

1
2
3
4
5
6
7
8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the Matter of the Claim of:

12 **Gerald McCall**

13 Claim No. G566589

Proposed Decision

(Penal Code § 4900)

14
15 **Introduction**

16 An in-person hearing on this claim was held on September 29, 2008, in Sacramento, California,
17 by Edward Carrillo, Hearing Officer, California Victim Compensation and Government Claims Board.
18 The claimant, Gerald McCall, appeared at the hearing and was represented by Alexander Simpson of
19 the California Innocence Project. The California Attorney General's Office was represented by Peter
20 Thompson, Deputy Attorney General (AG). The record remained open for the submittal of closing
21 briefs and arguments. Closing documents were received and the record closed.

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

25 **Procedural Background**

26 On March 16, 2000, McCall was convicted of voluntary manslaughter and sentenced to 11
27 years in prison for the death of Henrietta Davis. The Fourth District Court of Appeal affirmed the trial
28 court's judgment on November 8, 2001. On July 13, 2005, McCall filed a writ of habeas corpus
29 asking to be declared factually innocent of the crime with which he was charged. The court denied

1 McCall's writ on August 15, 2005, and stated that McCall was properly convicted and "far from
2 factually innocent." After finishing his sentence, McCall was released from prison on September 13,
3 2006, and he submitted his claim under Penal Code section 4900 to the Board on March 13, 2007.

4 **Summary of Evidence**

5 **I. Undisputed Facts**

6 On April 13, 1997, at approximately 11:45 p.m., McCall was driving home after an Alcohol
7 Anonymous meeting when victim Henrietta Davis approached McCall's vehicle and stated something
8 to the effect that she needed help. Davis entered McCall's vehicle and they drove to McCall's
9 apartment. At approximately 1:00 a.m., Majorie Stewart, who lived in the apartment next door to
10 McCall, awoke when she heard screams coming from a woman. These screams were described as
11 raspy, animal-like screams. Stewart called 911, but when the police knocked on McCall's door there
12 was no answer. The police also knocked on the door of the apartment below and there was no
13 answer as well. Not seeing or hearing anything suspicious, the police left the apartment complex.
14 Approximately 30 to 45 minutes later, McCall called 911 to report that Davis had died in his
15 apartment. McCall had fresh scratches and blood on his body and stated to the police that Davis
16 tried to rob him by going through his pants pockets and that a struggle ensued.

17 **A. The Prosecution's Evidence at Trial**

18 Prosecutors alleged that McCall strangled Davis to death. The prosecution stated that Davis
19 was a prostitute and was picked up by McCall in a known prostitution area. The apartment manager,
20 William Stephens, testified that he had seen McCall take prostitutes home with him on a few prior
21 occasions. Stephens testified that Davis appeared to be acting like a normal prostitute based on her
22 body movements and the way she conducted herself.

23 Stewart testified that she heard a woman screaming for about five to ten minutes, with each
24 scream lasting five to ten seconds. These screams were deep, raspy, animal-like sounding screams.
25 Stewart also heard a heavy thump on the wall.

26 Paramedic Gary McCafferty testified that he spoke to McCall inside the apartment while other
27 paramedics attempted to provide medical aid to Davis. According to McCafferty, McCall told him that
28
29

1 he had strangled or choked Davis.¹ McCafferty said that he remembers this comment because it
2 was unusual for a person to admit.

3 Forensic pathologist Venita Durazo testified that Davis died from manual strangulation.
4 Durazo based this conclusion mostly from internal trauma to Davis' neck, seeing scratches and
5 hemorrhages on the neck, a loose tooth, and bruising in the mouth. Durazo concluded that even
6 though Davis had high levels of cocaine in her system, the cocaine was not the cause of her death.
7 Forensic pathologist Frank Sheridan testified as a rebuttal witness and also stated that Stewart died
8 from manual strangulation. His conclusion was based primarily on Davis' fractured larynx and
9 injuries to her neck.

