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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| TIMOTHY ATKINS,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VICTIMS COMPENSATION AND GOVERNMENT CLAIMS BOARD,<br><br>Defendant and Appellant. | B281343<br><br>(Los Angeles County Super. Ct. No. BS158685) |

APPEAL from a judgment of the Superior Court of Los Angeles County, David R. Chaffee, Judge. Affirmed as modified and remanded with instructions.

Xavier Becerra, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Kenneth N. Sokoler, Supervising Deputy Attorney General, Barton Bowers, Deputy Attorney General, for Defendant and Appellant.

California Innocence Project, Justin Brooks, Alexander Simpson, Katherine Bonaguidi, Raquel Cohen, for Plaintiff and Respondent.

## INTRODUCTION

Plaintiff and respondent Timothy Atkins was incarcerated for 23 years after a jury found him guilty of murder and robbery in 1987. The trial court subsequently granted Atkins's habeas corpus petition and vacated his conviction; the District Attorney declined to retry the case. In 2007, asserting his innocence, Atkins filed a claim for monetary compensation under Penal Code section 4900[1] with defendant and appellant Victims Compensation and Government Claims Board (Board), which denied his claim. Atkins challenged the Board's denial by filing a petition for writ of mandate in the trial court. The trial court denied the petition. In a 2013 appeal, we reversed the trial court's ruling and ordered the court to grant Atkins's petition and order the Board to vacate its decision, hold a new hearing, and issue a written decision setting forth the decision's factual and legal bases.

While Atkins's case was pending before the Board following the 2013 appeal, the Legislature enacted section 1485.55. Effective January 1, 2014, subdivision (b) of the statute authorized individuals who have obtained a writ of habeas corpus to move in the trial court for a finding of innocence. Subdivision (d) of the statute provided that, once the court makes an

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

innocence finding under subdivision (b), the Board "shall, without a hearing," recommend that the Legislature pay the claim.[2]

Invoking the new statute, Atkins obtained a declaration of innocence from the trial court in August 2014. The Board, however, asserted it was not required to recommend payment of Atkins's claim under section 1485.55, subdivision (d) because (1) doing so would be tantamount to giving the statute improper retroactive effect and (2) the Board could not comply with the statute in light of its obligation to follow this court's 2013 order to hold a new hearing and issue a new decision.

The trial court rejected the Board's arguments and granted Atkins's second petition for a writ of mandate. We affirm the judgment as modified and remand with directions.

## BACKGROUND

We repeat the factual and procedural background set forth in our unpublished opinion regarding this matter, *Atkins v. Victim Comp. & Gov't Claims Bd.* (Sept. 5, 2013, B240295) (unpublished opinion):[3]

"1. Trial Proceedings

"On January 1, 1985, about 1:00 a.m., two men robbed Maria Gonzales and Vicente Gonzales, her husband, at gunpoint, and one of the robbers shot Vicente in the chest, killing him. In a

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[2] The statute's wording has been modified since its enactment in ways that do not affect our resolution of the issues in this appeal.

[3] Citations to the Administrative Record have been removed.

pretrial photographic lineup, Maria identified Ricky Evans as the shooter. In a separate photographic lineup, at the preliminary hearing, and at trial, Maria identified Atkins as the robber who took her necklace.

"The preliminary hearing testimony of Denise Powell was admitted at trial. She testified on the morning after the murder, Atkins and Evans joined her and Tommy Yates in their car. Atkins asked if Yates heard about a Mexican being killed the night before. Atkins said ""we offed him[,]"" i.e., killed him.

"In his signed statement, Marvin Moore stated: On January 1, 1985, about 5:00 a.m., Atkins and Evans ran toward him. Evans, who had dried blood on his right hand and forearm, stated """we just blasted a mother fucker."""" At trial, Moore recanted.

"Atkins relied on mistaken identity and alibi defenses. Yates testified Atkins did not admit he had killed anyone. Kelly Lane Simpson testified on January 2, 1985, Denise Powell told her that while at a party she heard Buster Young and Gus Doonan brag about killing someone near 4th Street and Brooks. Larry Pitre testified Moore told him he got [out] of jail by making a deal in the Atkins case but he lied to the police in that two others had actually committed the murder. Julie Davis, who was dating Lew Dewberry, Atkins's uncle, testified just after midnight on January 1, 1985, Davis and Atkins walked to the 4th and Brooks crime scene, because they had heard there was a murder. Laura Boney, Atkins's grandmother, testified she believed Atkins returned home between 12:30 and 1:00 a.m. on January 1, 1985. Officer Debbie Dresser testified she believed the murder suspect description matched a robbery suspect, Sylvester Gus Henderson.

