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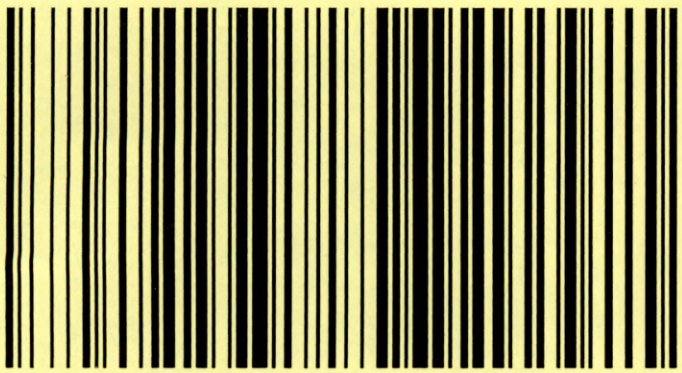

CA-S070647-WR

Docket #S070647

Brief Type:

Petition for Writ

Box #: 3950

Name Jeffrey M. Burks

Address C.C.I. TEHACHAPI IV-A (6A-203 U)
P.O. Box 1902-A
TEHACHAPI, CA 93581

CDC or ID Number B-64401

CALIFORNIA SUPREME COURT

(Court)

JEFFREY MILO BURKS
Petitioner
vs.
Respondent
JAMES GOMEZ / M.L. SMITH, et.,al.

PETITION FOR WRIT OF HABEAS CORPUS

No. S070647
(To be supplied by the Clerk of the Court)

INSTRUCTIONS — READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court (as adopted effective January 1, 1992). Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California
MC-275 [Rev. January 1, 1992]

This petition concerns:

X A conviction ____ Parole

____ A sentence ____ Credits

____ Jail or prison conditions ____ Prison discipline

____ Other *(specify)*: ____

1. Your name Jeffrey Milo Burks

2. Where are you incarcerated? CALIFORNIA CORRECTIONAL INSTITUTION-TEHACHAPI CA 93581

3. Why are you in custody? [X] Criminal Conviction [ ] Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: murder/with prior murder conviction with special circumstances.

b. Penal or other code sections: 187, 12022 (b), 190.2. (a) (2), 667 (a).

c. Name and location of sentencing or committing court: Sacramento Superior Court, 720 9th Street, Sacramento, Ca 95814

d. Case number: 69338

e. Date convicted or committed: September 2, 1987

f. Date sentenced: March 4, 1988

g. Length of sentence: Life without the possibility of parole + one year.

h. When do you expect to be released? N/A

i. Were you represented by counsel in the trial court? [X] Yes. [ ] No. If yes, state the attorney's name and address: Fred N. Dawson, 930 6th Street, Suite 220, Sacramento, Ca 95816; Brian Christiansen, 2431 Capitol Avenue, Sacramento, Ca 95816

4. What was the LAST plea you entered? (check one)

[X] Not guilty [ ] Guilty [ ] Nolo Contendere [ ] Other ____

5. If you pleaded not guilty, what kind of trial did you have?

[X] Jury [ ] Judge without a jury [ ] Submitted on transcript [ ] Awaiting trial

GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. (For example, "the trial court imposed an illegal enhancement.") *If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.*

Petitioner is unable to assert all arguments herein and responsible reliance is made upon accompanying petition.

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.*
CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did *exactly what* to violate your rights *at what time (when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

See Attached Points and Authorities

Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

See Attached Points and Authorities

8. Did you appeal from the conviction, sentence, or commitment? [X] Yes. [ ] No. If your answer is yes, give the following information about your appeal:
Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")
Court of Appeals, Third Appellate District

Result Affirmed Date of decision January 12, 1990.

Case number or citation of opinion, if known C004003

Issues raised: a. Denied right to draw from a representative cross-section of the

b. community.

c. Jury Misconduct

d. ~~Prosecutorial Misconduct.~~ Prosecutorial Misconduct.

Were you represented by counsel on appeal? [X] Yes. [ ] No. If yes, state the attorney's name and address, if known.
Harvey R. Zail, 1107 9th St., Suite 300, Sacramento Ca 95814. John Fresquez
~~Deputy Public Defender, 1107 9th St., Suite 301, Sacramento, Ca 95814~~

9. Did you seek review in the California Supreme Court? [ ] Yes. [X] No. Result

Date of decision Case number or citation of opinion, if known

Issues raised: a.

b.

c.

d.

If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal explain why the claim was not made on appeal: Petitioner's Appellate Counsel
Failed to raise these claims and did not give any reason why.

Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)
Explain what administrative review you sought or explain why you did not seek such review:
N/A

b. Did you seek the highest level of administrative review available? [ ] Yes. [ ] No. N/A
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? [X] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. (1) Name of court Superior Court in and for the County of Sacramento.

Nature of proceeding (for example, "habeas corpus petition") Motion for New Trial.

Issues raised: a. Newly Discovered Evidence, Insufficiency of Evidence.

b. Prosecutorial Misconduct, Jury Verdict Contrary to Law of Evidence

c. Inadmissible Evidence, Jury Misconduct, Motion for Judgment of acquittal.

Result (*Attach order, if available*) Denied Date of decision October 23, 1987

(2) Name of court N/A

Nature of proceeding

Issues raised: a.

b.

c.

Result (*Attach order, if available*) Date of decision

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

N/A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

See Attached Declaration →

16. Are you presently represented by counsel? [ ] Yes. [X] No. If yes, state the attorney's name and address, if known.

N/A

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [X] No. *If yes, explain.*

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

N/A

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

Jeffrey M. Burks
(Signature of Petitioner)

Jeffrey Milo Burks, #B-64401
C.C.I. Tehachapi IV-A 6A-203-U
P.O. Box 1902-A
Tehachapi, Ca 93581

In Propria Persona

CALIFORNIA SUPREME COURT

In re:

Jeffrey Milo Burks

On Habeas Corpus

Case No. 69338

Petition for writ of Habeas Corpus and Memorandum of Ponits and Authorities in Support There of.

Penal Code Section 1258 herein After.

I.

INTRODUCTION

1. Petitioner was found guilty of a murder in Sacramento Superior Court, (case No. 69338.) Petitioner contends that he was denied his due process rights under, In re: Winship, , and his right to effective assistance of counsel at trial and on appeal. (People V. Pope, (1979) 23 Cal. 3d 412, 425.)

II.

PARTIES

2. Petitioner, Jeffrey M. Burks, #B-64401, is a prisoner of the State of California, incarcerated at California Correctional Institution Tehachapi IV-A.

