

RESOLUTION 02-03-2008

DIGEST

Finding of Factual Innocence: Extends Availability to the Wrongfully Convicted

Amends Penal Code section 851.8 to allow a filing by the wrongfully convicted, and for this finding to be binding on all other California bodies.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 851.8 to allow a filing by the wrongfully convicted, and for this finding to be binding on all other California bodies. This resolution should be approved in principle because it will provide relief to those who are factually innocent and who have heretofore been unable to apply for this finding (since those who are convicted, even wrongfully, are foreclosed from it); and it will prevent the re-litigation of the issue of factual innocence for those making claims for compensation for time spent incarcerated.

The resolution allows those who were convicted despite being factually innocent to obtain a record that reflects their factual innocence. Penal Code section 851.8 is the most comprehensive relief available to those who have been arrested and subsequently vindicated either by way of a dismissal of criminal charges prior to trial or an acquittal at trial. This section calls for the sealing and destruction of arrest records, court records and Department of Justice records. Penal Code section 851.8 provides relief to those who have had their cases dismissed prior to trial or who have been acquitted at trial. However, relief has not been offered to those whose convictions are overturned as the result of DNA or other forensic evidence, or to those who were convicted following constitutional violations or where new evidence has surfaced which convinces the prosecution that the person convicted is factually innocent. The proposed amendment provides the relief to the factually innocent and also provides that a judicial finding of factual innocence under section 851.8 will be binding on all other California executive, administrative, legislative and judicial bodies. This will prevent the unnecessary re-litigation of these issues for those making claims for compensation due to their wrongful imprisonment.

This resolution is similar to AB 2937 (Solorio.)

TEXT OF RESOLUTION

RESOLVED that the Conference of the Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 851.8 to read as follows:

- 1 §851.8
- 2 (a) In any case where a person has been arrested and no accusatory pleading has
- 3 been filed, or a person has been convicted of a crime and that conviction has been

4 vacated or set aside by a state or federal court due to (i) DNA or other forensic evidence
5 exoneration, (ii) insufficient evidence so as to merit a directed verdict under Penal Code
6 §1118.1, or (iii) constitutional violations that prejudiced defendant's ability to present
7 exculpatory evidence where such evidence would more likely than not have exonerated
8 the person, or the person has been convicted and new evidence which was not presented
9 at trial has convinced the prosecuting attorney that the person convicted is factually
10 innocent of the crime(s) for which the person was convicted, the person arrested or
11 previously convicted may petition the law enforcement agency having jurisdiction over
12 the offense to destroy its records of the arrest. A copy of the petition shall be served upon
13 the prosecuting attorney of the county or city having jurisdiction over the offense. The
14 law enforcement agency having jurisdiction over the offense, upon a determination that
15 the person arrested is factually innocent, shall, with the concurrence of the prosecuting
16 attorney, seal its arrest records, and the petition for relief under this section for three
17 years from the date of the arrest and thereafter destroy its arrest records and the petition.
18 The law enforcement agency having jurisdiction over the offense shall notify the
19 Department of Justice, and any law enforcement agency that arrested the petitioner or
20 participated in the arrest of the petitioner for an offense for which the petitioner has been
21 found factually innocent under this subdivision, of the sealing of the arrest records and
22 the reason therefor. The Department of Justice and any law enforcement agency so
23 notified shall forthwith seal their records of the arrest and the notice of sealing for three
24 years from the date of the arrest, and thereafter destroy their records of the arrest and the
25 notice of sealing. The law enforcement agency having jurisdiction over the offense and
26 the Department of Justice shall request the destruction of any records of the arrest which
27 they have given to any local, state, or federal agency or to any other person or entity.
28 Each agency, person, or entity within the State of California receiving the request shall
29 destroy its records of the arrest and the request, unless otherwise provided in this section.

30 (b) If, after receipt by both the law enforcement agency and the prosecuting
31 attorney of a petition for relief under subdivision (a), the law enforcement agency and
32 prosecuting attorney do not respond to the petition by accepting or denying the petition
33 within 60 days after the running of the relevant statute of limitations or within 60 days
34 after receipt of the petition in cases where the statute of limitations has previously lapsed,
35 then the petition shall be deemed to be denied. In any case where the petition of ~~an~~
36 ~~arrestee~~ a person authorized by subdivision (a) to submit a petition to the law
37 enforcement agency to have an arrest record destroyed is denied, petition may be made to
38 the superior court that would have had territorial jurisdiction over the matter. A copy of
39 the petition shall be served on the law enforcement agency and the prosecuting attorney
40 of the county or city having jurisdiction over the offense, and the Department of Justice,
41 at least 10 days prior to the hearing thereon. The petitioner, prosecuting attorney and the
42 law enforcement agency through the district attorney, and the Department of Justice, may
43 present evidence to the court at the hearing. Notwithstanding Section 1538.5 or 1539, any
44 judicial determination of factual innocence made pursuant to this section may be heard
45 and determined upon declarations, affidavits, police reports, or any other evidence
46 submitted by the parties which is material, relevant and reliable. A finding of factual
47 innocence and an order for the sealing and destruction of records pursuant to this section
48 shall not be made unless the court finds that no reasonable cause exists to believe that the
49 ~~arrestee~~ petitioner committed the offense for which the arrest was made. In any court