"2. Habeas Corpus Hearing and Decision

"At the habeas corpus hearing, Atkins presented evidence to show his conviction was the product of false testimony improperly procured by the prosecution. In granting the petition, Judge Michael A. Tynan, the judge who presided over Atkins's trial, vacated his conviction due to Powell's false testimony and set a date for a new trial.[4]

"3. Administrative Proceedings and Board Decisions

"Following the claims hearing, the hearing officer issued his 'Proposed Decision' in which he found Atkins failed to prove his innocence.

"a. Claims Evidentiary Hearing

"The hearing officer considered the habeas corpus proceedings and the trial evidence. He also considered the following evidence based on Detective Roger Niles's notes from various police interviews.

"Atkins stated on the night of the murder, he was with Evans most of time except between 12:30 and 2:00 a.m. when he left to sell a stolen car stereo. Atkins was in the laundry room at 410 Indiana Avenue[5] to sell the stereo when he saw three males running down the alley behind the building. Cecil Bowens was

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4 "The People declined to retry Atkins, and Atkins was released from prison on February 9, 2007."

5 "This location was about a tenth of a mile away from the crime scene."

the one carrying a shotgun and Rickey Powell,[6] who held a handgun, advised Atkins to go home, because ""we just did a move."" Evans, who was the third, was carrying a wallet. Atkins went home.

"Evans told police he went to a New Year's Eve party on 7th and Broadway at about 10:30 p.m. and stayed until 5:00 a.m. on New Year's Day. Atkins was at the party. Evans laughed when asked if he had committed the murder.

"'Inmate A' told police on February 13, 1985, the date of Atkins's preliminary hearing, Atkins and he were waiting to be transported to court. Atkins told him on New Year's Eve he and Evans robbed a Mexican man and woman on Brooks Avenue. They stole the woman's necklace and shot the man.[7]

"At the claims hearing, Atkins presented mistaken identity and alibi evidence. Dr. Mitchell Eisen, an identification expert, testified regarding factors affecting identification reliability and explained how certain factors could lead to a low level of reliability. He admitted he never interviewed Maria, nor did he view the police six-packs of photographs shown to her when she identified Atkins and Evans as the perpetrators.

"Atkins testified on the night of December 31, 1984, he was in the basement hallway at 410 Indiana Avenue waiting for a friend to sell a car stereo Atkins had stolen. Atkins saw two fellow gang members, Cecil Bowens and Rickey Powell, and a

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6 "Any relationship he had with Denise Powell was unknown."

7 "Dewberry told police that either on December 31, 1984, or January 1, 1985, he saw Atkins with a necklace. In his declaration, Dewberry stated on New Year's Eve, he never saw Atkins with a necklace."

third individual whom he did not know. All three were running through the alley behind the building. Powell told Atkins to leave because ""they had just done a move."" Later, Atkins saw Davis outside the alley and heard sirens around the corner. He and Davis then walked about a block away to a location which was roped off. He observed a person who appeared to be deceased hanging out of the car. Atkins later left for 5th and Broadway where he met Evans. When Yates and Denise Powell pulled up in a vehicle, Atkins and Evans got in the back seat. There was no conversation about the commission of a murder.

"In his declaration, Judge David Wesley, who previously had been Atkins's defense lawyer, stated he believed Atkins was innocent of the charged crimes.

"b. Proposed Decision of Hearing Officer

"The hearing officer found Atkins failed to prove his innocence by a preponderance of the evidence. He pointed out no evidence was presented that Maria no longer believed Atkins was the perpetrator. Maria never recanted her identification of Atkins. He did not find Maria's identification to be unreliable 'due to the physical discrepancy between the description she gave and Atkins'[s] actual physical description.'

"The hearing officer found credible Denise Powell's testimony at the habeas corpus hearing at which she recanted her preliminary hearing testimony that Atkins said ""we offed him[.]"" He concluded this 'only shows that Atkins did not *admit* to committing the murder, it is not proof that Atkins is innocent.' The hearing officer gave the testimony and declarations of Moore, Inmate A, Pietre, Davis, Boney, and Dewberry 'very little weight, if any, due to their unreliability[.]' He found the declaration of

Judge Wesley, as Atkins's former defense attorney, to have 'little probative value.' The hearing officer determined Evans's statement to police was not credible, because 'there [was] no credible evidence that Atkins and Evans were together at a party the entire evening.'

"Although finding Atkins's testimony that he was only a block away committing a different crime 'appears to be credible,' the hearing officer concluded this uncorroborated testimony was insufficient to meet Atkins's 'heavy burden of proof in order to prevail in these proceedings.' He added 'Atkins provided no substantial evidence that the murder was committed by any other individual such as Bowens, [Rickey] Powell, Henderson, Young or Burns [*sic*].'

