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8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
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11 In the Matter of the Claim of:
12 **Karyl Clarke**
13 **Claim No. G580449**
14

Proposed Decision
(Penal Code § 4900 et seq.)

15 **Introduction**

16 A hearing on this claim was conducted on December 6, 2010, by Kyle Hedum, the Hearing
17 Officer assigned to hear this matter by the Executive Officer of the Victim Compensation and
18 Government Claims Board.

19 Clarke appeared in pro per and testified under oath. Clarke seeks \$63,200.00¹ pursuant to
20 Penal Code section 4900 et seq. Michael Canzoneri, Deputy Attorney General, represented the
21 California Department of Justice, Office of the Attorney General. The record remained open until
22 January 31, 2011, to allow Clarke to submit additional evidence. After the receipt of additional
23 evidence, the AG was given until February 18, 2011, to provide comments or arguments. Nothing
24 further was received and the record closed.
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28 ¹ Calculated at the rate of \$100 per day of incarceration (632 days) served subsequent to conviction.

1 After considering all the evidence, it is determined that Clarke has not proven by a
2 preponderance of the evidence that he was erroneously convicted and incarcerated. Therefore, it is
3 recommended that Clarke's claim for compensation pursuant to Penal Code section 4900 et seq. be
4 denied.

5 Background²

6 According to Ebony, age 21, she met Clarke at an October 2005, birthday party she gave for
7 her son at her residence in Los Angeles. Clarke, whom she knew as "Nelson," was her sister Lisa's
8 friend. In December 2005, Clarke asked Ebony for a favor. He told her that because he had no
9 identification,³ he wanted to use Ebony's name and her identification to receive a wire transfer from
10 his father through Western Union.⁴ Ebony agreed to pick up the wire transfer.⁵

11 On or about December 16, 2005, Clarke drove Ebony to a Nix Check Cashing store in Los
12 Angeles. Clarke filled out the appropriate paperwork and sent Ebony into the location alone to obtain
13 the money while he waited in his car. Ebony claimed that she showed her identification to the store
14 employee and was given \$2,900.00 in cash. She said that she returned to the car and gave Clarke
15 the money. He thanked her and gave her \$50.00 before driving her home.⁶

16 The following day, Ebony stated that Clarke wanted her to pick up another wire transfer that
17 he had sent in her name. She refused because she felt that what she was doing was not "right."

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19 ² The background is based on crime reports, trial testimony, an unpublished opinion, and other case-
20 related documents.

21 ³ During his criminal trial, it was determined that Clarke possessed a valid driver's license during this
22 period of time.

23 ⁴ According to the record, Clarke was not close to his father, who was a truck driver in Florida. Clarke
24 claimed that the money he received from his father was a gift and a loan that was arranged through his
25 aunt who acted as a middle-man.

26 ⁵ According to the prosecution, Lisa picked up a similar money transfer for Clarke on or about
27 December 15, 2005.

28 ⁶ However, Clarke claimed that Ebony went into the check cashing store and left through another door
without picking up his money. He learned later that day that Ebony returned afterwards and picked up
his money. She did not give him the money that she had picked up from the check cashing store.

1 Ebony claimed that when she continued to refuse to assist him, he threatened her. His comments to
2 her implied that he had more money wired in her name. Ebony owned a Nextel cellular telephone
3 that was also a walkie-talkie. After her refusal, Clarke repeatedly chirped⁷ her on December 17 and
4 December 18, 2005, attempting to persuade her to pick up the new wire transfer. On December 17,
5 2005, she said that Clarke told her that if she did not pick up the money, he would hurt her. On the
6 afternoon of December 18, 2005, Clarke repeatedly chirped her, threatening her and telling her to
7 pick up the wire transfer.