50 hearing to determine the factual innocence of a party, the initial burden of proof shall rest
51 with the petitioner to show that no reasonable cause exists to believe that the arrestee
52 petitioner committed the offense for which the arrest was made. If the court finds that this
53 showing of no reasonable cause has been made by the petitioner, then the burden of proof
54 shall shift to the respondent to show that a reasonable cause exists to believe that the
55 petitioner committed the offense for which the arrest was made. If the court finds the
56 arrestee petitioner to be factually innocent of the charges for which the arrest was made
57 or for which the petitioner suffered conviction(s), then the court shall order the law
58 enforcement agency having jurisdiction over the offense, the Department of Justice, ~~and~~
59 any law enforcement agency which arrested the petitioner or participated in the arrest and
60 conviction(s), if any, of the petitioner for an offense or offenses for which the petitioner
61 has been found factually innocent under this section, and any clerk of any court who
62 maintains records of the arrest or conviction(s), if any, to seal their records of the arrest
63 and conviction(s), if any, and the court order to seal and destroy the records, for three
64 years from the date of the arrest and thereafter to destroy their records of the arrest and
65 conviction(s), if any, and the court order to seal and destroy such records. The court shall
66 also order the law enforcement agency having jurisdiction over the offense and the
67 Department of Justice to request the destruction of any records of the arrest and
68 conviction(s), if any, which they have given to any local, state, or federal agency, person
69 or entity. Each state or local agency, person or entity within the State of California
70 receiving such a request shall destroy its records of the arrest and conviction(s), if any
71 and the request to destroy the records, unless otherwise provided in this section. The
72 court shall give to the petitioner a copy of any court order concerning the destruction of
73 the ~~arrest~~ records of arrest and conviction(s), if any.

74 (c) In any case where a person has been arrested, and an accusatory pleading has
75 been filed, but where no conviction has occurred, the defendant may, at any time after
76 dismissal of the action, petition the court that dismissed the action for a finding that the
77 defendant is factually innocent of the charges for which the arrest was made. A copy of
78 the petition shall be served on the prosecuting attorney of the county or city in which the
79 accusatory pleading was filed at least 10 days prior to the hearing on the petitioner's
80 factual innocence. The prosecuting attorney may present evidence to the court at the
81 hearing. The hearing shall be conducted as provided in subdivision (b). If the court finds
82 the petitioner to be factually innocent of the charges for which the arrest was made, then
83 the court shall grant the relief as provided in subdivision (b).

84 (d) In any case where a person has been arrested and an accusatory pleading has
85 been filed, but where no conviction has occurred, the court may, with the concurrence of
86 the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the
87 dismissal of the accusatory pleading.

88 (e) Whenever any person is acquitted of a charge and it appears to the judge
89 presiding at the trial at which the acquittal occurred that the defendant was factually
90 innocent of the charge, the judge may grant the relief provided in subdivision (b).

91 (f) In any case where a person who has been arrested is granted relief pursuant to
92 subdivision (a) or (b), the law enforcement agency having jurisdiction over the offense or
93 court shall issue a written declaration to the arrestee or wrongfully convicted person
94 stating that it is the determination of the law enforcement agency having jurisdiction over
95 the offense or of the court that the arrestee or wrongfully convicted person is factually

96 innocent of the charges for which the person was arrested or convicted and that the
97 arrestee or wrongfully convicted person is thereby exonerated. Thereafter, the arrest and
98 conviction(s), if any, shall be deemed not to have occurred, except as provided by
99 subsection (i) below and in any proceedings by the petitioner seeking compensation for
100 the wrongful conviction(s) pursuant to Penal Code sections 4900 et seq., or otherwise,
101 and the person may answer accordingly any question relating to its occurrence.

102 (g) The Department of Justice shall furnish forms to be utilized by persons
103 applying for the destruction of their arrest records and for the written declaration that one
104 person was found factually innocent under subdivisions (a) and (b).

105 (h) Documentation of arrest records destroyed pursuant to subdivision (a), (b), (c),
106 (d), or (e) that are contained in investigative police reports shall bear the notation
107 “Exonerated” whenever reference is made to the arrestee or wrongfully convicted person.
108 The arrestee or wrongfully convicted person shall be notified in writing by the law
109 enforcement agency having jurisdiction over the offense of the sealing and destruction of
110 the arrest records and records of conviction(s), if any pursuant to this section.

111 (i) Any finding that an arrestee or wrongfully convicted person is factually
112 innocent pursuant to subdivision (a), (b), (c), (d), or (e) shall ~~not~~ be admissible as
113 evidence in any action. A finding and order by a state or federal court of factual
114 innocence which is final shall be res judicata and binding upon any California executive,
115 administrative, legislative or judicial body.

116 (j) Destruction of records of arrest pursuant to subdivision (a), (b), (c), (d), or (e)
117 shall be accomplished by permanent obliteration of all entries or notations upon the
118 records pertaining to the arrest, and the record shall be prepared again so that it appears
119 that the arrest never occurred. However, where (1) the only entries on the record pertain
120 to the arrest and (2) the record can be destroyed without necessarily affecting the
121 destruction of other records, then the document constituting the record shall be physically
122 destroyed.

