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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 Application of:

12 **Frank Burnett**

13 Application No. G565353

Proposed Decision

(Penal Code §§ 4900 et seq.)

14 **Introduction**

15 A hearing on this claim was heard on May 20, 2008, by Kyle Hedum, Hearing Officer, who
16 was assigned to hear this matter by the Executive Officer of the California Victim Compensation and
17 Government Claims Board (Board).

18 Frank Burnett appeared at the hearing and testified under oath. Micheal F. Coley, Attorney at
19 Law, represented claimant Frank Burnett.

20 Michael Farrell, Senior Assistant Attorney General (AG) represented the California
21 Department of Justice, Office of the Attorney General.

22 After considering all the evidence, it is determined that Frank Burnett has failed to prove by a
23 preponderance of the evidence that he did not commit the crime for which he was incarcerated and
24 that he did not by any act or omission on his part, either intentionally or negligently, contribute to the
25 bringing about of the arrest or conviction for the crime. Therefore, it is recommended that Frank
26 Burnett's claim for compensation pursuant to Penal Code 4900 et seq. be denied.
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1 **Factual Background¹**

2 Sometime during the evening of January 8 or the early morning hours of January 9, 2004, the
3 Milk Barn (Milk Barn) in Mira Loma was burglarized. Taken in the burglary were cartons of cigarettes,
4 rolls of California Lottery scratch-off tickets, cash, coins, checks written to the Milk Barn, and personal
5 papers of the business owners.

6 On the morning of January 9, 2004, at about 6:40 a.m., Maria S., who lived near the Milk
7 Barn,² called the Riverside County Sheriff's Department to report a suspicious duffle bag in the street
8 in front of her house. Deputy Gill arrived at the scene at 7:36 a.m. Deputy Gill spoke with Maria S.
9 who told Deputy Gill that at about 6:20 a.m. she saw a duffle bag in the street and a man looking in
10 her direction from across the street. She saw another man come out from behind a wall and meet up
11 with the first man. When she walked her daughter to the corner so her daughter could meet up with
12 classmates to walk to school, she came within 50 feet of the two men.³ During the course of the
13 conversation with the deputy, Maria S. looked in the direction of the corner where the men were
14 earlier standing, which was about 200 to 250 feet away, and said, "There he is." Deputy Gill made
15 eye contact with the person, later identified as Frank Burnett. Deputy Gill noticed that Frank Burnett
16 was standing on the curb next to a Jeep Cherokee (Jeep).

17 Deputy Gill examined the bag and noted that the bag contained gloves, bolt cutters, a
18 hammer, a file, pliers, and a flashlight. After Deputy Gill placed the duffle bag in the back seat of her
19 patrol car, she saw Frank Burnett turn his back to her and walk in the opposite direction. As Deputy
20 Gill continued to watch him, she saw another man walk from behind the Jeep. Frank Burnett and the
21 other person walked away before Deputy Gill could make contact with them. Deputy Gill did not put
22 on her lights or siren or indicate to the men that they had to stop. When Deputy Gill could not locate
23 the men, she returned to the Jeep and observed that it was illegally parked in front of a fire hydrant.

24 Prior to having the Jeep towed from the scene because it was illegally parked, Deputy Gill

25 ¹ Much of the factual background is taken from the nonpublished opinion that reversed Frank Burnett's
26 convictions for burglary and receiving stolen property. (*People v. Burnett* (May 17, 2006), 2006 WL
133159 (Cal. App. 4 Dist.)).

27 ² Maria S. testified that there was only a restaurant between her residence and the Milk Barn.

28 ³ At trial, she identified Frank Burnett as one of the men that looked in her direction at about 6:20 a.m.
on January 9, 2004.

1 conducted an inventory search of the vehicle. Deputy Gill located black trash bags in the back of the
2 rear cargo area of the Jeep. In the trash bags, Deputy Gill found all of the property stolen from the
3 Milk Barn. The deputy also discovered some articles of clothing, a pair of reading glasses, a
4 backpack, and an empty gasoline can in the front seat area of the Jeep.

5 No fingerprints were found at the Milk Barn. However, a fingerprint expert noted at trial that
6 the absence of prints did not confirm that a particular individual had not been in a given location; it
7 only meant there were no readable prints from that person. The Jeep was also dusted for prints.
8 One readable print found on the Jeep matched a person named Lawrence Anthony Nash. Frank
9 Burnett's prints were not found.

10 Following additional investigation, it was learned that the Jeep in question was seen at a Mira
11 Loma Circle K store earlier that morning. Deputy Gill and Detective Holland subsequently reviewed
12 the Circle K's video surveillance tape for the early morning of January 9, 2004. The video showed
13 Frank Burnett and another man walk into the store together at 6:53 a.m. This other man was
14 identified by Deputy Gill to be the same man she saw with Frank Burnett on the morning of January 9,
15 2004. Frank Burnett bought a gas can and the surveillance tape showed Frank Burnett walking
16 toward a gas pump. The video surveillance tape also showed Sonya Earl and another woman
17 entering the store on January 9, 2004, at 6:02 a.m. which was prior to Frank Burnett entering the
18 Circle K store.