3. Larry Smalls, is the Warden of California Correctional Institution Tehachapi IV-A and the legal custodian of Petitioner.

4. James Gomez, is the Director of the California Department of Corrections (CDC), and is responsible for the operation of each of its state prisons, including the operation of California Correctional Institution Tehachapi IV-A.

III.

STATEMENT OF THE FACTS

THE PROSECUTION'S CASE

On march 24, 1984, at approximately 8:20 a.m., Black inmates were released to the Black exercise yard from Security Housing Unit, 4-A (the SHU) at Folsom State Prison. Correctional Officer Stafford was assigned to gun tower 17 which overlooked the Black yard as well as the adjacent White yard. Black Inmate Edwards Brooks was killed at approximately 11:30 a.m. in the Black yard by assailants with prison made knives.3/ (RT 11605)

There were twenty five inmates in the Black yard that day. Before the killing, they were engaged in a variety of activities ranging from basketball to exercises. (RT 10152, 10479)

Correctional Officer Micheal Vollmer was a yard Officer in the SHU on March 24, 1984. He was responsible for processing the inmates into the yard that day (RT 10125). After he released all the inmates into the Black yard, he was searching a cell in the SHU when he heard a gunshot. Officer Vollmer "looked out into the yard and saw a large group of Black inmates fighting ... and (he) couldn't ... recognize anybody in particular ..." (RT 10151 -10152, 10176-10178). After the incident, Vollmer went into the yard and observed inmates Gaulden and Jensen standing over Brooks (RT 10157).

All the inmates were eventually removed from the yard. The order in which they were removed was determined by Correctional Officer Dennis

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3. the Shu was located to the north of the Black yard. Tower 17 was located southeast of the yard. The toilets, showers and handball court were located on the westside of the yard. The heavy punching bag where Brooks fell is located on the eastside of the yard. The white yard was located to the eat of the Black yard and ajacent to it. The yards were seperated by a chain link fence.

Stafford up to the eleventh inmate. Vollmer took over the order of removal for the rest of the inamtes (RT 10160-10165).

Correctional Lieutenant James Walker testified at trial that at the time of the killing he was the sergeant in charge of the entire 4-A Security Housing Unit. He testified the Correctional Officer Dennis Stafford was working in Tower 17 on March 24, 1984. Satfford was not the regular tower officer. He was working overtime at that position because the regular tower officer, Ralph Avilas, had called in sick. Stafford's normal duties were search and escort, assist in running the yards and canteen officer on Sundays. Walker did not believe that Stafford had ever worked in Tower 17 before March 24, 1984. If Stafford had worked in the tower, it was not more than "once or twice at the most" (RT 10491-10494).

On March 24, 1984, Walker was in the south side of the SHU when he heard a gunshot fired from tower 17. He ran to the back of the unit and immediately called Stafford and asked what happened. Walker testified that Stafford stated that inmates "Celestine and Burks (petitioner) just stabbed Brooks and looked like Jensen and Gaulden also had --"4/ (RT 10501-10502). Walker saw Brooks lying under the heavy bag and inmates Jensen, Gaulden, Davis and White standing near Brooks. Inmate Gaulden was bleeding from the neck area and inmate Jensen was bleeding from the shoulder area. They were ordered to move away from Brooks and they complied. Walker and other Correctional Officers then entered the yard and removed Brooks on a stretcher.

Walker testified the Brooks had been bleeding profusely and there was a great deal of blood near Brooks and by the parallel bars several feet away.5/

4. This testimony was stricken as inadmissible hearsay (RT 10502-10503).
5. Inmate Geoffrey Franklin testified that Brooks was by the Parallel bars when the fight started (RT 10318).

Walker said that he ordered inmates Gaulden and Jensen off the yard because they were bleeding. stafford ordered the remaining inmates off the yard. Stafford ordered them removed according to a procedure in which the injured are removed first. The inmates believed to be responsible for the incident are removed next with the remaining inmates removed last (RT 10509-10510).

All inmates were checked for any evidence that they were involved in the incident. Inmates with blood, cuts or abrasions were photographed. Walker said that Brooks, Jensen and Gailden were removed from the yard, the other inmates were removed as follows: Lewis, defendant Jordan, defenfdant Bonville, and inmate Tidmore (RT 10511-10512). Inmate Lewis was removed because Stafford thought he was meant to be a diversion since Stafford had seen Lewis fall to the ground in a different area by the parallel bars (RT 11624). Walker left the yard after defendant Bonville was removed (RT 10562).

Evidence obtained when inmates were removed from the yard included clothing from Brooks, Gaulden and Jensen. Defendant Jordan had a cut on his finger and ... a small bit of blood or scratch on his left biceps and ... a small bit of blood or scratch on his right hand, right finger ... Inmate Johnson came in from the yard with a contusion on his eye. Inmate White came in with blood on his hand. And, inmate Faumi ...had a little cut on him also as well as an abrasion on a right knuckle (RT 10554-10555), 9979-9980).

Walker was in charge of the photography of inmates believed to have been involved in the incident. Walker said that no photographs were taken of Burks (petitioner) and he had no blood on his clothes and he had no injuries (RT 10559-10561). Burks (petitioner) was the seventeenth inmate removed from the yard (RT 10187-11659).

After all the inmates had been removed from the yard, Lieutenant

Jackson, officer Mahoney and Walker went back into the yard to look for physical evidence. They were walking toward the west side of the yard near the toilet area when they saw a knife, pair of shower shoes and a blood stained sweat shirt. The knife and shoes were directly below the toilet and the sweat shirt was in the sink, 6/ (RT 10513-10514).

On April 7, 1984, Walker spoke with defendant Jordan. Jordan confessed to Walker that he alone had killed Brooks for personal reasons. Walker informed Jordan that defendant Bonville had already confessed to the killing. Jordan again stated that he alone had killed Brooks and after the killing he had walked along the south fence and threw the knife over the fence 7/ (RT 10537-10539).

Corectional Officer Dennis Stafford testified at trial that on occasion he would work in Tower 17. He stated that he had worked in Tower 17 anywhere from "ten to thirty, forty times" and in Tower 14 "probably the same amount of times as [he] did 17, maybe even a little more in 14 tower" 8/

On March 24, 1984, he was working in Tower 17 (RT 11390-11391). His duties were mainly to provide protection by "gun coverage" over the Black and White exercise yards (RT 11459). As the inmates were being released in to the yard early that morning, he said that he noticed inmate Lewis, Burks (petitioner) and Jordan by the showers "standing in a kind of little huddle talking". Stafford moved several times in an attempt to look at them but Jordan was blocking his view.