10 **B. The Defense's Evidence at Trial**

11 The defense alleged that Davis died due to the cocaine in her body and that McCall did not
12 strangle her to death.² The defense also questioned the reliability of McCafferty's testimony since he
13 did not memorialize McCall's alleged statement about strangling Davis, nor did he tell any of the
14 other paramedics about this statement.

15 **II. Evidence at the 4900 Hearing**

16 At the hearing before the Board on the Penal Code 4900 claim, McCall alleged that he did not
17 kill Davis and that she instead died from "delayed strangulation." Dr. Sheridan, the doctor who
18 testified for the prosecution at McCall's criminal trial, altered the conclusion he testified to at trial and
19 advanced the theory of delayed strangulation. This theory alleges that Davis was strangled
20 sometime prior to meeting McCall in his car, and that she died as a result of a gradual swelling of her
21 neck, which led to her airway being blocked and her choking to death.

22
23
24
25
26 ¹ McCafferty was not sure which word McCall used.

27 ² Because McCall does not allege in his 4900 claim that Davis died from cocaine, the testimony of the
28 defense's medical experts at trial is only relevant to the extent that it was referenced at his 4900
29 hearing.

1 A. Dr. Sheridan's Testimony at the 4900 Hearing

2 After conviction, McCall wrote letters from prison to Dr. Sheridan asking him to review the
3 case. Dr. Sheridan had always thought that this case was unusual because Davis did not have any
4 petechial hemorrhages³ when she died. Dr. Sheridan testified that he had never seen a case of
5 manual strangulation where the victim did not have petechial hemorrhaging, and prior testimony
6 showed that petechial hemorrhaging is found in approximately 85% of manual strangulation cases.

7 McCall gave Dr. Sheridan two pieces of evidence that he had not known at the time of trial.
8 These two pieces of evidence were that Davis' voice had a "guttural quality" when she was picked up
9 in the car, and that she asked for a glass of ice water at McCall's apartment. Dr. Sheridan stated that
10 both of these show that Davis already had an injured larynx prior to meeting McCall. Her crushed
11 larynx prevented her from speaking normally and the water was to sooth her throat. Additionally,
12 Davis' already injured larynx is consistent with the evidence of the animal-like screams that Stewart
13 heard and the paramedics testimony that they had difficulty intubating into Davis' neck to help her
14 breath.

15 Upon closer examination of the medical records, Dr. Sheridan also noticed that Davis had
16 swelling in the lining of her airway. Normally, when a person is strangled there is no swelling
17 because the person dies immediately and the tissue does not have enough time to enlarge. The
18 presence of swelling in Davis' neck shows that the swelling was gradual and that she could not have
19 died immediately after being strangled. The swelling would also explain why petechial hemorrhaging
20 was not found since blood was still able to flow to Davis' brain.

21 Dr. Charles Welti, who testified for the defense at McCall's criminal trial that Davis died due to
22 the cocaine in her body and not due to strangulation, submitted a declaration stating that he agreed
23 with Dr. Sheridan's theory of delayed strangulation after reviewing the evidence again.

24
25
26
27 ³ Petechial hemorrhaging is loosely defined as the rupturing of blood vessels due to too much
28 pressure. When a person is strangled, blood flow is prevented, which causes blood congestion and
29 eventually blood vessels rupture due to the congestion. The rupturing is usually found in the white
area of the eyes.

1 **B. The AG's argument at the 4900 Hearing**

2 At the hearing on the 4900 claim, the AG argued that the evidence that Dr. Sheridan reviewed
3 to formulate his delayed strangulation theory is the same evidence that he reviewed at trial when he
4 formed his manual strangulation theory. The lack of petechial hemorrhaging was discussed at trial,
5 and despite it being found in most strangulation cases, Dr. Sheridan still testified that Davis died due
6 to manual strangulation. Testimony at trial showed that a strong chokehold on the victim to cut off
7 blood from the arteries and veins could be the reason there was not any petechial hemorrhaging in
8 the victim.