19 Detective Holland spoke with the owner of the Jeep, Karl Hides, and determined Hides was
20 not involved in the burglary. Karl Hides told the detective that he loaned his Jeep late in the evening
21 on January 8, 2004, to Lawrence Anthony Nash, the same man whose fingerprint was found in the
22 Jeep. Detective Holland showed Karl Hides the video surveillance tape and Hides stated that none of
23 the four individuals in the tape was Nash. However, he did identify Frank Burnett. Discussions with
24 Hides also led Detective Holland to a woman named Sonya Earl, who was later identified as
25 Lawrence Anthony Nash's aunt.

26 Frank Burnett was arrested on April 30, 2004. At the time of his arrest, he was in custody for
27 a parole violation as a result of a 1999 drug conviction. After waiving his constitutional rights, Frank
28 Burnett was questioned by Detective Holland and he admitted to having contact with or having used
the Jeep prior to the time of the Milk Barn burglary. He also admitted to entering the Circle K on

1 January 9, 2004, after he was shown photographs taken from the Circle K surveillance video. Frank
2 Burnett denied any involvement in the Milk Barn burglary.

3 Detective Holland subsequently listened in on telephone conversations between Frank Burnett
4 and other persons while Frank Burnett was in jail. During one conversation with Sonya Earl on May
5 4, 2004, Frank Burnett spoke about when he went and bought some gas and left the gas can in the
6 Jeep and about having the car once before. Frank Burnett said, "I need to find out who took me
7 down there. I rode with you or what?" Sonya Earl replied, "Yeah." Frank Burnett told Sonya Earl
8 that the evidence against him was circumstantial and that he was implicated because he bought the
9 gas can, his previous connection with the Jeep, and because of Lawrence Anthony Nash. Detective
10 Holland testified that because calls from jail inmates can be recorded, a tape-recorded message
11 repeats about every seven to 10 minutes admonishing that the conversation could be recorded or
12 that someone could be listening to the conversation. Detective Holland believed that in these
13 circumstances people will often try to speak in code so as not to reveal the true meaning of a
14 conversation.

15 During one conversation, Frank Burnett gave Sonya Earl the telephone number of the police
16 station, and she called the police station on July 19, 2004, and spoke with Detective Holland. This
17 conversation was recorded by Detective Holland and played for the jury. The conversation mainly
18 related to Sonya Earl receiving a call from Karl Hides, who told Sonya Earl that he was out of gas and
19 asked her to come help him. Detective Holland testified that Sonya Earl gave him four different
20 versions of the events on the morning of January 9, 2004, and Detective Holland testified that none of
21 the four versions matched the physical evidence.

22 On October 20, 2004, a jury convicted Frank Burnett of second-degree burglary and receiving
23 stolen property. On January 7, 2005, he was sentenced to four years state prison. Frank Burnett
24 appealed his conviction, and on May 17, 2006, his conviction was reversed,⁴ and on June 30, 2006,
25 he was released from prison.

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28 ⁴ The court held that there was insufficient evidence to support Frank Burnett's convictions for burglary and receiving stolen property.

Hearing Testimony

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2 At the hearing, Frank Burnett testified to the following: He was asleep in his bed the morning
3 of January 9, 2004, and was awakened at about 6:00 a.m. by his wife. She told him that Sonya Earl
4 was in the living room and needed his assistance. He immediately got dressed and, without asking
5 what she needed, left with her in her van. After they drove away from his home, Sonya Earl told him
6 that she needed his help in getting some gas for Karl Hide's vehicle.⁵ Because she did not have any
7 money, she needed him to buy a gas can and some gas. They drove to a Circle K store, and he went
8 into the store while Sonya Earl waited outside.⁶ He entered the store the same time as another black
9 male entered, but he did not know this individual. He then purchased a gas can and some gas, and
10 he and Sonya Earl drove to Karl Hides' vehicle. Upon arrival, he put the gas can inside Karl Hide's
11 vehicle. Prior to leaving the area in Sonya Earl's van, he saw a police officer and a civilian looking in
12 his direction.

13 Frank Burnett testified that: The only people present at the Jeep were himself and Sonya Earl.
14 Although Sonya Earl wanted to wait for Karl Hides to return to his vehicle, he wanted to leave
15 immediately. After waiting about two minutes, he got into Sonya Earl's van and she drove him back
16 to his home. He did not wait any longer because he did not want to be contacted by the police
17 officer, as he was under the impression that because he was on felony parole for a prior drug
18 conviction in 1999, his parole could be violated if a police officer spoke with him. He denied walking
19 away from the vehicle with another man, as reported by Deputy Gill.