8 On December 19, 2005, Clarke continued telephoning her and threatening her. Ebony spent
9 the night at her boyfriend Everett's residence in order to avoid Clarke. Early the next morning, on
10 December 20, 2005, Clarke accosted Ebony and Everett outside Everett's residence and kidnapped
11 Ebony. According to Ebony and Everett, Clarke wore a black ski mask. At gunpoint, he ordered her to
12 get into his car. Everett told police that Clarke had a chrome revolver. Everett said that he did not get
13 involved because he did not want Ebony to get hurt. Clarke drove Ebony to an alley near her residence
14 at Jefferson Boulevard and Western Avenue. He parked his car so that the passenger door was
15 against a wall, preventing Ebony from escaping out the passenger side of the car. He attempted to
16 cajole her into picking up the new wire transfer. She would not agree to do so, and he told her that she
17 was going to pick up the "f --ing money" and that he did not want to hurt her, but he threatened to kill
18 her if she did not help him.

19 Clarke kept Ebony in his car from approximately 7:30 a.m. to 10:30 a.m. Ebony characterized
20 his remarks to her during this time as threats. When he made these threats, he had his hand in his
21 pocket on a handgun. He told her that he would hurt her family if she did not pick up the wire transfer.
22 Specifically, he told her, "Bitch, if you don't go get my money, I'll kill you," that she "was going to pick up
23 the f ---ing money," and he threatened to hurt her "f ---ing dad." Ebony continued to refuse because
24 she did not want to get into trouble and because she was afraid that no matter what she did, he would
25 hurt her.

27 ⁷ A chirp is an indication of an incoming call over the walkie-talkie portion of the cellular network.
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1 When a police car drove by, Clarke got out of his car, apparently to put his handgun into the
2 trunk. When he attempted to return to his driver's seat, Ebony kicked him in the groin and escaped out
3 the driver's door. She ran to a nearby Food-4-Less store and telephoned her father. Ebony told him
4 about Clarke's threats to her and to the family, and everyone was frightened. During the time Ebony
5 was in and around the Food-4-Less store, she did not telephone the police or seek help from anyone at
6 the store. Her father and other family members drove over and picked her up on the corner. The entire
7 family, including all nine of the brothers and sisters who still lived with her parents, went to her
8 grandmother's residence for two to three days.

9 During the time that the family was staying at the grandmother's residence, Clarke started
10 calling Lisa. Lisa had previously cashed checks for Clarke at various Nix Check Cashing locations or
11 at a Ralph's Grocery store until she was arrested on November 30, 2005.⁸ Clarke told Lisa that he
12 needed Ebony to pick up money from Nix. Lisa was uncooperative in revealing her sister's location,
13 so Clarke told her that if she did not tell him where Ebony was, he was going to hurt Lisa. He also
14 told her that the next time he caught Ebony, she would be missing in action. Later, Clarke told Lisa
15 that he would shoot Lisa and her family and would send the Jamaican mafia to shoot everyone at the
16 house. He said that if he saw Lisa on the street, he would shoot her and that Lisa should watch her
17 back. Lisa believed that Clarke would carry out his threats because of his demeanor and because
18 she had previously seen him with two loaded handguns at his apartment.

19 On December 23, 2005, at 1:00 a.m., the family checked into a motel where they stayed until
20 early Christmas morning. On Christmas morning, the family returned to their residence. Clarke
21 continued to chirp Ebony on her cellular telephone. During these calls, he told her that he was going
22 to make her suffer. Clarke also called Ebony's father and threatened the family.

23 On Christmas morning, despite their fear, the family returned home. Ebony and her son left
24 their residence and moved in with her family. Clarke continued making threats to Ebony by
25 telephone, telling her that if he found her walking down the street, she would not escape again. He
26 also threatened to hurt her son.

27 ⁸ Lisa was convicted of a misdemeanor count of cashing a fraudulent check.
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1 At Clarke's trial, Ebony's father testified that at about 8:00 a.m. on December 19, 2005, Ebony
2 telephoned him from Food-4-Less and asked him to pick her up. She claimed that she had been
3 kidnapped. The family then spent two days at his mother's residence, two days at the hotel, and
4 returned home on Christmas morning.⁹ The father made contradictory claims about when he spoke
5 to Clarke initially by telephone. When trial counsel attempted to pin the father down as to several
6 dates of contact, the father testified that he did not know exactly when this all happened because it
7 had occurred seven months previously.

