chemical testing for particles of blood; no blood or trace

1 evidence was found. Technician Start also examined the broken ashtray for hair, fibers, tissue or
2 blood, and none were found.

3 Detective Ted Armijo was employed by the San Diego Police Department for 31 years prior to
4 his retirement in January, 1993. He was the homicide detective in charge of the San Diego Police
5 Department's Homicide 3 Team that investigated Phillip's death. The investigation information was
6 ultimately presented to the San Diego County District Attorney's office. Detective Armijo informed
7 Deputy District Attorney Coulter that he was of the opinion that there was insufficient evidence to
8 charge Marsh with Phillip's death, based on the crime scene investigation and witness interviews.

9 **Key Prosecution Medical Testimony at Trial**

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11 At Children's Hospital, Dr. Kaufman examined the three lacerations on the back of Phillip's
12 neck, the largest one was one to one-and-one-half inches deep, and approximately two inches long.
13 Dr. Kaufman opined that there would have been immediate, massive bleeding at the time that the
14 lacerations were inflicted. Dr. Kaufman went on to state that the type of injury suffered by Phillip is
15 typically caused by a great deal of force; either the child is moving with great force against a fixed
16 object, or a moving object strikes the child's head. Dr. Kaufman was of the opinion that even if one
17 were to assume that Phillip fell from a height of six feet (standing on top of the back of a sofa), there
18 would not be sufficient force to cause the injuries suffered because of insufficient acceleration, and any
19 cautious person, even a newborn baby, would demonstrate reflexes to protect oneself in a fall by
20 flexing the neck forward with the hands going back. He also believed that Phillip would have had to fall
21 multiple times or strike multiple surfaces in order to sustain his injuries.

22
23 Doctor Johnston examined Phillip upon arrival at Children's Hospital. Dr. Johnston indicated in
24 his report that he suspected Phillip to be a battered child with severe head injury and brain death.

25 Doctor Ruth Stern had been Phillip's treating physician since birth. Dr. Stern examined Phillip at
26 Children's Hospital at approximately 4:00 p.m. on April 27, 1983. Dr. Stern opined that the injuries
27 suffered by Phillip were much more severe, more extensive and varied than she would expect from a
28 fall from a sofa to a fireplace. Phillip's neck lacerations were much "sharper" than what one would
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1 expect from striking a corner of a fireplace hearth. There would have been very extensive bleeding
2 from the lacerations at the time they were incurred. Only if the person were dead and had no blood
3 pressure would there not be any bleeding.

4 Dr. David Chadwick was the medical director for Children's Hospital. Dr. Chadwick was of the
5 opinion that Phillip's injuries were comparable in force to a car crash at 35 miles per hour or a fall from
6 a second story building or at least an 8 - 10 foot fall. He stated that a fall from a standing position on
7 top of the couch would not account for the multiple impacts and Phillip would not have received such
8 severe injuries. Dr. Chadwick also testified that he believed that if the lacerations were made by broken
9 glass, the glass would have blood on it. Dr. Chadwick stated that the lacerations would bleed promptly
10 with significant blood loss and that it would be impossible for no blood to have been found in the area of
11 the fall. Dr. Chadwick was of the opinion that it was extremely unlikely that Phillip was the victim of
12 non-accidental injury. Dr. Chadwick also believed that Phillip was injured approximately an hour before
13 Marsh called for medical assistance.
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15 Dr. Williams, Pathologist, performed Phillip's autopsy on April 29, 1983. The coroner's report,
16 dated July 21, 1983, deemed Phillip's death to be Traumatic Death due to being beaten by another
17 person.
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19 **Evidence and Testimony at Hearing**

20 Vickie Peterson, Brenda's sister, testified at the hearing that she knew Marsh for six years prior
21 to Phillip's death. She lived down the street from Brenda's residence and often visited with Brenda and
22 her children. She was of the opinion that Marsh had a good relationship with Brenda's children and she
23 never saw him spank or act violently towards his children or Brenda's children. She stated that Marsh
24 would discipline the children by sending them to their rooms. She also did not observe Phillip express
25 or manifest any fear towards Marsh. She opined that Marsh was a very truthful and honest person.
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27 Judith Watkins, Brenda's mother, testified at the hearing that she had regular contact with her
28 daughter and her daughter's children. She stated that Marsh had a fine relationship with Brenda's
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1 children and she never saw him discipline them. She also never saw Phillip manifest any fear towards
2 Marsh.