20 Frank Burnett testified that: He spoke with Sonya Earl on the telephone on May 4, 2004. He
21 explained that he worded his question to Sonya Earl, "I need to find out who took me down there. I
22 rode with you or what?" in such a way because he did not want to "implicate her without asking."

23 In support of his contention that he was not involved in the Milk Barn burglary, Frank Burnett
24 cited the appeals court finding that there was insufficient evidence to support Frank Burnett's

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26 ⁵ Frank Burnett testified at the hearing that he disliked Karl Hides because of an earlier dispute during
27 which Karl Hides called the police and reported that his car had been stolen by him. He also testified
28 that he was very upset with Sonya Earl because she did not immediately tell him that Karl Hides was
the recipient of his help.

⁶ According to Frank Burnett's hearing testimony, the Circle K store was located less than ten miles
from his home in Riverside.

1 convictions for burglary and receiving stolen property. The court held that because the evidence in
2 Frank Burnett's trial was less than reasonable, credible and of solid value, the convictions were
3 required to be reversed. The court also held that, notwithstanding the evidentiary issues, that there
4 was a strong suspicion that Frank Burnett and Lawrence Nash had committed the crimes in question.

5 **Approximate Time Line for January 9, 2004** ⁷

6 6:02 a.m. Sonya Earl and another woman enter the Circle K store.

7 6:20 a.m. Maria S. sees a duffle bag in the street and sees two men looking at her from
8 across the street. As she walks her daughter to the corner to wait for her
9 classmates, Maria S. comes within 50 feet of the two men, and she subsequently
10 identifies one of the men as Frank Burnett.

11 6:40 a.m. Maria S. calls the sheriff's department regarding the duffle bag.

12 6:53 a.m. Frank Burnett is video-taped entering the Circle K store the same time as another
13 black male enters. Frank Burnett purchases a gas can and gas.

14 7:36 a.m. Deputy Gill arrives at the scene. Maria S. tells Deputy Gill that the man she
15 saw earlier in the morning is across the street looking at them now. Deputy Gill
16 sees a man later identified as Frank Burnett and an unidentified black male
17 looking in her direction from across the street. Frank Burnett and the other
18 black male leave the area on foot before Deputy Gill can contact them. The
19 other black male is subsequently identified by law enforcement as being the
20 man that entered the Circle K at the same time as Frank Burnett.

21 **Findings**

22 A preponderance of the evidence supports the following findings:

- 23 1. Frank Burnett was convicted of burglary and receiving stolen property on October 20, 2004.
- 24 2. Frank Burnett was released from incarceration on June 30, 2006.
- 25 3. Frank Burnett was in the vicinity of the Milk Barn at 6:20 a.m.
- 26 4. Frank Burnett's testimony is not credible.

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28 ⁷ Compiled from the nonpublished opinion, (*People v. Burnett* (May 17, 2006), 2006 WL 133159 (Cal. App. 4 Dist.)), crime report, and hearing testimony.

1 **Determination of Issues**

2 Penal Code section 4903 establishes the requirements for a successful claim for an
3 erroneously convicted felon. A person convicted and imprisoned for a felony may submit a claim to
4 the Board for pecuniary injury sustained as a result of his erroneous conviction and imprisonment.⁸
5 The claim must be filed within six months after judgment of acquittal or discharge, granting of a
6 pardon, or release from imprisonment.⁹ Frank Burnett's claim was timely filed.

7 In order to be successful, the claimant must prove: (1) that the crime with which he was
8 charged was either not committed at all, or, if committed, was not committed by him; (2) that he did
9 not by any act or omission on his part, either intentionally or negligently, contribute to the bringing
10 about of the arrest or conviction for the crime; and (3) that he sustained a pecuniary injury through his
11 erroneous conviction and imprisonment.¹⁰ If the claimant meets his burden of proof, the Board shall
12 recommend to the legislature that an appropriation of \$100 be made for the claimant for each day of
13 incarceration served subsequent to the claimant's conviction.¹¹ The claimant has the burden of
14 proving the necessary elements of his claim by a preponderance of the evidence.¹²

15 Preponderance of the evidence means evidence that has more convincing force than that
16 opposed to it.¹³ In reaching its determination of the merits of the claim, the Board may consider the
17 following, but the following will not be deemed sufficient evidence to warrant the Board's
18 recommendation that the claimant be indemnified in the absence of substantial independent
19 corroborating evidence that the claimant is innocent of the crime charged: (1) claimant's mere denial
20 of commission of the crime for which he was convicted; (2) reversal of the judgment of conviction on

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22 ⁸ Pen. Code, § 4900.