8 Ebony's father testified that he spoke to Clarke by telephone and that Clarke made threats
9 against his grandson. During a visit to the residence, Clarke told the father that Ebony had picked up
10 \$2,900.00 for him and that she had a confirmation number he wanted because there was \$20,000.00
11 that anybody could get with the number.

12 Ebony's father further testified that on January 3, 2006, he gave Clarke \$800.00 because he
13 believed that if he gave Clarke some money that would be the end of defendant's visits and threats.
14 However, Clarke told the father that he was from the Jamaican mafia, that he was loyal to the mob,
15 and that a big man from Miami was going to come and kill the family. The father testified that every
16 time he spoke to Clarke, Clarke threatened him. The father believed the threats and that Clarke was
17 capable of murder.

18 Ebony's father did not recall testifying at the preliminary hearing that Clarke came by his
19 residence on December 19, 2005, and told him that Ebony owed him money. He acknowledged that
20 at his initial interview with the detective, he denied giving Clarke any money. However, he explained
21 that he later informed the detectives that he had lied about the money because he feared reprisal
22 from Clarke.

23 Ebony's sister-in-law testified that she was present during the time the family was staying at
24 their grandmother's home. She said that the threats worried the entire family and that Ebony's father
25 was pacing before the door and continually looking outside. She said that everyone was afraid, and
26 that the father was telling his children and family members to stay away from the door.

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28 ⁹ Ebony's father provided a receipt for a motel that indicated the family was at the motel from the early
morning hours of December 24, 2005, to Christmas morning.

1 his apartment, and he denied ownership of the loaded handgun that was recovered from the bushes
2 below his apartment. Clarke also denied Lisa's assertion that she had assisted him in cashing
3 fraudulent checks. He claimed that Ebony and Ebony's family fabricated the kidnapping and threats
4 in order for Ebony to keep the \$2,900.00 that she stole from him.

5 Clarke claimed at trial that on December 19, 2005, he picked up Lisa and Ebony at their
6 respective residences. They went to three or four Nix Check Cashing locations and to Ralph's
7 grocery stores looking for locations with enough cash so that the women could pick up two \$2,900.00
8 wire transfers. That evening, Lisa obtained \$900.00 in cash and \$2,000.00 in money orders at a
9 Ralph's grocery store. Clarke was not able to find a location that had enough cash for the transfer he
10 had arranged in Ebony's name, so he dropped the women off at their respective residences.

11 The following morning, he picked up Ebony at her residence at about 10:00 a.m. and they
12 drove to a Nix Check Cashing store. In the parking lot, Clarke filled out the paperwork necessary to
13 pick up the Western Union transfer, writing down the confirmation number on the paperwork. Ebony
14 entered the store and Clarke waited for her in the parking lot. When Ebony did not return, he
15 investigated and learned that she left the store without picking up the wire transfer. However,
16 because the wire transfer was in her name and because she had the confirmation number, she could
17 pick up the \$2,900.00 wire transfer at any time. Clarke testified that he had no way of notifying his
18 father to cancel the monetary transaction. Clarke claimed that the wire transfer was picked up by
19 Ebony later that same day and that she never gave him the money.

20 Because Ebony would not speak to him, Clarke drove to Ebony's parent's home and had a
21 two-hour talk with her parents that he described as a friendly conversation. Clarke told Ebony's father
22 that she had stolen \$2,900.00 from him. Clarke told her father that he would have Ebony arrested for
23 taking his money. He returned to speak to her father on December 21, 2005, and he may also have
24 spoken to Ebony's father on December 23, 2005, by telephone, but he could not be certain; he did
25 drive to the family residence on that date. After speaking with Ebony's father, Clarke claimed that her
26 father agreed to repay him the amount that Ebony had taken from him, and her father gave him
27 \$600.00 in January 2006 and \$200.00 in February 2006.

1 Clarke explained that the ski mask that was found in his apartment during the search warrant
2 was in a bag given to him by Ebony's boyfriend in late December 2005. The bag also contained
3 another ski mask and some children's clothing that had been purchased by Ebony after she picked up
4 and absconded with his money. Clarke testified that he kept and wore the ski masks when he
5 changed the oil on his car in order to keep his hair from getting dirty.