3 Brenda testified at the hearing that Marsh had a close relationship with his children and that
4 they loved him. She believes that Marsh loved her children. He never expressed any complaint about
5 having to care for her children while she was at work. She stated that Phillip had some resentment
6 towards Marsh when he first moved in, but that this was probably due to Phillip's close relationship with
7 his father.

8 Brenda testified that Phillip was the first male child and that her parents, her sister, and Marsh
9 doted on Phillip. She had an extremely close relationship with Phillip and she viewed Phillip as her
10 special child. Brenda had seen Marsh verbally discipline his own children, but had never witnessed any
11 physical discipline. Marsh would also verbally discipline her children; she never saw him physically
12 discipline her children.
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14 Retired Detective Ted Armijo testified at the hearing that he and his team did a thorough
15 investigation of Phillip's death, including searching the inside and outside of Phillip's residence for
16 evidence of any criminal wrongdoing. He and his team came to the conclusion that there was
17 insufficient evidence to charge Marsh with Phillip's death. Detective Armijo stated that Marsh's account
18 of April 27, 1983, was consistent with what was discovered at the scene.
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20 Bill Duke was a co-worker of Marsh in 1982 and 1983. Mr. Duke testified at the hearing that he
21 had never observed Marsh to exhibit any violent behavior or conduct. He also testified that he believed
22 Marsh to be truthful.

23 Ms. Eleanor Church was employed as an Appeals Coordinator at Soledad State Prison. Ms.
24 Church testified at the hearing that she came to know Marsh while he was an inmate. She interviewed
25 and hired Marsh as a prison clerk. She noted that Marsh had no disciplinary history and that he was
26 very warm, friendly, and personable.
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28 Dr. Schweller provided testimony via declaration. He stated that he reviewed numerous records
29 including, but not limited to, paramedic reports, autopsy photographs, coroner's investigative report,

1 autopsy report, and hospital patient records. Dr. Schweller opined to a reasonable medical certainty
2 that Phillip's head injuries were accidentally inflicted. Dr. Schweller stated that although Phillip was not
3 stable, he had not yet deteriorated at Alvarado Hospital. During the transport from Alvarado Hospital to
4 Children's Hospital, Phillip was administered with eight grams of mannitol by intravenous push into his
5 jugular vein. Ten minutes after the mannitol transfusion, Phillip's blood pressure dropped to 90. At
6 1:00 p.m., 40 minutes after the mannitol push, Phillip's pulse dropped to 46, no blood pressure was
7 recorded, and Phillip suffered bradycardia (a slow heart rate and reflects a slow pulse). Dr. Schweller
8 stated that he believed that the mannitol exacerbated the magnitude of Phillip's brain swelling.

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10 Doctor Gulino was retained by the San Diego County District Attorney's Office in 2004 to review
11 the evidence in the Marsh case. Dr. Gulino is board certified in anatomic pathology and forensic
12 pathology, and is a full-time forensic pathologist for the Hillsborough County Medical Examiner
13 Department (Florida). Dr. Gulino has performed in excess of 3,000 autopsies, including approximately
14 17 in cases involving homicide by child abuse. Doctor Gulino stated via declaration that he was of the
15 opinion that although he was concerned that Phillip's fatal head injury may have been the result of
16 inflicted trauma, he was unable to conclude beyond a reasonable doubt or to a reasonable degree of
17 medical certainty that Phillip was a victim of child abuse.

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19 Dr. Rieber is triple board certified in anatomic pathology, clinical pathology, and forensic
20 pathology. From 1985 to the time of hearing, he performed approximately 6,000 autopsies (1,000
21 being children) for various coroners' offices throughout the state of California. At Brenda's request, Dr.
22 Rieber reviewed relevant medical records, physician testimony at the preliminary hearing and trial,
23 declarations of medical experts, Duke University pathology report, a 1996 EB virus serology test result,
24 and photographs of a broken ashtray and the living room scene. Dr. Rieber testified at the hearing that
25 he believes that Phillip's death was accidental based on his review of the various records. He testified
26 that Phillip was not a normal, healthy child; Phillip's medical records indicate several problems with
27 ecchymosis and petechial hemorrhages that are forensic symptoms of disease and coagulopathy. Dr.
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1 Rieber stated many of the findings seen in Phillip's life suggest a bleeding disorder that was never fully
2 characterized because coagulation testing never included tests of platelet function.