"The hearing officer concluded the decision of the habeas corpus court did not provide proof of innocence, because that 'court did not base its ruling on an alibi witness who could place Atkins in the basement[;] it did not state that another suspect committed the crime[;] nor did it declare Atkins to be factually innocent. [Also, t]he case was returned to the trial court for retrial.'

"c. The Board's Initial Decision

"On March 18, 2010, a hearing was held before the Board on Atkins's claim. The record does not include a certified reporter's transcript of the hearing. The Board later issued its 'Notice of Decision,' which stated the Board adopted 'the attached Proposed Decision of the [h]earing [o]fficer as its Decision[.]'

"d. The Board's Amended Decision

"In a letter, the Attorney General requested the Board amend its decision to correct certain discrepancies between the hearing officer's credibility determinations and the Board's determinations and proposed certain modifications. In its 'Amended Notice of Decision,' the Board stated on March 18, 2010, the Board 'adopted the Hearing Officer's decision to deny' Atkins's claim.

"4. Mandamus Hearing and Decision

"Atkins filed a mandamus petition to compel the Board to grant his claim for compensation. The Attorney General filed opposition, and Atkins filed a reply. Following a hearing, the superior court denied the petition." (*Atkins v. Victim Comp. & Gov't Claims Bd.* (Sept. 5, 2013, B240295) (unpublished opinion), pp. 3-7.)

5. The 2013 appeal

Atkins appealed the trial court's decision denying his mandamus petition. We asked the parties to submit supplemental briefing on whether the Board's failure to set forth the factual and legal bases for the denial of Atkins's claim in its amended notice of decision mandated reversal of the judgment and remand to the Board.

In September 2013, we issued the unpublished decision referenced above holding the Board had abused its discretion by failing to support its decision with sufficient written findings. Quoting our Supreme Court's decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514, we noted that "[u]nder Code of Civil Procedure section

1094.5, it is incumbent on the Board to render findings that are sufficient 'both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the [agency's] action.'" We concluded the lack of findings in the Board's amended notice of decision was a fatal flaw requiring reversal of the order denying the petition for writ of mandate.

Moreover, "[i]n view of the ambiguous and confusing circumstances under which the Board issued its original and amended decisions," we remanded the matter to the trial court with directions to "enter a [new] judgment granting the petition and directing the Board to (a) vacate its Amended Notice of Decision, (b) hold a new hearing, and (c) render a written decision setting forth its factual and legal bases therefor."

On October 22, 2013, the trial court complied with our instructions.

6. The trial court's finding of factual innocence

On January 1, 2014, section 1485.55 became effective. (Stats 2013 ch. 800 § 3.)

On August 6, 2014, Atkins filed a motion in the trial court seeking a finding of innocence under section 1485.55, subdivision (b). On August 22, 2014, Judge Tynan heard the motion. Atkins's counsel argued the burden of proof on the motion is "a preponderance of the evidence;" no physical evidence tied Atkins to the crime; Atkins's conviction was primarily premised on the testimony of a witness who had since recanted her testimony, and her recantation was corroborated by two other witnesses; Atkins's conviction was also based on a witness's identification of Atkins, but that identification "was highly questionable, if not

totally unreliable;" and substantial evidence supported Adkins's innocence.

After the hearing, Judge Tynan entered an order granting the motion. Judge Tynan found Atkins was factually innocent of the charges for which he was erroneously convicted in 1987. Judge Tynan also ruled that section 1485.55 applied and "there's no problem in my mind as to retroactivity." Judge Tynan stated, "Had I been trying this case within a court trial, I would have found him not guilty, I think. I didn't set aside the verdict at the time of the trial because I thought it would . . . probably would withstand appellate review, and . . . indeed, it had. But it struck me that the initial identification of the assailant . . . was way off base, and the only thing that held this case together for the People was [the recanting witness's] statement alleging that Mr. Atkins had confessed."[8]

7. The Board's second denial of Atkins's compensation claim

On November 10, 2014, Atkins's counsel emailed an attorney for the Board (copying the Attorney General's office) asking about the status of Atkins's claim. Atkins's counsel noted that "a finding of innocence by a court pursuant to [section 1485.55] requires the . . . Board to recommend compensation to the Legislature without further hearing on the matter." Atkins's counsel received a response from the Board's hearing officer, who stated he was analyzing whether section 1485.55 applied "retroactively" to Atkins's claim.

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[8] A trial court's order granting a section 1485.55 motion is not appealable by the People. (*In re Anthony* (2015) 236 Cal.App.4th 204, 207 (*Anthony*).)