6 Jury Trial Outcome

7 At the conclusion of the trial, the judge instructed the jury with CALCRIM 207: "It is alleged
8 that the crime occurred on or about December 20, 2005. The People are not required to prove that
9 the crime took place exactly on that day but only that it happened reasonably close to that day." The
10 defense objected that the instruction was improper because on the date in question, Clarke asserted
11 that he was elsewhere. During final argument, the prosecutor argued that the specific dates on which
12 the events occurred was not as important as determining whether the events occurred as claimed by
13 the prosecution witnesses.

14 The jury returned a guilty verdict only as to Count 3, referencing the criminal threats made to
15 Ebony on or about December 20, 2005. The jury deadlocked on the other counts and the trial court
16 declared a mistrial with respect to counts 1, 2, 4, 5 and 6. Prior to sentencing, the prosecutor
17 informed the court that the People were declining to retry Clarke on the deadlocked counts. Those
18 counts were dismissed by the court and Clarke was sentenced to six years in state prison.¹⁰

19 In an unpublished opinion reversing Clarke's conviction, the court found that the trial
20 court had committed prejudicial error by failing to charge the jury with a unanimity instruction. The
21 appellate court provided the following analysis:

22 Trial testimony indicates that Clarke had committed multiple independent acts, any one of
23 which may have constituted the making of a criminal threat on or about December 20, 2005.
24 The People made no election, and the trial court failed to inform the jury of the requirement
25 that it unanimously agree on the acts constituting the crimes alleged.

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27 ¹⁰ Clarke had a juvenile adjudication of a prior serious felony of robbery that qualified him for sentencing
28 pursuant to the three strikes law.

1 All the witnesses, including defendant, lied or hedged on any number of claims he or she
2 made during the trial testimony. The evidence concerning when the threats occurred, exactly
3 what happened during a particular time frame, and what motivated the threats, kidnapping,
4 and stalking was disparate, often vague, and contradictory. The verdict and deadlocks on the
5 other counts indicate that the jury failed to believe most of the accusations lodged against
6 Clarke beyond a reasonable doubt, whether they were based on the evidence produced by
7 the prosecution or by the defense.

8 However, the jury concluded that Clarke had committed at least one criminal threat with
9 respect to Ebony. But, there is a reasonable possibility that in the absence of a unanimity
10 instruction, the jury may have amalgamated the evidence of the multiple threats so as to reach
11 a conclusion beyond a reasonable doubt of defendant's guilt of one threat. The error is
12 prejudicial because we cannot conclude that the jury resolved the issues at trial based upon a
13 blanket rejection of defendant's claims in defense or on the basis of his credibility.

14 Following the reversal of Clarke's conviction, the case was returned to the trial court. On July
15 23, 2008, the prosecutor advised the trial court that the People would not retry Clarke. The court then
16 dismissed the case.

17 **PC 4900 Hearing Testimony**

18 Clarke testified to the following information at his hearing for compensation. He did not kidnap
19 Ebony nor did he threaten Ebony, Lisa, or any of their family members. He claimed that he was
20 merely trying to convince Ebony, her sister, and Ebony's parent's that Ebony needed to return the
21 money she stole from him on or about December 19, 2005. Clarke painted a picture of himself as the
22 victim of Ebony and her family. He also claimed that Ebony and her family lied about being
23 kidnapped and being threatened so that Ebony could keep the \$2,900.00 that she had stolen from
24 him. Clarke stated that he was not "upset" but instead "hurt" that Ebony stole his money. However,
25 once he spoke with Ebony's father, he was "disappointed" and "upset."