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6. Inmate Jensen had been wearing what may have been a blue sweatshirt (RT 11544-11545).
7. Defendant Jordan also confessed to Ray Schultze (the prosecutor's investigator) that he had killed Brooks (Augmented CT 1-34).
8. Lieutenant Walker, had previously testified that he did not believe that Stafford had ever worked in Tower 17 and, "if he had, maybe once or twice at the most". (RT 10494) Officer Olivera was the regular officer assigned to Tower 14. Even he had worked Tower 17 "less than ten times". (RT 12101)

Finally, he made a phone call to yard officer Vollmer. He did not say whether Vollmer looked into the matter but eventually the huddle "broke up" (RT 11468-11474).

Stafford testified that he was outside the guntower on the gunrail overlooking the Black yard. He saw victim Edward Brooks walking back and forth in a straight line from the handball area near the shower on the west side of the yard to the heavy bag on the east side. He said that Brooks "made several walks the length from the shower area up to the bag and there was someone walking alongside Brooks for almost the whole time until right up before the attack". Stafford did not recall who the other inmate was. He first became aware that Brooks was walking back and forth "probably after 11:00, going for 11:30." Brooks and the other inmate walked a minimum of "four or five" circuits. (RT 11476-11477) Stafford said "I was watching him walk back and forth, real slow pace, not even a normal walk, it was slower than an average walk. And then he would just turn real slow to his left when he got to the punching bag, walk all the way back to the showers and then back again, and he continued that several times" (RT 11479).

Stafford further testified that Brooks was wearing a blue denim jacket buttoned to the top and his clothes were "pretty well pressed. He ... wasn't dressed for exercising" and Stafford did not recall whether Brooks did exercise. Stafford noticed Brooks because he was wearing a blue denim jacket and "no one dressed like that, and [it] seemed strange that he would wear a jacket when [the weather] was so nice" (RT 11479).

Stafford said, "[a]fter the yard was processed out ... I moved out on the gunrail ... more on the black side, and I elected to stay out because it was so nice, and I stayed out there a long time." At a point close to the attack the person walking with Brooks "dropped off" and Brooks continued walking along toward the heavy bag when Stafford turned his head away Brooks had not yet reached the heavy bag.

Stafford said that he started walking east along the gunrail toward the guntower "more towards the white side ... I had been out there quite a length of time and then I started moving back, which is what I normally do" (RT 11479-11481). 9/

Stafford was about to walk into Tower 17 when he heard "high pitched" yelling coming from the Black yard. He said that he turned around and saw petitioner and Celestine "making overhand thrusting type movements" towards Brooks who was by the heavy bag. Stafford did not know how many such motions were made. When asked if he had seen anything in petitioner's hand. Stafford replied "I couldn't tell. I couldn't see. I couldn't see a weapon" (RT 11486-11489) Stafford said that it took him "but [a] very short period of time to zero in on what was happening ... [he] took in the whole yard and then zeroed in on . Brooks being attacked" (RT 11481-11483).

Stafford testified that when he turned around, Brooks was falling to the ground. When Brooks fell, he was directly beneath the heavy bag. His head was toward the SHU which was located on the north side of the yard. His feet were toward guntower 17 located southeast of the Black yard. Stafford said that he saw several inmates around Brooks but he saw the faces of petitioner and Celestine.10/

He said that petitioner was on the right of the heavy bag and Celestine was on the left. They were looking down at approximately a thirty to forty-five degree angle (RT 11484). Stafford could not say how far petitioner was from Brooks when Stafford first turned and saw petitioner. He stated, "I recall probably within -- could have been two feet or less. I can't tell you the exact angle, because it's just too hard to tell from up there (RT 14485).

9. The length of time Stafford claims he was out on the gunrail is important because, on cross-examination , Stafford admitted that he had been on the telephone with Officer Olivera from one to five minutes before he heard the attack. The telephone is located inside Tower 17 (RT 11598).

10. Tower 17 is on top of building 2 which is five stories high and is located southeast of the Black yard. (RT 9809-9813). It is 130 feet from the heavy bag (RT 9813, 11620).

Stafford stated that when he first saw Brooks, defendant and defendant Jordan were also near Brooks. Bonville was to the right of petitioner "two or three feet farther away from Brooks ... could have been up to five feet or more" from Brooks. Jordan was "five to seven feet from Brooks". They were looking towards Brooks. There were other inmates in the area. Inmate Capers was "ten, twenty-five feet" to the right of Brooks. Inmate Wilkerson was on the left side a little farther away (RT 11489-11490).

Stafford said that he continued to watch Brooks until he actually hit the ground. He also said, I was trying to take in a large area ... at the same time, something else appeared to be going on that I was watching at the same time [another] attack was taking place over between the chin-up bars and the parallel bars, an inmate Lewis was laying on his back" (RT 11490). The chin-up and parallel bars were at least fifteen feet away from the heavy bag (RT 10733). Lewis head was pointing toward guntower 17 and his feet were facing the SHU. Inmate Tidmore was standing over him. Stafford stated that he was standing three or four feet outside the guntower while he made these observations (RT 11491-11492).

He said, "when I was walking towards the White yard, there would have been a very short period of time ... when I didn't have full attention on that yard ..." He also said that from the time he heard the yelling to the time he fired the first shot "[i]t could not have been three to five seconds, maybe six, maybe seven. Pretty fast." Stafford had binoculars that day but did not use them (RT 11576-11577).

Stafford fired a warning shot into an area between the guntower and the yard when he saw Brooks falling to the ground(RT 11493). He said petitioner (Burks) and Celestine "started to back stepping (sic) and both ended up all the way from the heavy bag back against the wall by the shower" (RT 11494). 11/

11. The showers were located on the west side of the yard several yards away from away from where the incident took place. Petitioner testified that he moved to the wall to get away from Defendant Jordan who was walking in his direction with a knife in his hand (RT 12133).

Stafford said that the shot stopped all movement in the yard for four or five minutes. Then there was additional movement so he fired a second shot to stop it (RT 11493). He said that approximately five minutes after the first shot, defendant "Bonville moved from his position [near Brooks] ...[to] all the way over by the fence going along 2 building towards the toilet area" (RT 11494). He also said, "[M]ainly inmate Bonville moved from his position all the way over to within fifteen feet of the toilets ..." (RT11495). Inmate Wilkerson was also moving. Inmate Jordan would not squat down. Stafford told him to sit down and Jordan yelled back that he would sit down when he wanted to (RT 11489-11495).

