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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 **Kellen Clarke**

Proposed Decision

(Penal Code § 4900)
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15 **Introduction**

16 An in-person hearing on this claim was held on May 23, 2011, in Sacramento, California, by
17 Kevin Kwong, Hearing Officer, California Victim Compensation and Government Claims Board. The
18 claimant, Kellen Clarke, did not appear at the hearing nor was he represented by an attorney. The
19 California Attorney General's Office was represented by Leanne LeMon, Deputy Attorney General
20 (AG), and has opined that Clarke has failed to meet his burden of proving his innocence.

21 As explained below, Clarke has failed to meet the statutory requirements to receive
22 compensation under Penal Code section 4900 because he has failed to prove by a preponderance of
23 the evidence that he did not commit the crimes with which he was charged.

24 **Procedural Background**

25 On October 14, 2006, Clarke's truck, with a U-haul attached, was blocking Paul Binnebose's
26 path to his tow yard. Clarke then struck the fence of the tow yard with his truck and detached the U-
27 haul so that it remained in Binnebose's path. An argument ensued and Clarke attempted to punch
28 Binnebose but missed. When the police arrived on the scene they determined that Clarke was
29 intoxicated and he was arrested. Clarke resisted officers while being placed under arrest.

1 On approximately June 11, 2008, a jury trial commenced and Clarke was convicted of driving
2 under the influence with a prior felony conviction for that crime, driving with a blood alcohol level of
3 .08 percent or higher with a prior felony conviction for that crime, resisting a peace officer, and driving
4 with a suspended license. He was sentenced to a four year prison term.

5 Clarke was released from prison and placed on parole on or about April 26, 2010. Prior to his
6 release, he had filed an appeal with the California Court of Appeals. In an unpublished opinion filed
7 on January 13, 2011, the judgment of the Superior Court was affirmed. Clarke's application to the
8 Board for compensation under Penal Code section 4900 was received on or about June 13, 2010.

9 **Summary of Evidence**

10 **I. Facts and Evidence at the Criminal Proceeding**

11 Shortly before 3:00 a.m. on October 14, 2006, Clarke was blocking the path to tow truck
12 driver Paul Binnebose's tow yard. Clarke asked Binnebose if he could be let into the tow yard but
13 was denied entry. Clarke then entered his vehicle and drove it into the tow yard fence. He then
14 disconnected the U-haul that was connected to his truck and left it blocking the entry gate into the
15 tow yard. Clarke drove his truck a short distance away and Binnebose called the police and
16 positioned his vehicle in a manner to prevent Clarke from leaving. Angry that the police were called,
17 Clarke threw several punches at Binnebose but missed.

18 Two police officers arrived and Binnebose identified Clarke as the person driving the vehicle.
19 One officer spoke to Clarke, who was standing next to the vehicle with its headlights still on, and
20 Clarke stated that he had one beer. The officer determined that Clarke appeared to be intoxicated
21 and requested that he perform a field sobriety test and a breathalyzer test. Clarke refused these
22 requests. At this time Clarke was placed under arrest. However, after being handcuffed and placed
23 in the police car he attempted to slide the handcuffs from behind his back and through his legs.
24 When the officers opened the door to secure Clarke he kicked an officer and continued to struggle.
25 Toxicology results later showed that Clarke had a blood alcohol level of 0.23 percent.

26 At trial, Clarke admitted that he was intoxicated but stated that he was not the driver of the
27 vehicle. Clarke declined attorney representation and chose to represent himself. The prosecution
28 offered testimony from Binnebose who identified Clarke as the driver of the vehicle that crashed into
29 the tow yard fence and he also stated that he did not see anybody else in the vehicle. Binnebose

1 also testified that Clarke appeared to be intoxicated and threw punches at him. The two officers who
2 responded to the scene also testified. One officer testified that when he arrived Clarke was sitting in
3 the driver's seat of his truck and the engine and headlights were on. This officer also testified that
4 Clarke admitted to him that he was driving the truck. Also admitted into evidence was video footage
5 from the police vehicle dashboard. The video shows the police encountering Clarke at the end of a
6 long dirt driveway surrounded by a fence. Clarke is standing next to his vehicle which has its
7 headlights on. The footage also shows Clarke's struggle with police after being arrested. No other
8 people are seen in the video footage. Finally, evidence was presented that Clarke had three prior
9 felony convictions for driving under the influence in 1996, 2002, and 2004, and that he had a
10 misdemeanor conviction for driving under the influence in 1999.

11 The jury determined that Clarke was guilty of driving under the influence with a prior felony
12 conviction for that crime, driving with a blood alcohol level of .08 percent or higher with a prior felony
13 conviction for that crime, and resisting a peace officer. The guilty charge of driving on a suspended
14 license was determined by the judge. Clarke was sentenced to a four year prison term.

15 Clarke appealed his conviction to the Court of Appeals. He alleged that he was deprived of
16 his right to counsel because he was not properly warned by the court of the dangers of self-
17 representation. He also alleged a *Brady*¹ violation because the prosecution failed to disclose
18 Binnebose's 911 call and the police video footage. The Appeals Court determined that Clarke was
19 fully apprised of the dangers of waiving his right to representation. Additionally, although the phone
20 call and videos were not disclosed to Clarke, these items were determined by the court to be
21 inculpatory and not exculpatory, thus no *Brady* violation was found. The court also stated that based
22 on the dead-end road and high fence no other possible driver was present.