In April 2015, the Board's hearing officer issued a proposed decision declining to apply section 1485.55. Nonetheless, the hearing officer concluded "there is a preponderance of the evidence that Atkins did not commit the crime." The hearing officer recommended that Atkins's claim be approved and the Legislature appropriate $713,700.

In June 2015, "[p]er the order of the Court of Appeal[ ]," the Board conducted a hearing to consider Atkins's claim. In a two-to-one vote, the Board rejected the hearing officer's recommendation that the claim be approved, voted to deny Atkins's claim, and directed its staff to prepare an amended proposed decision denying the claim.

The hearing officer prepared an amended proposed decision recommending that the claim be denied, which the Board adopted. The amended proposed decision acknowledged the trial court found Atkins was factually innocent on August 22, 2014. But it asserted that "[a]pplying [section 1485.55] would be tantamount to giving [the statute] a retroactive effect" because Atkins filed his claim, and the Board held an evidentiary hearing and issued its original decision, before section 1485.55 existed. In addition, the amended proposed decision stated the Board could not comply with section 1485.55, subdivision (d) because "[t]he order from the Court of Appeal[ ] is in direct conflict with the new code section. The Court [of Appeal] ordered the Board to conduct a new hearing and consider the evidence while [section 1485.55, subdivision (d)] states that the Board cannot conduct a hearing and must recommend approval of the claim."

8. Atkins's second petition for writ of mandate

Atkins filed a second petition for writ of mandate in the trial court, arguing the Board again improperly denied his claim for compensation. After ordering additional briefing on the retroactive effect of section 1485.55, the trial court granted the writ and remanded Atkins's claim to the Board with instructions "to compensate [Atkins] as required by" section 1485.55. On January 11, 2017, the trial court entered a judgment in accordance with the order granting the writ. The Attorney General appealed.

## STANDARD OF REVIEW

The party filing a petition for writ of mandate under Code of Civil Procedure section 1094.5 "must show that the agency acted without or in excess of jurisdiction, failed to afford a fair trial, or prejudicially abused its discretion. [Citation.] An abuse of discretion is shown if the agency failed to proceed in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. [Citation.]" (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1260 (*Schafer*), citing Code Civ. Proc., § 1094.5.)

In cases (like this one) that do not involve a fundamental vested right, the trial court "reviews the administrative record to determine whether substantial evidence in the record supports the agency's factual findings.[9] The court also determines

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[9] Compensation claims under section 4900 do not involve or substantially affect a fundamental vested right. (*Tennison v.*

whether the findings support the agency's decision and whether the agency committed any legal error. [Citations.] An appellate court in a case not involving a fundamental vested right reviews the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court. [Citations.]" (*Schafer*, *supra*, 237 Cal.App.4th at pp. 1260-1261.)

The appellate court reviews questions of law de novo. (*Antelope Valley Press v. Poizne*r (2008) 162 Cal.App.4th 839, 851.) And "to the extent we construe statutory provisions, an issue of law is presented that we review by applying the rules of statutory interpretation." (*Madrigal v. California Victim Comp. & Government Claims Bd.* (2016) 6 Cal.App.5th 1108, 1113 (*Madrigal*).)

The relevant facts here are undisputed. We therefore review the legal issues de novo. (*Canales v. Wells Fargo Bank, N.A.* (2018) 23 Cal.App.5th 1262, 1269; *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 254.)

## DISCUSSION

### A. California's statutory scheme for compensating exonerated inmates.

"California has long had a system for compensating exonerated inmates for the time they spent unlawfully imprisoned." (*People v. Ethridge* (2015) 241 Cal.App.4th 800, 806 (*Ethridge*).) "Sections 4900 through 4905 provide for presenting a

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*California Victim Comp. and Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1182.)

claim to the [Board] . . . , which is vested with the power to recommend to the Legislature that an inmate be compensated if it finds the inmate eligible under the statutory scheme." (*Ibid*.)

Prior to the enactment of section 1485.55, "an inmate was required to introduce evidence to prove his claim [to the Board], 'including the fact that the crime with which he or she was charged was either not committed at all, or, if committed, was not committed by him or her[;] the fact that he or she did not, by any act or omission on his part, intentionally contribute to the bringing about of his or her arrest or conviction for the crime with which he or she was charged[;] and the pecuniary injury sustained by him or her through his or her erroneous conviction and imprisonment.'" (*Ethridge*, *supra*, 241 Cal.App.4th at p. 806, quoting former § 4903, as amended by Stats. 2009, ch. 432, § 6.)