After the first shot, Stafford received a call from Sergeant Walker. Stafford testified that he informed Walker that Brooks needed emergency medical aid and that inmates Jensen, Gaulden, and White were trying to ward off the attack. He said that Jensen had his arms extended with palms out trying to ward off the attack (RT 10501-10502). 12/ Stafford also told Walker that Brooks was attacked by petitioner and Celestine (RT 11496).

Stafford testified further that he saw Jensen on the side of the heavy bag across from Celestine. Jensen was "very close" to Brooks. Gaulden was just behind the bag and moved a little to the left of it "and he also had his hands up just like Jensen trying to ward off the people attacking". Inmate White was further to the rear and to the right but Stafford did not "specifically remember him, his hands or what he was doing" at the time of the attack (RT 11496-11498). Immediately after he fired the shot and Brooks was on the ground under the heavy bag, Stafford said that he saw Inmate White squat over Brooks. He stated "I let them go, because ... they were making no overhand movements ... and they just had some clothing and I could see that they were pushing down around his neck and chest ... to stop the bleeding" (RT 11498).

12. Jensen had testified earlier that he fought Brook's attackers with his fist. (RT 10208-10210).

Stafford saw Brooks removed from the yard by other Officers but had difficulty remembering whether he was removed before the second shot was fired. Stafford directed the other guards to remove Gaulden, Jensen and Lewis in that order. He said he believed the yard crew took over the order in which the remaining 22 inmates would be removed from the yard. He did not tell the other guards to take petitioner and Celestine off the yard. He " had them under coverage, they were all the way back against the wall." As the inmates were processed off the yard, the other guards were recording any injuries that the inmates had (RT 11499-11501).

Stafford did not see any knives at the time of the attack or while the inmates were being removed from the yard He remembered seeing clothing bunched up in the sink near the toilet area but he had no idea how it got there.

Stafford returned to work the following day in his regular capacity as canteen officer. He was assigned to the first floor of SHU 4-A. He spoke to defendant Bonville who said, "you have everything pretty much down to a T, but instead of Burks stabbing Brooks that was me. What [sic] do you think I kept moving after you fired the shot ... ?" Stafford said, "if that's really the case and ... Burks never had a weapon in his hand, then you better come forth with a confession." Bonville refused stating, "No, I'm not coping to no murder beef" (RT 11503-11507). Stafford said that he did not see Bonville stab Brooks nor did he see petitioner or anyone else stab Brooks. 13/ (RT 11508)

13. The prosecutor's case against petitioner would stand or fall on Staffords testimony alone. However Stafford was thoroughly impeached by defense counsel and even the prosecutor described him as a "bumbler" and a "crummy, lousy witness" with all the human frailties that one could find". (RT 12491. See Argument V.)

The Defense Case:

Petitioner testified that until approximately one week before the killing, he had been housed on the third tier of the SHU. During this time he would exercise in a yard located north of the Black yard. Since he had been transferred to the first tier in mid-March and had been there only one week, he had only exercised in the Black yard about two or three times before the killing (RT 12125).

On the day of the killing, petitioner was wearing gray gym trunks, white T-shirt, and off white thermal top. (RT 12126). He wore a beard and sunglasses (RT 12127-12128). Petitioner was playing basketball when he heard a gunshot. He testified that seconds before the shot, he noticed that some of the players had stopped playing. He looked at the players and saw them looking past him. He turned to look in the same direction when he heard the shot, ducked and looked up to Tower 17. He saw Stafford looking in the direction of the bars and heavy bag. Petitioner then looked around his immediate area and saw defendant Jordan walking towards him from the heavy bag area. Jordan had a knife in his hand. Petitioner tried to keep some distance between himself and Jordan by backing up against the west wall near the handball court. He did not leave that position until he was removed from the yard. (RT 12128-12134). Other inmates were also trying to move away from the area of the killing towards him or the south fence. (RT12146).

When petitioner was removed from the yard, he was required to undress and his clothes and body were examined for any blood or cuts. Because there was no evidence of blood or cuts on either his clothes or person, he was not photographed and none of his clothes were confiscated. After the search his clothes were returned to him and he was returned to his cell. He learned the next day that he was suspected of being involved in the killing.

Petitioner was read his Miranda rights and freely chose to give a statement. He explained that he was playing basketball at the time of the killing and denied any involvement in the killing. 14/ (RT 12135-12137)

Nine other inmates testified that petitioner was playing bastekball at the time of the incident. Inmate Georffrey Franklin testified that petitioner was playing basketball at the time of the incident (RT 10312). Inmate Russell Capers saw petitioner playing basketball at the time of the killing (RT 10351). Inmate Moses Mata Johnson stated petitioner was playing basketball (RT 10416).

Inmate Mario Craig testified that petitioner was on his basketball team (RT 10575). Inmate William Bell stated that petitioner was playing basketball at the time of the incident and that petitioner was on the basketball court when defendant Jordan walked past Bell after Brooks was stabbed (RT 10639-10669). Inmate Fred Tidmore stated that petitioner was playing basketball (RT 10962). Rudy Moon Stated that petitioner was on the basketball court when the first shot was fired (RT 11301). Inmate Raymond Osborne testified that he was on the second tier of the SHU on the date of the Killing. He was watching the basketball game and saw petitioner playing basketball when he heard the first shot (RT 12112). Even Stafford himself corroborated that petitioner was, in fact, playing basketball at the time of the incident. Correctional Officer Judy Colvin testified that she was assigned as petitioner's investigative employee to conduct an investigation on his behalf. In conducting the investigation, she asked Stafford where petitioner was at the time of the incident. He informed her that "Burks was playing basketball on the outer boundaries close to the attack area" (RT 12087-12089).

14. When asked on cross-examination why he thought Stafford had picked him as one of the assilants petitioner said that he believed Stafford had made a mistake (RT 12137-12138).

IV.

CONTENTIONS

CONTENTIONS

I.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY BY THE TRIER OF FACT.

2.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT NEW EVIDENCE WAS AVAILABLE TO THE DEFENSE WHICH WARRANTED A NEW TRIAL.

3.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT THE COURT ERRED WHEN IT DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO PENAL CODE SECTION 1118.1 AT THE CONCLUSION OF THE PROSECUTION'S CASE.

4.

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT THE COURT ERRED WHEN IT DIDN'T GRANT PETITIONER A MISTRIAL BECAUSE THE VERDICT WAS CONTRARY TO LAW OR EVIDENCE.