3 Dr. Rieber testified that the wounds to the back of Phillip's neck are not "lacerations," but are
4 incised cuts that readily could have been caused by sliding across large shards of broken glass. The
5 lack of bloodstains on the ashtray does not rule it out as the inflicting object because bleeding does not
6 occur instantaneously. If the contact between Phillip's neck and the glass were brief enough, no blood
7 would be deposited. The lack of blood at the scene is consistent with immediately compressing the
8 wound with a towel. The appearance of blood on the towel, but not elsewhere at the scene, is evidence
9 that the injuries received prompt attention from Marsh. The injuries to the left rear of Phillip's neck
10 show active oozing of blood at the hospital, which would be unlikely after several hours' delay in
11 seeking treatment. Additionally, retinal hemorrhages were not present when the child was first seen at
12 Alvarado Hospital, but were noted several hours later at Children's Hospital. The fact that the retinal
13 hemorrhages were not present when Phillip was first seen renders Dr. Chadwick's theory of a delay
14 between injury and emergency medical response untenable.
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16 The scrapes behind the right and left ears and the "bruising" of the left eye were misinterpreted
17 as indications of basal skull fracture, according to Dr. Rieber. No evidence of basal or calvarial skull
18 fracture was present at the autopsy. The superficial nature of these injuries suggests that they
19 occurred as a result of emergency medical intervention. Dr. Rieber disagrees that there were multiple
20 major impacts; the external scrapes and bruises are small and superficial and are not representative of
21 significant trauma to multiple sites. Dr. Rieber also agrees with Dr. Schweller's testimony (declaration)
22 that the mannitol transfusion probably exacerbated Phillip's intracranial bleeding. Dr. Rieber based his
23 opinion about the mannitol transfusion from Phillip's spontaneous breathing with ventilated assistance
24 at Alvarado Hospital and that no retinal hemorrhages were observed at Alvarado Hospital.
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26 Dr. Rieber also testified that the lack of verified skull fracture, lack of significant surface injuries
27 of the scalp, and the unilateral nature of the subdural hemorrhage contradict the concept of multiple
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1 severe blows to Phillip's head. Dr. Rieber also stated at the hearing that the laboratory testing
2 performed on April 27, 1983, was inadequate to truly establish the lack of any bleeding problem.

3 **Prior Injuries**

4 On November 17, 1982, Phillip was treated for an injury to the back of his head. It was reported
5 that Phillip had fallen two days previously, on a Monday. Phillip was on a tricycle that tipped over.
6 Evidence was presented at hearing that Marsh was not present or involved in this injury.

7 On January 5, 1983, Phillip was brought to the emergency room at approximately 4:50 p.m. in
8 shock, with intra-abdominal injuries causing bleeding into the abdomen, and external bruises,
9 scratches, or abrasions in several locations. Evidence at hearing was that Phillip fell onto a toy, injuring
10 his spleen. Although Marsh was present in the residence at the time of the injury, evidence was
11 presented at hearing that Marsh was not involved in this injury.

12 The clinical progress report for February 10, 1983, states that Phillip fell on his nose and mouth,
13 and Philip was admitted for a nosebleed and bleeding from the mouth. The progress record indicates
14 puffing nose and oozing of blood from mouth. An X-ray of Phillip B.'s nasal bones were negative and
15 the progress note indicated the bleeding had stopped. Evidence was presented that Phillip may have
16 bumped into his nightstand while sleeping. Evidence was also presented at the hearing that Marsh was
17 not present or involved in this injury.

18 Records from a March 25, 1983, medical visit indicate that Phillip fell two days prior (a
19 Wednesday) and bruised his right side (hip). Phillip's skin was pale. The summary medical record
20 showed that the bruise was scaring Phillip's mother, the bruise having turned red, blue, and yellow
21 within a short time. Evidence was presented that Phillip fell from his booster seat while at the dinner
22 table. Evidence was also presented at the hearing that Marsh was not present or involved in this injury.

23 Dr. Self performed a pediatric gastroenterology consult on March 31, 1983, and observed fading
24 petechiae (pinpoint redness) over Phillip's abdominal and upper chest and a three-by-six centimeter
25 (approximately one inch by two inches) over the right hip. Phillip also had a swollen left hand. Dr. Self
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1 noted that neither Phillip's mother nor Marsh offered any explanation for the bruise on the right hip or
2 the swollen left hand.