Section 1485.55 became effective on January 1, 2014. (*Madrigal*, *supra*, 6 Cal.App.5th at pp. 1114-1115.) The purpose of section 1485.55 (and related statutory changes) "was 'to streamline and clarify the process for compensating exonerees,' defined as 'unlawfully imprisoned or restrained' persons." (*Ethridge*, *supra*, 241 Cal.App.4th at p. 807, quoting Sen. Com. On Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess.) as amended Apr. 15, 2013, p. 2, italics omitted (Sen. Com. On Public Safety Analysis).) Section 1485.55 and the related statutory changes also were "intended to make the system [l]ess expensive by saving taxpayer money spent on years of costly litigation where innocence has already been proven." (*Ibid*., quoting Assem. Com. on Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess.) as amended June 27, 2013, pp. 4, 5, bold and internal quotation marks omitted.)

Interestingly, the Senate Committee on Public Safety report specifically identified Atkins as an example of the people the legislation that became section 1485.55 was designed to help:

> "Since the year 2000, of the 132 men and women released from custody after serving time for murder, rape, or another serious offense they did not commit, only 11 were granted an approval and recommendation for payment by the California Victim Compensation and Government Claims Board (VCGCB) allowing them to get on with their lives and get back on their feet.
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> "Exonerees who have been denied compensation include individuals who were found to be 'unerringly innocent' by a trial court and those whose convictions were reversed based on DNA evidence and findings of factual innocence.
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> "Take for example Timothy Atkins who was imprisoned for a crime he didn't commit for 23 years before a witness recanted her testimony. After more than two decades behind bars, the same judge that heard his original case found that the new evidence pointed to unerring innocence and stated on the record that the witness testimony on which his conviction was based was not credible and could not be believed.
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> ". . . . After years of unlawful imprisonment, Timothy Atkins's claim for relief from the Victim Compensation Board was denied.
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> "SB 618 addresses [systemic problems in the exoneree compensation system] by creating a fair and

> efficient review process that reduces a number of obstacles that continue to prevent eligible exonerees from gaining access to meaningful compensation for their unlawful imprisonment." (Sen. Com. on Public Safety Analysis, *supra*, at pp. 6-7, italics and bold omitted.)

It is undisputed that, but for the fact that Atkins's previously-filed claim remained pending before the Board when section 1485.55 became effective, the statute would govern his claim.

### B. Application of section 1485.55 to Atkins's claim is not tantamount to giving the statute retroactive effect.

In August 2014, Atkins filed a motion in the trial court for a finding of innocence under section 1485.55, subdivision (b). The trial court granted the motion, finding Atkins innocent of the charges for which he was convicted in 1987.

When Atkins filed his motion in August 2014, section 1485.55, subdivision (b) provided: "[I]f the court grants a writ of habeas corpus concerning a person who is unlawfully imprisoned or restrained on any ground other than new evidence that points unerringly to innocence or actual innocence, the petitioner may move for a finding of innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her." (§ 1485.55, subd. (b) (2014).) If the court made such a finding, section 1485.55, subdivision (d) provided that "the board shall, without a hearing, recommend to the Legislature

that an appropriation be made and the claim paid pursuant to Section 4904."[10] (§ 1485.55, subd. (d) (2014).)

The Board argues that, despite the trial court's innocence finding under section 1485.55, subdivision (b), it was not required to make the recommendations specified in section 1485.55, subdivision (d). Ordering the Board to make these recommendations, according to the Board, would be "tantamount to giving the statute retroactive effect."

"'[T]here is a presumption that laws apply prospectively rather than retroactively.'" (*People v. Superior Court* (2018) 4 Cal.5th 299, 307.) "No part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive

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[10] The provisions now read as follows:

> (b) In a contested or uncontested proceeding, if the court grants a writ of habeas corpus and did not find the person factually innocent in the habeas corpus proceedings, the petitioner may move for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her.
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> (d) If the court makes a finding that the petitioner has proven his or her factual innocence by a preponderance of the evidence pursuant to subdivision (b) or (c), the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(§ 1485.55, subds. (b) & (d), as amended by Stats. 2016, Ch. 785, Sec. 3. (SB 1134).)

application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

The Board concedes that application of section 1485.55 in most cases will be consistent with the presumption that criminal statutes apply prospectively and not retroactively. This is because "[t]he critical question for determining [whether a statute is retroactive] usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157.)

The Board agrees that the last event necessary to trigger section 1485.55, subdivision (d), which requires the Board to recommend that the Legislature pay the claim, is the trial court's finding of innocence under section 1485.55, subdivision (b). As the Board explains, "[s]ubdivisions (b) and (d) were enacted at the same time, so in most cases where the superior court issues an innocence finding under section 1485.55[, subdivision b, subdivision (d)] will not have a retroactive effect."