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¹ *Brady v. Maryland* (1963) 373 U.S. 83, 87, which requires disclosure of material evidence favorable to the defendant.

II. Evidence and Arguments Presented at the 4900 Hearing

Clarke did not appear at the 4900 hearing.² He submitted a statement alleging that Binnebose and the two officers who testified at trial perjured themselves by giving false testimony. He also stated that exculpatory evidence was not disclosed in this case.

The AG made the following arguments at the hearing:

- Binnebose observed Clarke as the driver of the vehicle, he told the police at the scene that Clarke was the driver of the vehicle, he did not see anybody else in the vehicle, and he testified in court that Clarke was the driver of the vehicle.
- One officer testified that he saw Clarke in the driver's seat of the vehicle as they pulled up to the scene and that Clarke admitted to be the driver of the vehicle.
- The video footage shows Clarke next to the vehicle and does not show anybody else nearby. Additionally, the footage shows that the vehicle is on an enclosed dirt road that was surrounded by fences.
- Clarke admitted to be intoxicated and had a blood alcohol level of 0.23 percent.
- Clarke has four prior driving under the influence convictions.
- The Appeals Court upheld the convictions and also stated that nobody else could have been driving the vehicle.
- There is no evidence that any witness gave perjured testimony.
- The exculpatory evidence that Clarke alleges was determined by the Court of Appeals to be inculpatory and not exculpatory.

Findings

A preponderance of the evidence supports each of the following findings:

1. Clarke was driving the vehicle that crashed into the fence of a tow yard.
2. Clarke was intoxicated at the time he was driving the vehicle.

² This hearing was originally schedule to occur in February 2011. Approximately one week before that scheduled hearing date, Clarke requested a continuance due to family and financial hardship. The continuance was granted and at this time he chose May 23, 2011, to be the new hearing date. Approximately one week before the May 23rd hearing date, Clarke asked for another continuance for the same reason. The AG objected to this request. The continuance was denied and Clarke declined to appear at the hearing.

3. The jury's guilty verdict was affirmed by the Court of Appeals.
4. The Court of Appeals determined that Clarke was driving the vehicle.
5. Video footage from the police vehicle shows Clarke resisting arrest.

Determination of Issues

I. Clarke's Burden of Proof to Obtain Compensation

A person erroneously convicted and imprisoned for a felony may submit a claim to the Board for pecuniary injury sustained as a result of his erroneous conviction and imprisonment.³ Penal Code section 4903 provides that in order to state a successful claim for compensation, the claimant must prove the following by a preponderance of the evidence:⁴

1. That the crime with which he was charged was either not committed at all, or, if committed, was not committed by him;
2. That he did not by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of the arrest or conviction for the crime; and
3. That he sustained a pecuniary injury through his erroneous conviction and imprisonment.

If the claimant meets his burden of proof, the Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the claimant.⁵ Clarke's claim should be denied because he has not shown by a preponderance of the evidence that he did not commit the crime with which he was charged.

II. Clarke Has Not Met His Burden of Proving Innocence

The evidence overwhelmingly shows that Clarke was the driver of the vehicle and was responsible for crashing into the fence of the tow yard. Toxicology reports showed that Clarke was intoxicated and had a blood alcohol level of 0.23 percent. Clarke was identified at the scene and at

³ Pen. Code, § 4900.

⁴ *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and Government Claims Board* (2000) 152 Cal. App. 4th 1164. Preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People v. Miller* (1916) 171 Cal. 649, 652.)

⁵ Pen. Code, § 4904.

1 trial by Binnebose as the driver of the vehicle. One law enforcement officer testified that when he
2 arrived he saw Clarke in the driver's seat of the vehicle with its engine and headlights on. He also
3 testified that Clarke admitted that he was the driver. The video footage shows Clarke next to his
4 vehicle. There is no evidence that there was any other person nearby or that anybody else could have
5 been driving the vehicle. The car was also stopped along an enclosed dirt road that was surrounded
6 by fences which means it would be very difficult for anybody to have left the scene. The jury's guilty
7 verdict has never been reversed and the Court of Appeals stated that it believes that Clarke was the
8 driver. Further, Clarke's four prior convictions for driving under the influence show that he has a
9 propensity for driving drunk. Thus, Clarke has failed to meet his burden of proof.

10 Since Clarke did not provide any persuasive evidence to show that he was not driving the
11 vehicle and that he did not resist arrest, he has failed to meet his burden of proving that he is innocent
12 of the crimes with which he was charged. Thus, his claim under Penal Code section 4900 is denied.

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14 Dated: July 14, 2011

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16 Kevin D. Kwong
17 Hearing Officer
18 California Victim Compensation and
19 Government Claims Board
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**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

Kellen Clarke

Notice of Decision

On August 18, 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:

Tisha Heard
Board Liaison
California Victim Compensation and
Government Claims Board