9 The AG pointed out that Dr. Sheridan ignored evidence in arriving at his delayed strangulation
10 theory. Specifically, Dr. Sheridan ignored McCafferty's testimony that McCall told him that he
11 strangled the victim. He also did not consider Stephens' testimony that Davis acted sexy and
12 seemed normal. If Davis already had a fractured larynx caused by another individual, it is unlikely
13 that she would have been acting sexy. Finally, there is no reliable evidence that Davis' voice had a
14 "guttural quality" to it. In fact, a separate correspondence from McCall states that Davis' voice was
15 normal.

16 The only new evidence that Dr. Sheridan received in formulating his new theory is that Davis
17 asked for a glass of water. However, it was a hot and humid evening and there are a number of
18 reasons why she could have wanted a glass of water. This fact alone does not support the
19 conclusion that Davis was strangled prior to meeting McCall.

20 Finally, the AG noted that McCall's writ of habeas corpus based on Dr. Sheridan's new theory
21 was denied. The court stated that "he (McCall) killed the victim," and that Dr. Sheridan's new opinion
22 is not based on any new facts and that his inconsistency in opinions was not grounds for a new trial.

23
24 **Findings**

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

- 26 1. Davis was strangled to death.
27 2. McCall told McCafferty that he had strangled or choked Davis.

1 3. All significant facts and details of Davis' death were analyzed by Dr. Sheridan before his
2 testimony at McCall's criminal trial that Davis died due to manual strangulation.

3 4. McCall's writ of habeas corpus based on Dr. Sheridan's theory of delayed strangulation
4 was rejected by the court.

5 **Determination of Issues**

6 **I. McCall's Burden of Proof to Obtain Compensation**

7 A person erroneously convicted and imprisoned for a felony may submit a claim to the Board for
8 pecuniary injury sustained as a result of his erroneous conviction and imprisonment.⁴ Penal Code
9 section 4903 provides that in order to state a successful claim for compensation, the claimant must
10 prove the following by a preponderance of the evidence:⁵

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

16 If the claimant meets his burden of proof, the Board shall recommend to the legislature that an
17 appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the
18 claimant.⁶ Here, however, McCall's claim must be denied because he failed to show by a
19 preponderance of the evidence that he did not commit the crime with which he was charged.

20 **II. The Delayed Strangulation Theory is Not Persuasive**

21 The only evidence that McCall presented as proof of his innocence is Dr. Sheridan's theory of
22 delayed strangulation, which theorizes that Davis was strangled prior to meeting McCall in his car.

23
24

⁴ Pen. Code, § 4900.

25
26 ⁵ *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and*
27 *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.)

28 ⁶ Pen. Code, § 4904.
29

1 However, Dr. Sheridan's delayed strangulation theory is not persuasive based on the limited facts
2 showing delayed strangulation occurred and the overwhelming evidence that McCall strangled Davis.

3 First, and most importantly, there has not been any judicial determination that McCall did not
4 commit the crime. McCall was found guilty at the trial court, the Court of Appeals affirmed the guilty
5 verdict, and McCall's writ of habeas corpus was also denied.⁷ The court that denied McCall's writ also
6 rejected Dr. Sheridan's theory of delayed strangulation in determining that McCall was not innocent of
7 the crime charged.

8 Second, McCafferty's testimony that McCall stated that he choked or strangled Davis is given
9 great weight. McCall argued that this statement is unreliable, was not memorialized in any document,
10 and was not heard by any other party. However, McCall offered no reason or evidence for McCafferty
11 to fabricate this statement. As a paramedic, McCafferty's concern is the victim's health and McCall
12 made a spontaneous statement when asked how Davis sustained her injuries.