Applying that test here, the last event necessary to trigger the Board's duty to recommend payment of Atkins's claim was the trial court's innocence finding in August 2014, which occurred seven months after section 1485.55 became effective on January 1, 2014. Under this test, application of section 1485.55, subdivision (d) is not retroactive.

The Board, however, argues "this case is different" from other cases because the Board held a hearing and issued a decision before section 1485.55 took effect. Citing *People v. Hayes*

(1989) 49 Cal.3d 1260 (*Hayes*), the Board contends that applying section 1485.55, subdivision (d) to Atkins's claim would "'be tantamount to giving the statute retroactive effect'" because it would render irrelevant the Board's prior inquiries and the evidence previously presented to the Board.

In *Hayes*, the surviving victim of the defendant's crimes was hypnotized to help the police investigate the crimes. A jury convicted the defendant of murdering the victim's husband, raping the victim, and other offenses. The Court of Appeal affirmed. The Supreme Court reversed, holding the erroneous admission of the victim's posthypnotic testimony required reversal of the convictions under the rule of *People v. Shirley* (1982) 31 Cal.3d 18 (*Shirley*). (*Hayes*, *supra*, 49 Cal.3d at p. 1268, quoting *Shirley*, *supra*, 31 Cal.3d at pp. 66-67 ["'the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events at issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward'" (emphasis omitted)].)[11]

The Supreme Court further held that, on retrial, Evidence Code section 795 would not bar the victim from testifying about events which she recalled and related *prior* to the hypnotic session. (*Hayes*, *supra*, 49 Cal.3d at pp. 1262-1263.) Evidence Code section 795, which restricted the admission of such prehypnotic evidence, took effect several years after the victim made her statements. (*Id.* at p. 1274 ["The prehypnotic evidence in question here predates the statute by several years"].) The

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[11] In *People v. Guerra* (1984) 37 Cal.3d 385, 390 (*Guerra*), the Supreme Court made the rule of *Shirley* retroactive to all cases not yet final as of the date *Shirley* was decided. (*Hayes*, *supra*, 49 Cal.3d at p. 1269.) *Hayes* was such a case. (*Ibid.*)

legislation which became Evidence Code section 795 contained no retroactivity clause and "[n]othing in the history, context, wording or purpose of the legislation suggests that the Legislature intended the new provisions to apply retroactively." (*Ibid*.) The court found nothing to overcome the presumption that the new statute operated only prospectively. (*Ibid*.)

The Supreme Court also reasoned it would be "manifestly unfair" to apply Evidence Code section 795 to the retrial of the criminal case where the investigation took place some six years before the statute was enacted. (*Hayes*, *supra*, 49 Cal.3d at p. 1274.) The court recognized "'a special need to ensure that in our zeal to protect the citizenry from the hazards of hypnosis, we do not create a greater injustice by an after-the-fact disqualification of crucial witnesses who have relevant–frequently vital–information that has not been tainted by the hypnosis.'" (*Id*. at p. 1271, quoting *Guerra*, *supra*, 37 Cal.3d at p. 431 (Kaus, J., concurring).) The court stated, "[t]o invoke section 795 to exclude such [prehypnotic] evidence on retrial would be tantamount to giving the statute retroactive effect." (*Id*. at p. 1274.)

The Board's reliance on *Hayes* is misplaced. As the Supreme Court later explained in *Tapia v. Superior Court* (1991) 53 Cal.3d 282 (*Tapia*), *Hayes* stands for the proposition that, in determining whether a statute's effect is prospective or retroactive, a court "look[s] to the date of the conduct regulated by the statute." (*Tapia*, *supra*, 53 Cal.3d at p. 291.) In *Hayes*, "[t]he past conduct to which the statute attached legal consequences was the use of hypnosis . . . ." (*Ibid*.) And "[b]ecause the prehypnotic evidence in question predated the statute [Evidence Code section 795], we held that '[t]o invoke section 795 to exclude such evidence . . . would be tantamount to

giving the statute retroactive effect." (*Ibid*.) *Tapia* thus clarified that *Hayes* is a straightforward application of the presumption against statutes' retroactive application which looks to the date of the conduct regulated by the statute – i.e., the conduct to which the statute attaches legal consequences. In *Hayes*, that conduct – the victim's prehypnotic statements – took place prior to the statute's enactment, making use of section 795 to exclude the statements a retroactive application of the statute.