123 (k) No records shall be destroyed pursuant to subdivision (a), (b), (c), (d), or (e) if
124 the arrestee or a codefendant has filed a civil action against the peace officers or law
125 enforcement jurisdiction which made the arrest or instituted the prosecution and if the
126 agency which is the custodian of the records has received a certified copy of the
127 complaint in the civil action, until the civil action has been resolved. Any records sealed
128 pursuant to this section by the court in the civil actions, upon a showing of good cause,
129 may be opened and submitted into evidence. The records shall be confidential and shall
130 be available for inspection only by the court, jury, parties, counsel for the parties and any
131 other person authorized by the court. Immediately following the final resolution of the
132 civil action, records subject to subdivision (a), (b), (c), (d), or (e) shall be sealed and
133 destroyed pursuant to subdivision (a), (b), (c), (d), or (e).

134 (l) For arrests occurring on or after January 1, 1981, and for accusatory pleadings
135 filed on or after January 1, 1981, petitions for relief under this section may be filed up to
136 two years from the date of the arrest or filing of the accusatory pleading, whichever is
137 later, or in the case of conviction(s), petitions for relief under this section may be filed up
138 to two years from the date of a court order vacating or setting aside a conviction(s), if
139 later. Until January 1, 1983, petitioners can file for relief under this section for arrests
140 which occurred or accusatory pleadings which were filed up to five years prior to the
141 effective date of the statute. Any time restrictions on filing for relief under this section

142 may be waived upon a showing of good cause by the petitioner and in the absence of
143 prejudice.

144 (m) Any relief which is available to a petitioner under this section for an arrest
145 shall also be available for an arrest which has been deemed to be or described as a
146 detention under Section 849.5 or 851.6.

147 (n) This section shall not apply to any offense which is classified as an infraction.

148 (o) (1) This section shall be repealed on the effective date of a final judgment
149 based on a claim under the California or United States Constitution holding that evidence
150 that is relevant, reliable, and material may not be considered for purposes of a judicial
151 determination of factual innocence under this section. For purposes of this subdivision, a
152 judgment by the appellate division of a superior court is a final judgment if it is published
153 and if it is not reviewed on appeal by a court of appeal. A judgment of a court of appeal is
154 a final judgment if it is published and if it is not reviewed by the California Supreme
155 Court.

156 (2) Any decision referred to in this subdivision shall be stayed pending appeal.

157 (3) If not otherwise appealed by a party to the action, any decision referred to
158 in this subdivision which is a judgment by the appellate division of the superior court
159 shall be appealed by the Attorney General.

160 (p) A judgment of the court under subdivision (b), (c), (d), or (e) is subject to the
161 following appeal path:

162 (1) In a felony case, appeal is to the court of appeal.

163 (2) In a misdemeanor case, or in a case in which no accusatory pleading was
164 filed, appeal is to the appellate division of the superior court.

(Proposed language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Existing statutory law (Penal Code §§4900-4906) provides a mechanism for a person convicted of a felony, imprisoned as a result, and subsequently exonerated, to initiate a claim for compensation from the state. The claim is heard by the Victim Compensation And Government Claims Board. Under the current statutory scheme, to qualify for compensation, the claimant/exoneree must prove that he did not commit the offense and also did not contribute in any culpable way to his/her own arrest or conviction. This statutory definition of “factual innocence” differs from the definition in Penal Code §851.8, which currently permits expungement of an arrest if “the court finds that no reasonable cause exists to believe that the arrestee committed the crime for which the arrest was made,” or regardless of lack of probable cause if the District Attorney concurs in the request. Thus, a person found factually innocent pursuant to Penal Code §851.8 may not be deemed innocent *enough* to receive compensation under §4900 et seq.

This Resolution: Would create a single and simple statutory mechanism for an exoneree released from prison to be declared innocent, released from the penalties and disabilities associated with wrongful conviction, AND compensated for the wrongful incarceration. Further, once a person

has obtained a final order and finding of factual innocence, compensation should be automatic and the use of res judicata in subsection (i) will implement that concept and will end the current practice of relitigation by the Attorney General's Office under §4900 et seq. of innocence claims.

The Problem: The statutory scheme for compensating exonerees with up to \$100 per day for the months and years they were wrongly imprisoned is flawed due to the lack of a simple and single procedure for a finding of factual innocence. Penal Code section 851.8 does not explicitly provide relief for a person who has been erroneously convicted and subsequently exonerated. *People v. McCann* (2006) 141 Cal.App.4th 353 held that an appellate reversal of a felony conviction based on insufficient evidence was the functional equivalent of an acquittal for section 851.8 purposes, but in *People v. Adair* (2003) 29 Cal.4th 895, 909, the Supreme Court reversed a trial court that found an acquitted murder defendant factually innocent under section 851.8 because the substantial evidence test used by the lower court proved only that the case presented reasonable doubts, but did not negate all reasonable cause for having arrested and charged the defendant.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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