5.

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO INVESTIGATE POSSIBLE EXCULPATORY EVIDENCE THAT WOULD HAVE CORROBORATED CO-DEFENDANTS JORDAN'S CONFESSION THAT HE WAS RESPONSIBLE FOR THE MURDER. WITHDRAWING A CRUCIAL DEFENSE FROM PETITIONER.

6.

PETITIONER SIXTH AND FOURTEENTH AMENDEMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO THOROUGHLY PREPARED FOR TRIAL, OMITTING CRUCIAL EXCULPATORY EVIDENCE FROM DEFENSE.

7.

CO-DEFENDANT CELESTINE JOINS IN THOSE ISSUES RAISED BY PETITIONER BURKS NOT RAISED BY CELESTINE AND ADOPTS BY REFERENCE THOSE ARGUMENTS WHICH WOULD DENEFIT PETITIONER.

8.

PRAYER FOR RELIEF

Petitioner is without remedy save by writ of hebeas corpus.

WHEREFORE, petitioner prays the Court:

1. Issue a Writ of Hebeas Corpus and/or grant application to recall the remittitur by this Court directing the Superior Court of Sacramento County to enter judgment of acquittal by the powers invested in this Court pursuant to Penal Code section 1262, and to vacate its order of September 2, 1987.

2. Issue its order to show cause to James Gomez, Director of the California Department of Corrections, and/or M.L. Smith, Warden of Tehachapi IV-A facility, to inquire into the legality of petitioner present incarceration.

3. Appoint counsel for petitioner and any other relief as the court deem appropriate in the interest of justice.

DATED: APRIL 4, 1998

RESPECTFULLY SUBMITTED

Jeffrey M. Burks

JEFFREY M. BURKS
IN PROPRIA PERSONA

VERIFICATION

I, JEFFREY M. BURKS, the undersigned, being first sworn, say:

I am the petitioner in this action. I have read the foregoing petition for Writ of Hebeas Corpus and the facts stated therein are true of my own knowledge, except as to matters that are therein stated on my own information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 4th day of April, 1998, here at CCI-Tehachapi 4A, P.O.B. 1902, Tehachapi, Ca. 93581.

Jeffrey M. Burks

JEFFREY M. BURKS

CDC# B-64401

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

I

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIX AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY BY THE TRIER OF FACT.

Petitioner submits before the instant Court, that the Trial Court erred when it denied Petitioner's Motion for New Trial based on Insufficiency of the Evidence to Sustain a Verdict of Guilty of Murder in The First Degree, and Counsel's failure to raise such crucial issue on appeal deprived Petitioner of his right to effective counsel, guaranteed by the Six Amendment of the U.S. Constitution.

Petitioner further submits, that the function of the trial judge in determining a motion for new trial on the grounds of insufficiency of the evidence is "... to see that the jury intelligently and justly perform its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict".

If the court entertains doubts concerning the credibility of a witness it is not bound by the contrary conclusion of the jury.

The trial court must "... give the defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict" People V. Sarazzawski (1945 27 C2d 7, 15-16, 161 P2d 934. People V. Reyes (1974) 12 C3d 486, People V. Kunkin (1973) 9 C3d 245, In re Roderick P. (1972) 7 C3d 801, Burks V. U.S. (1978) 437 US 1, Greene V. Massey (1978) 437 US 19.

Petitioner was entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for new trial in giving consideration to the important matter of the sufficiency of the

Evidence to support the jury's verdict, the trial court, in ruling on the motion for new trial, is not bound by conflicts in the evidence, and the duty is imposed upon it then to consider such additional and unimportant features as the credibility of the witnesses, their manner and appearance in testifying, and the proper weitht to be accorded to the evidence. The following evidence, which was adduced at the trial, is insufficient to support a finding of guilt:

1. The medical evidence indicated the eight wounds to the victim's chest and back were straight in and not angled upward or downward. The scientific evidence is contradictory and cannot be reconciled with the evidence of the eyewitness testimony.

2. The single eyewtiness saw overhand/downward striking motions made by two men standing upright, who he identified as petitioner and the defendant Celestine. Such motions are inconsistent with the wounds received by the victim. Even if the court bleieved petitioner and Celestine were the men Stafford saw, Stafford's descriptions do not support an objective conclusion that the men he saw were in fact the killers.

a. He saw no knife in either man's hands.
b. He saw no blood on either man.
c. He saw nither man discar any item of clothing or weapon.
d. He saw no contact between either man's hand or body and the body of the victim.
e. He saw neither man go to the shower or sink where they could wash off blood.
f. Neither petitioner nor defendant Celestin had blood on their clothes or body.
g. Neither petitioner nor defendant Celestine had any cuts on their body.

3. Other evidence was received at trial to discredit the reliability and trustworthiness of Stafford as a percipient witness.

4. Brooks did not wear a long sleeved deenim jacket buttoned to the neck on March 24, 1984, as testified by Stafford. There was no jacket on his body or found on the yard.

5. Brooks had been to SHU I yard 17 times between January 4, 1984, and March 24, 1984, contrary to Staffords testimony that he had not been to the yard for several months.

6. Stafford claimed to have worked as gunman in tower 17 as many as 40 times before March 24, 1984. His supervisor in SHU I, Sgt. Jimmy Walker, could not recall Stafford ever working that post before, or not more than once or twice.

7. Stafford testified that he was on the catwalk the last five minutes before hearing the commotion. Officer Olivera, the gunman in Tower 14, testified he was on the phone with Stafford within one to five minutes of Stafford firing the first warning shot.

Petitioner submits that, if the objected to motive about the BGF was removed from the case and the remaining admissible evidence evaluated on the issue of guilt, it is reasonably clear, that petitioner who is presumed to be innocent until and only if there is proof of his guilt beyond a reasonable doubt, in the interest of justice should have been found not guilty.

Finally, petitioner submits before this Honorable Court, that for counsel not to bring such issues before the court is incompetence per se. The Smith Court, in In re Smith (1970) 3 c 3d. 192, expressly noted that '[Petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of counsel]", it went on to hold that the inexcusable failure of petitioner's appellate counsel to rasie crucial assignments of error, which arguably might have resulted in a reversal, deprived petitioner of effective assistance of appellate counsel to which he was entitled under the Constitution (Smith, supra, at pp. 202-203).