26 Clarke believes that the officers who arrested him rushed to judgment based on his criminal
27 record. He stated that Ebony and her family made many inconsistent statements that could only
28 mean that they were lying to protect Ebony. One of the inconsistent statements was that Ebony's
29 father first told the police that he did not give Clarke any money, but then he admitted that he gave

1 Clarke \$800.00. Clarke also believed that his defense attorneys did a poor job in investigating his
2 claims and that they provided poor representation at trial.¹¹

3 Clarke again claimed that the police lied when it was reported that he was seen running
4 across the street in his socks. He claimed he was arrested wearing socks and sandals, and that the
5 police did not take him back to his apartment to allow him to obtain some footwear prior to going to
6 jail. He further explained that he had gone downstairs in socks and sandals to get his shoes from his
7 car. When he heard the police knock on the door, he felt that the police were there for him so he
8 walked away and headed towards his grandmother's home.

9 Clarke also testified at his hearing that although he had a valid California license at the time
10 that Ebony assisted him in cashing the checks from his father, he did not have physical possession of
11 the license because it was lost.

12 Clarke also submitted a declaration from his defense attorney after the hearing attesting that
13 the attorney personally took possession of Clarke's vehicle along with the vehicle's keys that were
14 released to the attorney as part of Clarke's personal property. Clarke believes that this proves that
15 he went to his car and was returning to his apartment when he heard the police at his apartment
16 door. Finally, Clarke claimed that the fact that Ebony's father began to give him money was proof
17 that Ebony had stolen \$2,900.00 from him.

18 The Attorney General argued at the hearing that Clarke presented insufficient evidence that
19 he was erroneously arrested, convicted, and incarcerated. The decision of the Court of Appeal to
20 grant Clarke a new trial was based on the trial judge's failure to instruct the jury on the requirement of
21 unanimity because there was more than a single act upon which the jury could have based its verdict.
22 The Attorney General also emphasized the evidence that showed Clarke was not truthful when
23 speaking with the police and at his criminal trial. Clarke's claim that he was wearing sandals when he
24 was seen running across the street after the police entered his apartment is contradicted by the
25 police who describe him as running across the street in his socks. The police also noted that Clarke
26 was provided sandals from his apartment prior to being transported to jail.

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28 ¹¹ Clarke had four attorneys during the course of the prosecution of his case, and there was at least one
Marsden hearing to determine if a new attorney should be retained or appointed.

1 The Attorney General also submitted a summary of Clarke's criminal history in its opposition.
2 The criminal history reveals that Clarke had previously been arrested for robbery, assault with a
3 deadly weapon, spousal battery, burglary, and for carrying a concealed weapon. Clarke was
4 convicted of one misdemeanor count of carrying a concealed weapon in 1994, a misdemeanor count
5 of assault with a deadly weapon in 1999, and a misdemeanor count of assault in 2000. Also, Clarke
6 was determined to have suffered a "strike" when a felony petition for robbery was sustained in 1991
7 when he was a juvenile.

8 9 Findings

10 A preponderance of the evidence supports the following findings:

- 11 1. Clarke was sentenced to state prison on October 25, 2006.
- 12 2. Clarke's conviction was reversed due to an improper jury instruction.
- 13 3. Clarke was released from prison on July 18, 2008.
- 14 4. Clarke served 632 days in prison subsequent to conviction.
- 15 5. Clarke's hearing testimony was not credible.

16 Determination of Issues

17 Penal Code section 4903 establishes the requirements for a successful claim for an
18 erroneously convicted felon. A person erroneously convicted and imprisoned for a felony may submit
19 a claim to the Board for pecuniary injury sustained as a result of his erroneous conviction and
20 imprisonment.¹² In order to be successful on such a claim, a claimant must prove the following, by a
21 preponderance of the evidence:

- 22 (1) that the crime with which he was charged was either not committed at all, or, if committed,
23 was not committed by him;
- 24 (2) that he did not by any act or omission on his part, intentionally contribute to the bringing
25 about of the arrest or conviction for the crime; and

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28 ¹² Pen. Code, § 4900.