23 ⁹ Pen. Code, § 4901.

24 ¹⁰ Pen. Code, § 4903.

25 ¹¹ Pen. Code, § 4904.

26 ¹² *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation*
27 *and*
Government Claims Board (2000) 152 Cal. App. 4th 1164.

28 ¹³ *People v. Miller* (1916) 171 Cal. 649, 652.

1 appeal; (3) acquittal of claimant on retrial; or (4) the failure of the prosecuting authority to retry
2 claimant for the crime.¹⁴

3 The Board may consider, as substantive evidence, testimony of witnesses claimant had an
4 opportunity to cross-examine, and evidence to which claimant had an opportunity to object, admitted
5 in prior proceedings relating to the claimant and the crime with which he was charged. The Board
6 may also consider any information that it may deem relevant to the issue before it.¹⁵

7 Frank Burnett testified at the hearing that he did not commit the Milk Barn burglary and that he
8 was not in receipt of stolen property. In support of his claim of innocence, Frank Burnett relied on the
9 appeals court's opinion that there was insufficient evidence to support his convictions for burglary and
10 receiving stolen property. However, the appellate court's determination is not dispositive in this case.

11 The fact that the prosecution failed to meet its burden in the criminal case is not analogous to a
12 determination that Frank Burnett has satisfied his burden in this administrative proceeding. In the
13 context of the criminal case, the prosecution had the burden of proving beyond a reasonable doubt
14 that Frank Burnett was guilty of burglarizing the Milk Barn and of receiving stolen property. In the
15 context of his claim for compensation as an erroneously convicted felon, the burden shifted to Frank
16 Burnett to prove, by a preponderance of the evidence, that he did not commit the crimes for which he
17 was incarcerated and that he did not, either intentionally or negligently, contribute to his arrest or
18 conviction for those offenses.

19 Frank Burnett did not provide any credible evidence that would support a finding that he is
20 innocent of the crimes for which he was convicted and incarcerated. Frank Burnett testified at the
21 hearing that he left his home with Sonya Earl sometime after 6:00 a.m. on January 9, 2004. They did
22 not stop until they got to the Circle K store, where he purchased a gas can and gas. Frank Burnett
23 and Sonya Earl then drove to where the Jeep was parked, put the full gas can inside the Jeep's
24 interior, and left the area in Sonya Earl's van. Frank Burnett also testified that he did not know the
25 identity of the black male who appeared to accompany him as he entered the Circle K store and he
26 denied that the this black male was with him at the location of the Jeep.

27 ¹⁴ Cal. Code Regs., tit. 2, § 641.

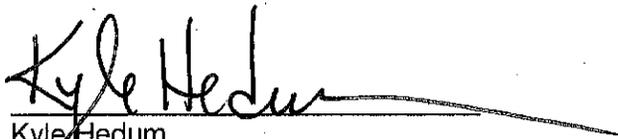
28 ¹⁵ Cal. Code Regs., tit. 2, § 641.

1 Frank Burnett's hearing testimony is contradicted in numerous instances. The Circle K video
2 surveillance tape shows Sonya Earl entering the store at 6:02 a.m., so it is improbable that Sonya
3 Earl was at Frank Burnett's home in Riverside at 6:00 a.m. Deputy Gill testified at trial that the black
4 male who accompanied Frank Burnett into the Circle K store was the same person she saw standing
5 near Frank Burnett by the Jeep at approximately 7:36 a.m. Deputy Gill also testified at trial that Frank
6 Burnett did not leave the area in Sonya Earl's van, but instead walked away from the Jeep
7 accompanied by the man that was with him at the Circle K store. And, at his criminal trial, Maria S.
8 identified Frank Burnett as the man that was standing across the street looking in her direction at
9 about 6:20 a.m. and again at 7:36 a.m. In addition, Frank Burnett demonstrated an interest in the
10 duffle bag, as evidenced by his looking in that direction while the bag was first looked at by Maria S.
11 and later by Deputy Gill. Finally, although the court reversed Frank Burnett's conviction, it noted that
12 the evidence did support a strong suspicion that Frank Burnett and Lawrence Nash had committed
13 the crimes in question.¹⁶

14 Based on the evidence, Frank Burnett has clearly not met his burden of proving by a
15 preponderance of the evidence that he did not commit the crimes for which he was incarcerated and
16 that he did not, either intentionally or negligently, contribute to his arrest or conviction for those
17 offenses.

18 Frank Burnett's claim under Penal Code sections 4900 *et seq.* is denied.

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21 Date: August 18, 2008

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23 Kyle Hedum
24 Hearing Officer
25 Victim Compensation and
26 Government Claims Board

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28 ¹⁶ (*People v. Burnett* (May 17, 2006), 2006 WL 133159 (Cal. App. 4 Dist.)).