13 Third, Dr. Sheridan's opinion regarding delayed strangulation does not prove by a
14 preponderance of the evidence that McCall did not strangle Davis. Dr. Sheridan's testimony as a
15 whole is given little credibility because he reached a different conclusion at the criminal trial based on
16 the same evidence. In denying McCall's writ for habeas corpus, the court stated it best by saying "Dr.
17 Sheridan's apparently [sic] altered opinion is not based upon any new facts," and that he reached an
18 inconsistent conclusion from the same facts. Dr. Welti's concurrence in the theory is given even less
19 weight than Dr. Sheridan's testimony because Dr. Welti's previous testimony after reviewing the same
20 evidence was that Davis did not even die due to strangulation but instead died from a cocaine
21 overdose. While doctors can change their expert opinions, the only new evidence presented to the
22
23

24 ⁷ In addition to the merits of McCall's claim, the AG also argued that McCall's 4900 claim was barred
25 under the doctrines of res judicata and collateral estoppel since the guilty verdict was never overturned,
26 thus the Board did not have jurisdiction to hear this claim. However, Penal Code section 4900 states
27 that *any* person who was erroneously convicted may present a claim to the Board. Requiring claimants
28 to obtain a reversal of conviction or a finding of factual innocence before being eligible to file a 4900
29 claim adds a requirement not found in the statute. Additionally, as the AG's office has cited on
numerous other 4900 claims, the Board is not bound by a finding of factual innocence. (*Tennison v.*
California Victim Compensation and Government Claims Board (2007) 152 Cal.App.4th 1164, 1177-
1180). Thus, the Board would also not be bound by the absence of a finding of factual innocence.

1 doctors after the criminal trial was McCall's personal letters stating that Davis' voice had a "guttural
2 quality" and that she asked for a glass of water.

3 The assertion that Davis' voice had a "guttural quality" and that she asked for a glass of water
4 are not strong pieces of evidence to change a cause of death, nor are they reliable statements. There
5 was no testimony or any other statement from any witness that Davis' voice had a "guttural quality."
6 The only information indicating that Davis' voice was "guttural" comes from a letter that McCall wrote to
7 Dr. Sheridan while in prison. However, one of McCall's other letters states that he was sure that Davis'
8 speech was normal. Thus, there is very little reliable evidence to corroborate that Davis' voice had a
9 "guttural quality" to it. Similarly, Davis asking for water could be due to numerous reasons, including
10 that it was hot or that she was thirsty from being out in the street.

11 While Dr. Sheridan found it unusual that a person died from being strangled but did not have
12 any petechial hemorrhaging, trial testimony established that in about 15 percent of manual
13 strangulation cases there is no petechial hemorrhaging. Thus, the absence of petechial hemorrhaging
14 in this death does not prove that the victim must have died in another manner. Additionally, trial
15 testimony established that there would be no petechial hemorrhaging if McCall squeezed Davis' neck
16 hard enough to cut off blood from the arteries and veins.

17 Dr. Sheridan's only evidence that has any credibility is his argument about the swelling in Davis'
18 neck. While swelling may seem unusual, there is strong evidence that points to McCall being the
19 perpetrator. The presence of swelling alone is not enough to meet McCall's burden that he did not
20 commit the crime with which he was charged.

21 III. Conclusion

22 A reasonable view of all the evidence points to McCall being the perpetrator. Stephens stated
23 that Davis acted sexy and was similar to the other prostitutes that McCall brought home. It is unlikely
24 that Davis would have been acting sexy and like a normal prostitute if she had previously been
25 strangled and had internal injuries to her neck. Stewart's uncontroverted testimony of hearing screams
26 for five to ten minutes and a loud thump, along with the scratches on McCall, indicate that a lengthy
27 and fierce struggle occurred inside of McCall's apartment. When the police arrived at the scene
28 McCall did not answer the door. McCall then called 911 30 to 45 minutes after the fight ended. In light
29

1 of all these facts there is not a preponderance of the evidence to support McCall's allegation that Davis
2 died solely because she was previously strangled at least two hours earlier.

3 Based on the totality of the evidence, McCall has not met his burden of proving that he did not
4 commit the crimes with which he was charged. Thus, his claim under Penal Code section 4900 is
5 denied.

6
7 Dated: October 23, 2009

8 
9 _____
10 Kevin D. Kwong
11 Hearing Officer
12 California Victim Compensation and
13 Government Claims Board
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29