1 (3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.¹³
2 "Preponderance of the evidence" means evidence that has more convincing force than that opposed
3 to it.¹⁴ If a claimant meets his burden of proof, the Board shall recommend to the legislature that an
4 appropriation of \$100 be made for each day of incarceration served subsequent to the claimant's
5 conviction.¹⁵

6 In reaching its determination of the merits of the claim, the Board may consider the claimant's
7 mere denial of commission of the crime for which he was convicted, reversal of the judgment of
8 conviction on appeal, acquittal of claimant on retrial, or the decision of the prosecuting authority to
9 retry claimant for the crime. However, those factors will not be deemed sufficient evidence to warrant
10 the Board's recommendation that a claimant be indemnified in the absence of substantial
11 independent corroborating evidence that the claimant is innocent of the crime charged.¹⁶ The Board
12 may also consider as substantive evidence testimony of witnesses the claimant had an opportunity to
13 cross-examine, and evidence to which the claimant had an opportunity to object, admitted in prior
14 proceedings relating to the claimant and the crime with which he was charged. Finally, the Board
15 may also consider any information that it may deem relevant to the issue before it.¹⁷

16 On or about March 12, 2008, the Court of Appeals for the Second District reversed Clarke's
17 conviction after it determined that the trial court failed to give a unanimity instruction. Following the
18 reversal, the prosecutor chose not to retry Clarke. Although the fact that Clarke's conviction was
19 overturned can be considered by the Board, it will not be deemed sufficient evidence to warrant the
20 Board's recommendation that a claimant be indemnified in the absence of substantial independent
21 corroborating evidence that the claimant is innocent of the crime charged.

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23 ¹³ Pen. Code, § 4903, *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v.*
24 *Victim Compensation and Government Claims Board* (2000) 152 Cal. App. 4th 1164.

25 ¹⁴ *People v. Miller* (1916) 171 Cal. 649, 652.

26 ¹⁵ Pen. Code, § 4904.

27 ¹⁶ Cal. Code Regs., tit. 2, § 641.

28 ¹⁷ Cal. Code Regs., tit. 2, § 641.

1 Clarke testified at the hearing that he did not kidnap Ebony nor did he threaten Ebony, Lisa, or
2 any of their family members. He claimed that he was merely trying to convince Ebony, her sister, and
3 Ebony's parent's that Ebony needed to return the money she stole from him on or about December
4 19, 2005. At his trial and also at his hearing, Clarke painted a picture of himself as the victim of
5 Ebony and her family. He claimed that Ebony and her family lied about being kidnapped and being
6 threatened so that Ebony could keep the \$2,900.00 that she had stolen from him.

7 Clarke's claim for compensation hinges on his credibility. Clarke denies leaving his second-
8 story apartment through an open window after hearing the police at his door. He claims that the
9 apartment complex had thin walls so that the toilet heard flushing could have been from another
10 apartment. Clarke denies ownership of the pistol found below his window. He also denies hearing
11 the police call his name as he ran across the street, and he denies wearing only socks as he ran
12 away.

13 However, Clarke's claims of innocence must be viewed in light of the entire record. Based on
14 the evidence, it is determined that Clarke's hearing testimony was not credible. In particular, Clarke's
15 claim that he was wearing sandals when he fled law enforcement is contradicted by the police who
16 stated that Clarke was shoeless and in his socks as he was running away from the apartment. The
17 police also noted that he was shoeless when he was apprehended near his grandmother's residence.
18 The crime report also documents Clarke was allowed to get a pair of sandals from his apartment prior
19 to going to jail. Because there was no reason for law enforcement to lie about allowing Clarke to
20 wear footgear prior to being transported to jail, this incident of untruthfulness reflects negatively on his
21 credibility. This determination that Clarke's hearing testimony is not credible is further supported by
22 the court of appeal's determination that all the witnesses, including defendant, lied or hedged on any
23 number of claims he or she made during the trial testimony.

24 Since it is Clarke's burden to prove that he was not responsible for his arrest or conviction and
25 that he was innocent of the crime for which he was incarcerated, he needed to provide sufficient
26 evidence in support of his claim. Mere testimony that he was not guilty of the crime for which he
27 served time in prison is not sufficient.
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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

Karyl Clarke

Notice of Decision

On June 16, 2011, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: June 20, 2011

Tisha Heard
Board Liaison
Victim Compensation and
Government Claims Board