In the case of People V. Valenzuela, (1985) 175 Cal. 3d. 381, the Court relied on People V. Rhoden, (1972) 6 Cal. 3d 519, another case involving a claim of incompetence of appellate counsel, the court, as in Smith, "catalogued the contentions which defendant's appellate counsel failed to raise not to imply how the merits of the appeal should have been resolved but to emphasize the gross deficiencies in counsel's presentation (Id., at p. 529). "Having concluded that defendant had been denied his constitutional right to the effective assistance of counsel on appeal, the Rhoden court stated that defendant was "entitled to have his entire appeal re-briefed and rearuged by competent counsel, and it's merits redetermined by the Court of Appeals." Ibib.

In the case of Strickland V. Washington, 466 U.S. 668, (1984), established the standard for ineffective assistance of counsel, and though it is phased in terms of ineffective assistance of trial counsel it can be used as a basis for establishing a standard for ineffective assistance of appellate counsel, Bowen V. Flotz, 763 F. 2d. 191, 195 (6th Cir. 1985), Schwander v. Blackburn, 750 F. 2d. 494, 502 (5th Cir. 1985); Michell V. Scully, 746, F. 2d. 951, 954 (2d Cir. 1984). Under Strickland, ineffective assistance of counsel will be found when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result". Therefore, petitioner submits that in light of the above facts his case should be reversed.

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF WRIT OF HABEAS CORPUS

II

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIX AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT NEW EVIDENCE WAS AVAILABLE TO THE DEFENSE WHICH WARRANTED A NEW TRIAL

Petitioner submits before the instant Court, that the Trial Court erred when it denied Petitioner's Motion for New Trial based on New Evidence available to the defense which warranted a New Trial, and Counsel's failure to raise such crucial issue on appeal deprived petitioner of his right to effective assistance of counsel, guaranteed by the Six Amendment of the U.S. Constitution.

Petitioner further submits, that attached hereto, as Exhibit "A" is a copy of a letter provided to counsel by the Court which purports to be from defendant Warren Jordan. Mr. Jordan did not testify at the trial, although prior statements he made to Investigator Schultz and prior testimony at the Post-Indictment Preliminary Examination were received into evidence. Further, Mr. Jordan was allowed to address the jury in closing arguments while acting in the capacity of his own attorney. However, at no time was Mr. Jordan examined or cross examined as a witness at trial.

As reflected in the letter to the Court from Mr. Jordan, Mr. Jordan continues, even after his acquittal in this matter, to confess his responsibility for the murder of Brooks.

Although Mr. Jordan's position was known, his testimony was not available to be produced at the trial unless he chose to take the witness stand himself. His co-defendants could not call him to the stand before the jury any more than the prosecutor could call him to testify. Accordingly, a new trial should have been granted to allow a jury the opportunity to hear and consider evidence properly admitted and restricted to the testimony of

Mr. Jordan since he can now be called to the stand because jeopardy has attached to his participation in this crime. Nevertheless, it is not necessary to produce witnesses at the hearing. People V. Trujillo. (1977) 67 Ca 3d 547, 557.

Penal Code § 1181 (8) allows the granting of a new trial when new evidence is discovered material to the Defendant and which could not with reasonable diligence have been discovered and produced at trial. This information is not newly discovered, but could not have been produced at trial by petitioner. Appellate Counsel for Petitioner, should have at least produced Mr. Jordan's letter before this Honorable Court to weigh its evidence to determine whether or not if the jury heard such evidence that it would have made a different result probable on retrial.

Petitioner further submits, that Mr. Jordan's letter compounded with the scientific evidence that was contradictory and could not be reconciled with the evidence of the eyewitness testimony, petitioner believes that would have had a different effect on the jury. For counsel to ignore such evidence without diligently trying to establish petitioner's innocence is incompetence per se.

In the case McCoy V. Lockhart, 969 F. 2d. 649, 651, (8th Cir. 1992), states in relevant part. "To show [actual innocence], petitioner must show by clear and convincing evidence, that but for constitutional error, no reasonable juror would have found him guilty under the applicable state law. The standard in Sawyer V. Whitely, with reference to the death penalty applies equally to habeas challenges to convictions. Appellate Counsel failed to raise this issue of innocence on appeal which was clearly supported by the factual evidence presented at trial and if not for the numerous errors throughout the trial petitioner would not haye been found guilty.

The harmless error test does not apply in regards to the deprivation of a procedural right so fundamental as the effective assistance of appellate counsel. (See Glasser V. United States, 315, U.S. 60 At p. 76 (1942), Chapman V. California, 386 U.S. 18, 23, 43, (1967). In Reece V. Georgia, 350 U.S. 85, (1955), Accordingly constitutionally adequate assistance can no longer be measured by the Due Process Standard of Ibarra, but instead must be determined by a Standard bottomed on the Sixth Amendment of the United States Constitution and Article I, Section 15 of the California Constitution. Petitioner submits that for the reasons stipulated above this Honorable Court should reverse his conviction.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

III

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIX AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT THE COURT ERRED WHEN IT DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO PENAL CODE SECTION 1118.1 AT THE CONCLUSION OF THE PROSECUTOR'S CASE

Petitioner submits before the instant Court, that the Trial Court erred when it denied Petitioner's Motion for New Trial based on Judgment of Acquittal Pursuant to Penal Code Section 1118.1 at the conclusion of the Prosecutor's case, and Counsel's failure to raise such crucial issue on appeal deprived petitioner of his right to effective counsel, guaranteed by the Six Amendment of the U.S. Constitution.

Petitioner further submits, that in a case tried before a jury, the Court on Motion from Defendant or on its own motion, at the close of the evidence on either side before the case is submitted to the jury for decision, shall Order the Entry of Judgment of Acquittal ... if the evidence then before the Court is insufficient to sustain a conviction of such offenses or offenses on appeal ... (Penal Code Section 1118.1).

A Motion for Judgment of Acquittal was made at the conclusion of the prosecutor's case by all defendants except defendant Jordan. The Court denied that motion. By reference to the general summary of the state of the evidence as set forth in Argument I. above concerning the insufficiency of the evidence, the evidence taken in the light most favorable to the prosecution at the close of its case was that Officer Stafford, if not mistaken in any aspect of his testimony, saw Petitioner make an overhand motion in the immediate area of the victim Brooks while Brooks was falling to the ground. Other evidence in the record clearly establishes that numerous other inmates were within striking distance of the decedent; that in fact a fight took place involving multiple people on the yard and that various

Other persons were injured or showed evidence of being involved in the fight, whereas Petitioner did not; that someone was sufficiently injured to leave a substantial trail of blood covering a general line approximately fifteen (15) feet long from the position Mr. Brooks' body was found to the parallel bars which was unseen by Officer Stafford; that Defendant Jordan admitted commencing his assault on Brooks in the vicinity where the blood stains were observed and continued it to the point where Brooks fell to the ground; that whatever events occurred in the vicinity where the assault began as described by Jordan was not observed by Officer Stafford because he admitted not seeing what caused Inmate Lewis to be rendered unconscious in that immediate area at approximately the same time ; that at least one inmate saw Jordan stab Brooks, that several inmates saw Petitioner playing basketball at the time of the commotion involving Brooks; and that Officer Stafford did not see Petitioner with a weapon at any time and did not see Petitioner stab Brooks.