3 Both of Phillip's hands were X-rayed on March 31, 1983. The X-rays showed no fracture of the
4 swollen left hand, but showed that Phillip's right hand had a healing fracture at the first metacarpal, the
5 fracture appearing to be approximately two to three weeks old. Dr. Self's report indicates that Marsh
6 explained that he had caught Phillip's hand in a shirtsleeve and bent it (finger/hand) back. The
7 explanation was determined to be credible.

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9 **Findings**

- 10 1. It is found that Marsh was convicted of second-degree murder on November 28, 1983.
- 11 2. It is found that Marsh was released from custody on August 10, 2004.
- 12 2. It is found Marsh was incarcerated for 7,569 days subsequent to his conviction.
- 13 3. It is found that Marsh was not responsible for the prior physical injuries suffered by Phillip.
- 14 4. It is found that Phillip had an undiagnosed blood disorder that contributed to his death.
- 15 5. It is found that the administration of mannitol to Phillip contributed to his death.
- 16 6. It is found that Phillip received the cuts to the back of his neck when his neck dragged over
17 the broken ashtray as he fell to the floor.
- 18 7. It is found that Phillip received his fatal head injury in a single impact with a hard surface.
- 19 8. It is found that Phillip was injured in the manner described by Marsh.
- 20 8. It is found that Phillip was injured in the manner described by Marsh.
- 21 9. It is found that Marsh was employed prior to his conviction on November 28, 1983.

22 **Determination of Issues**

23 Penal Code section 4903 establishes the requirements for a successful claim for an
24 erroneously convicted felon. The claimant must prove: 1) that the crime with which he was charged
25 was either not committed at all, or, if committed, was not committed by him; 2) that he did not by any
26 act or omission on his part, either intentionally or negligently, contribute to the bringing about of the
27 arrest or conviction for the crime; and 3) that he sustained a pecuniary injury through his erroneous
28 conviction and imprisonment. (Pen. Code, § 4903.) If the claimant meets his burden of proof, the
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1 Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration
2 served subsequent to conviction be made for the claimant. (Pen. Code, § 4904.)

3 The claimant has the burden of proving his innocence by a preponderance of the evidence.
4 (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)

5 In reaching its determination of the merits of the claim, the Board may consider the following,
6 but the following will not be deemed sufficient evidence to warrant the Board's recommendation that
7 the claimant be indemnified in the absence of substantial independent corroborating evidence that
8 the claimant is innocent of the crime charged: (1) claimant's mere denial of commission of the crime
9 for which he was convicted; (2) reversal of the judgment of conviction on appeal; (3) acquittal of
10 claimant on retrial; or (4) the failure of the prosecuting authority to retry claimant for the crime. (Cal.
11 Code Regs., tit. 2, § 641. ¹)

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13 Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to which
14 claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and the
15 crime with which he was charged, may be considered by the Board as substantive evidence. The
16 Board may also consider any information that it may deem relevant to the issue before it. (Reg., §
17 641.)

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19 After careful evaluation of all of the evidence, and with the concurrence of the AG, it is
20 determined that Marsh has proven by a preponderance of the evidence that he did not violate
21 California Penal Code section 187 and that he did not, either intentionally or negligently, contribute to
22 his arrest or conviction for that offense. In addition, it is determined by a preponderance of the
23 evidence that Marsh suffered pecuniary loss due to his erroneous conviction and subsequent
24 imprisonment. Marsh is thereby entitled to compensation in the amount of \$100.00 per day from
25 November 28, 1983, through August 10, 2004, a period of 7,569 days, in an amount of \$756,900.00.

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29 ¹ All citations to regulations are to California Code of Regulations, title 2.

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Order

Kenneth Marsh's claim under Penal Code sections 4900 *et seq.* is granted.

Date: January 4, 2006

Kyle Hedum
Hearing Officer

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

3
4 In the Matter of the Claim of:

5 **Kenneth Marsh**

6 Claim No. G 550140

Notice of Decision

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8 On _____, the California Victim Compensation and Government Claims Board
9 adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-
10 referenced matter.
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14 Date: _____

15 Irma Mitchell
16 Board Liaison
17 Victim Compensation & Government Claims
18 Board
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