Here, section 1485.55, subdivision (d) attaches legal consequences to the trial court's finding of innocence under section 1485.55, subdivision (b). The innocence finding triggers the Board's obligation under subdivision (d) to recommend payment of a claim. But in contrast to *Hayes*, where Evidence Code section 795 became effective after the conduct to which it attached legal consequences (the prehypnotic evidence), in this case section 1485.55, subdivision (d) became effective before the conduct to which it attaches legal consequences (the innocence finding). The Board has identified no conduct to which section 1485.55, subdivision (d) attaches legal consequences that took place before the statute became effective on January 1, 2014. Therefore, *Hayes* does not support the Board's argument that application of section 1485.55, subdivision (d) would be tantamount to giving the statute retroactive effect.

Moreover, unlike *Hayes*, this case does not involve the risk of manifest unfairness resulting from after-the-fact application of a statute to exclude previously-gathered evidence. The Board asserts that application of section 1485.55, subdivision (d) "would render irrelevant the inquiry that the Board undertook in 2009 and 2010 in an exhaustive and vigorously contested evidentiary hearing" and "would render irrelevant all of the evidence

presented to the Board that had not already been presented at trial or in the habeas proceeding." According to the Board, this would occur "merely because in 2010, the Board failed to explain its original decision in enough detail to facilitate review, thus necessitating a remand [by this court] for a new written decision."

There is no unfairness, much less manifest unfairness, in applying section 1485.55, subdivision (d) when, as the Board acknowledges, Atkins's claim remained pending past the date of the statute's enactment as the result of the Board's failure to comply with its obligation to provide factual findings and legal conclusions, leading this Court to reverse the earlier judgment. The Board suggests that application of section 1485.55, subdivision (d) to require it to recommend payment of Atkins's claim without a further hearing is somehow disproportionate to its fault in issuing the deficient 2010 decision. We are not assigning blame but only addressing whether it is unfair to apply section 1485.55, subdivision (d) when – through no fault of Atkins – his claim remained pending after the statute became effective because the Board issued a decision that lacked the necessary written findings. We believe it is not.

Therefore, *Hayes* does not support the Board's argument that application of section 1485.55, subdivision (d) would give the statute improper retroactive effect.[12]

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[12] At oral argument, the Board asserted that because Atkins's claim has been pending since 2007, it would be impossible for the Board to comply with both section 1485.55, subdivision (d) and section 4902, which provides that when section 1485.55 applies, the Board "shall, within 30 days of the presentation of the claim, calculate the compensation for the claimant pursuant to Section 4904 and recommend to the Legislature payment of that sum."

### C. This court's 2013 decision and the superior court's writ of mandate do not prevent the Board from complying with section 1485.55, subdivision (d).

The Board also contends it was required to comply with this court's 2013 decision and the trial court's writ of mandate directing the Board to hold a hearing and issue a new decision, and therefore it was unable to comply with section 1485.55, subdivision (d). The Board argues that summarily approving Atkins's compensation claim would contradict "this Court's order that the Board hold a new hearing and issue a new written decision" and applying section 1485.55, subdivision (d) "will negate . . . this Court's order on the writ of mandate . . . ."

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The Board contended this demonstrates the Legislature did not contemplate section 1485.55 would apply to claims pending more than 30 days when the statute became effective. The argument is waived because the Board did not raise it in its appellate briefs. (See *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 808, fn. 1 ["An argument not raised in the briefs is waived"].) Even if the argument was not waived, it appears to assume, mistakenly, that the 30-day period of section 4902 begins to run for claims under section 1485.55, subdivision (d) before a court makes the finding of factual innocence that triggers the statute's application. "Interpretations that lead to absurd results . . . are to be avoided." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037, internal quotation marks omitted.) Instead, we read the phrase "presentation of the claim" in section 4902 to be consistent with the language of section 1485.55, subdivision (d) conditioning the Board's obligation to recommend payment of a claim on a court's "finding that the petitioner has proven his or her factual innocence by a preponderance of the evidence pursuant to subdivision (b) or (c) . . . ." (§ 1485.55, subd. (d).)

The Supreme Court's decision in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279 (*Arakelian II*) addresses a situation like this one involving an administrative agency, a reviewing court, and an intervening change in the law. In *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd*. (1985) 40 Cal.3d 654 (*Arakelian I*), the Supreme Court affirmed an order of the Agricultural Labor Relations Board (Labor Board) directing the employer to make its employees whole for violations of the Agricultural Labor Relations Act. (*Arakelian II, supra,* 49 Cal.3d at p. 1285.) Based on *Arakelian I*, the Labor Board remanded the case to the regional director to determine the employer's monetary obligation under the make-whole award. (*Id*. at p. 1287.) While the matter was pending before the regional director, the Court of Appeal for the Third District issued a published decision in another case (*William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd.* (1987) 191 Cal.App.3d 1195 *(Dal Porto*)). The Labor Board opted to apply *Dal Porto* retroactively to certain pending matters, but not to matters (like the employer's) involving a technical refusal to bargain. (*Arakelian II, supra,* 49 Cal.3d at p. 1288.) Nonetheless, the employer petitioned the Labor Board to reopen its case and reconsider the make-whole order in light of *Dal Porto*. (*Ibid*.) The Labor Board refused and the employer sought judicial review. The Court of Appeal granted review and determined that the Labor Board erred in refusing to apply *Dal Porto* to cases involving a technical refusal to bargain. (*Ibid*.)