The Trial Court must apply the same test as an appellate court in reviewing a conviction. People V. Blair, (1979) 25 Cal. 3d. 640. That test is that a rational trier of fact could not reasonably have found the defendant guilty based on the state of the evidence then presented. In determining an appeal, California Supreme Court, Courts of Appeal, and appellate departments of Superior Courts may (a) reverse, affirm, or modify a judgment or order appealed from; (b) set aside, affirm, modify any or all of the proceedings following or dependent on the judgment or order; and (c) order a new trial. Penal Code § 1260 (supreme court, court of appeal), 1469 (superior court appellate department). This includes the power to reduce the degree of the offense or attempted offense or reduce the punishment imposed and the power to order dismissed.

However, both Penal Code § 1262 and 1469 must be read in light of recent U.S. and California Supreme Court holdings that, when an appellate court reverses a conviction because the evidence introduced at trial was insufficient to sustain the verdict, the bar against double jeopardy precludes retrying defendant for that offense. Burks V. U.S., (1979) 437, U.S. 1; In re Johnny G. (1979) 25 C3d. 543, 159 CR 180. This bar extends to allegations affecting punishments. People V. Green, (1980) 27 C3d. 1, 164 CR 1 (special circumstances).

The California Supreme Court has recognized that under Burks, when defendant's Penal Code § 1118 motion was erroneously denied, the conviction must be reversed with directions to enter Judgment of Acquittal; under Penal Code § 1262, a general reversal would have subjected defendant to retrial. People V. Belton, (1979) 23 Cr 516, 527, 153 CR 195, 202. Note also Hudson V. Louisiana, (1981) 450 U.S. 40, in which the court applied Burks to bar retrial when the trial judge granted defendant's motion for new trial following conviction because the evidence was insufficient to support the verdict of guilty.

Petitioner submits in the instant case that, if one also qualifies that by limiting the evidence only to that which should have been properly admitted, Petitioner asserts that all inferences from the record that are resolvable adversely to Petitioner only result in the conclusion that Petitioner may have been in the vicinity of Mr. Brooks at some point during the general melee as were numerous other persons not charged. The evidence did establish at the close of the prosecution's case that there was ample evidence before the court that the Defendant who did not make a motion for Judgment of Acquittal was guilty. That Defendant was Jordan. Petitioner asserts that this legal error warranted a new trial or dismissal.

Lastly, Petitioner further asserts that it is the Appellate Counsel's duty to argue such fine points of law for his client. The right to counsel guaranteed by the Constitution, however, means more than just the opportunity to be physically accompained by a person privileged to practice law. See Strickland V. Washington, 466 U.S. 688, 80 L.Ed. 2d 674 (1984). Powell V. Alabama, 287 U.S. at 58, 53 S. Ct. at 60 (indigent defendants provided with unprepared and pro forma lawyers "were not accorded the right to counsel in any substantial sence".) Thus, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the court is fair". Strickland, 466 US at 685, S. Ct. at 2063. In other words, the assistance to which a defendant is entitled must be "effective" id. at 686, 104 S. Ct. at 2064, unhindered either by the state or by counsel's Constitutionally deficient performance. This required performance contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice. See Javor V. United States, 724, F 2d. 831, 834 (9th Cir. 1984) (a defendant's Sixth Amendment right to counsel is denied when his attorney sleeps through a substantial portion of the proceedings). See also Tucker V. Day, 969 F2d. 155, 159 (5th Cir. 1992) (an attorney who provided his client with no assistance at sentencing and who said, "Oh, I am just standing in for this one". did not satisfactorily discharge his Sixth Amendment responsibilities). The Tenth Circuit's holding that "an attorney who adopts and acts upon a belief that his client should be convicted "fail[s] to function in any meanignful sense as the Government's adversary," id. (quoting Osborn V. SHillinger, 861, F 2d. 612, 625 (10th Cir. 1988) (Cronic, 466 US at 666, S Ct. at 2051). In Light of the facts articulated in this ground for relief, Petitioner submits that his conviction should be reversed.

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF WRIT OF HABEAS CORPUS

IV

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIX AMENDMENT OF THE CONSTITUTION WHEN APPELLATE COUNSEL FAILED TO RAISE (FROM PETITIONER'S NEW TRIAL MOTION) THAT THE COURT ERRED WHEN IT DIDN'T GRANT PETITIONER A MISTRIAL BECAUSE THE VERDICT WAS CONTRARY TO LAW OR EVIDENCE

Petitioner submits before the instant Court, that the Trial Court erred when it denied Petitioner's Motion for New Trial based on a Mistrial because the Verdict was Contrary to Law or Evidence, and Counsel's failure to raise such crucial issue on appeal deprived Petitioner of his right to effective counsel, guaranteed by the Six Amendment of the U.S. Constitution

Petitioner further submits, implicit from the guilty verdict against Petitioner and Defendant Celestine and the acquittal of Defendants Jordan and Bonville is that the jury accepted the prosecution's theory of the case as presented in the course of evidence in closing argument; that Petitioner and Defendant Celestine were personally responsible for the stabbing of the victim Brooks, and the motive for the killing was a factual dispute within the Black Guerrilla Family, hereinafter referred to as the BGF. It is asserted that the evidence does not support these verdicts in the following particulars:

Evidence was presented that the fatal wounds sustained by the victim Brooks were inflicted such that all the torso wounds were perpendicular to the body or straight into the body (See testimony of Dr. Trowbridge of June 24, 1987 and Dr. Masters of August 6, 1987). The conduct of Petitioner and Defendent Celestine as described by the "eyewitness", Officer Stafford, was that he saw overhand movements being made by the Defendants while approximatley two (2) feet away as Brook's body was falling to the ground (RT of July 28, 1987, pp. 1194-1198). The conduct of the Defendants as observed by Stafford is not consistent with the conduct required to produce the fatal wounds.