The Supreme Court granted review and reversed. (*Arakelian II*, *supra*, 49 Cal.3d at p. 1289.) The court held the Labor Board correctly declined to apply *Dal Porto* to cases involving a technical refusal to bargain (including the employer's

case). (*Id*. at p. 1292.) The court therefore upheld the Labor Board's refusal to reopen the employer's case. (*Id*. at p. 1295.)

As relevant here, the Supreme Court in *Arakelian II* explained that an administrative agency is generally bound by the law of the case established by a reviewing court's order: "It is inherent in our system of judicial review of agency adjudication that once a court has passed on a question of law in its review of agency action, the agency cannot act inconsistently with the court's orders. [Citations.] Instead, absent unusual circumstances, the decision of the reviewing court establishes the law of the case and binds the agency in all further proceedings. [Citation.]" (*Arakelian II, supra,* 49 Cal.3d at p. 1291, citations omitted.)

The court recognized, however, "that as a procedural rule the law of the case may operate harshly, and we have fashioned a number of exceptions to the doctrine," including "when . . . there has been an intervening change in the law . . . ." (*Arakelian II, supra,* 49 Cal.3d at p. 1291.) The court "caution[ed] that the [Labor Board] should not lightly presume the existence of [this and other] exceptions; before the [Labor Board] is free to disregard a lawful order of this court, judicial economy demands that [the employer] demonstrate that failure to apply *Dal Porto* would be a manifest misapplication of existing legal principles and would result in substantial injustice." (*Ibid*.)

In a footnote, the court added: "We emphasize that our decision should not be construed to imply that an administrative agency may overrule or nullify decisions of appellate courts. Instead, we affirm the obvious rule that administrative agencies may not void the judgment of an appellate court [citation], and decide only that when an *appellate court* has announced a change

in the controlling rules of law, an administrative agency may apply that decision to all pending cases." (*Arakelian II, supra,* 49 Cal.3d at p. 1291, fn. 8, original emphasis.) In another footnote, the court observed that "[n]ot all changes in the law justify disregarding the established law of the case. Instead, there must be a change in the *controlling* rules of law." (*Id.* at p. 1292, fn. 9, original emphasis.)

In the case before us, the Board acknowledges that section 1485.55, subdivisions (b) and (d) "changed the law." The statute changed the law by "set[ting] forth circumstances under which the trial court, rather than the board, is responsible for determining whether the claimant has established factual innocence." (*In re Anthony*, *supra*, 236 Cal.App.4th at p. 209.) If the trial court makes an innocence finding, the Board "shall, without a hearing," recommend that the Legislature pay the claim. (§ 1485.55, subd. (d).) We agree with the Board and hold that section 1485.55, subdivisions (b) and (d), change the controlling rules of law.

In addition, we conclude that failure to apply section 1485.55, subdivision (d) in this case "would be a manifest misapplication of existing legal principles and would result in substantial injustice." (*Arakelian II*, *supra*, 49 Cal.3d at p. 1291.) After being incarcerated for more than 20 years, Atkins was released when the trial court granted his habeas corpus petition and the District Attorney declined to retry the case. The trial court later granted Atkins's motion for a finding of innocence under section 1485.55, which was enacted "'to streamline and clarify the process for compensating exonerees'" like Atkins. (*Ethridge*, *supra*, 241 Cal.App.4th at p. 807.) Although the Board argues that application of section 1485.55, subdivision (d) would

"render irrelevant the extensive inquiry that the Board conducted in 2009 and 2010," the Board concedes that this outcome is the result of the absence of adequate written findings to support its original decision.

Accordingly, we affirm the trial court's decision to apply section 1485.55, subdivision (d). We remand with directions to modify the decision to require that the Board recommend that an appropriation be made and Atkins's claim be paid.

## DISPOSITION

We affirm the trial court's decision and remand the matter to allow the trial court to modify the judgment and writ of mandate to require that the Board recommend to the Legislature that an appropriation be made and Atkins's claim be paid. Atkins is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.