Officer Stafford testified that he kept Petitioner and Defendant Celestine in full view as they backed away from the area where Brooks was observed following the firing of a shot into the yard. However, at no time did he ever see either Petitioner or Defendant Celestine disposing of the knives which were subsequently found on the yard and shown to be the murder weapons. (RT of July 28, 1987, pp. 2003-2005). If the overhand striking motions as described by Stafford did involve the infliction of fatal wounds on Brooks, it is incredible that Stafford did not see any weapons at any time in the hands of either Petitioner or Defendant Celestine. It is also noteworthy that Stafford testified that he did not see either Petitioner or Defendant Celestine stab Brooks (RT July 29, 1987, pp. 2142-1246).

There was testimony that even after the shot fired by Stafford to stop the fighting on the yard a large group of inmates were observed involved in a fight in the vicinity were Brooks' body was found (See testimony of Officer Vollmer of June 25, 1987). Other inmates were subsequently observed with wounds and/or blood on their persons which was recorded in a series of photograph marked and received in evidence as People's Exhibits 14-20 (See Testimony of Officer Bolin of June 24, 1987). Petitioner was not included in any of these observations of wounds or blood on his person. One of the six other inmates (Gaulden, White, Faumi, Johnson, Bonville and Jordan) who had wounds or blood stains, however, inmate Gaulden, refused to testify when called to the witness stand (See RT of July 6, 1987). One of the inmates observed with blood and injuries on his person was Defendant Jordan whose subsequent confession to being the one who stabbed Brooks was presented to the jury through the testimony of the District Attorney's Investigator, Ray Shultz, and the Court Reporter at the Post-Indictment Preliminary Examination, Dorothy Parrish. It is noteworthy that Jordan's confessions described that he commenced his assault on Brooks in the vicinity of the parallel bars and that it continued to the area were Brooks fell near

the punching bag. Following the assault, blood was observed in these areas but it was not preserved and was subsequently destroyed (See testimony of Officer Walker of July 13, 1987, pp. 1069-1077).

Additionally, one of the prosecution's witnesses, Mario Craig, testified that he observed Jordan with the knife as he approached Brooks and in fact saw Jordan stab Brooks (See Testimony of Mario Craig on July 13, 1987, pp. 1101-1106).

Another prosecution's witness, Fred Tidmore, established the "bad blood" that existed between Jordan and Brooks in his testimony (See RT of July 15, 1987, pp. 1438-1445). This information corroborated Jordan's version of the events by confirming Jordan's motive and refuting the "hit" on Brooks being part of a BGF dispute.

Officer Stafford further testified that he made the critical observations relied upon by the jury to convict, during a period of time that covered no more than two (2) to five (5) seconds (RT of July 29, 1987, pp. 2142-2146). Significant, his observations did not include all of the fight, nor the circumstances of inmate Lewis being rendered unconscious within a few feet of the body of Brooks, nor the clothing worn by Brooks which he described to be a blue denim jacket buttoned to the neck, but which was not found on the body of Brooks when it was taken to the infirmary immediately after the assault. Thus, the question arises did Stafford see Brooks being stabbed at all, and if so, what happened to the jacket Stafford insists he saw Brooks wearing at the time he was assaulted?

Additionally, numerous witnesses called by the prosecution testified that at the time of the initial commotion involving Brooks, Petitioner was playing basketball. This testimony was provided by among others, inmates Franklin and Capers on July 6, 1987, and inmates Craig and Bell on July 13, 1987, all of whom were called by the State to testify.

Penal Code 1118 (6), states that the Court may grant a new trial upon application of a defendant when the verdict has been made against him "... when the verdict or finding is contrary to law or evidence ..." It is contended that such is the case as reflected in the record herein, and the jury's verdict of guilt as to Petitioner was prompted not by the evidence, which was wholly insufficient, but rather by the combination of errors as asserted herein, Petitioner submits, on these grounds set forth in his argument and predicated on Appellate Counsel's failure to significantly raise these issues on appeal Petitioner conviction must be overturned with directions to enter a judgment of Acquittal (Powers of Reviewing Court on Appeal P.C. 1262).

V

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO INVESTIGATE POSSIBLE EXCULPATORY EVIDENCE THAT WOULD HAVE CORROBORATED CO-DEFENDANTS JORDAN'S CONFESSION THAT HE WAS RESPONSIBLE FOR THE MURDER. WITHDRAWING A CRUCIAL DEFENSE FROM PETITIONER.

PERTINENT FACTUAL BACKGROUND:

Petitioner was charged with the murder of Edward Brooks, stemming from an incident that occurred on the exercise yard in the Security Housing Unit, 4-A, (the SHU at Folsom State Prison). The Prosecutions case rested solely on the testimony of Corectional Officer Dennis Stafford, who was manning gun-tower #17 which overlooked the Black yard as well as the adjacent White yard. Correctional Officer Stafford's testimony consisted of numerous inconsistencies, and was continuously contradicted by his co-workers. But, he was the only witness that testified that he saw Petitioner attacking the deceased. The Prosecutor stated in his closing argument:

> "Now, this case, ladies and gentlemen, comes down to one witness. It comes down to Dennis Stafford. (R.T. 2997)." Then soon after stated: "if anything he's more of a bumbler." (R.T. 2998).

Yet, even with this weak prosecution case, Petitioners defense counsel was in possession of exculpatory evidence that corroborated Co-defendant Jordan's confession that he murdered the victim.

Through discovery, Petitioner's trial Counsel received the preliminary reports from the Laboratory of Forensic Services, prepared by Ray A. Bartneck. The report catalogued the items that were tested and the results of those tests. The blood stains on both prison made knives were tested and indicated that at least two individuals were responsible for the blood stains examined. The Laboratory at that time had only <u>one blood sample</u> and that sample was from the victim. The Laboratory requested blood samples be taken from the remaining victims and suspects and submitted for comparison purposes.

Fore:

> "Due to the limited quantity of some of the stains, it will be necessary to screen the known bloods of all concerned in order to determine which system will yield the most information upon further typing of the stains."
>
> (See Exhibit B).

And, there were numerous inmates who sustained cuts and scratches during the incident. Evidence obtained minutes after the incident when the inmates were being removed from the exercise yard included clothing from inmates Brooks, Jensen and Gaulden. Defendant Jordan had a cut on his finger ... and a small bit of blood or scratch on his left biceps and Co-defendant Bonville had a small spot of blood or scratch on his right hand and finger. Inmate Johnson came in from the exercise yard with a contusion over his eye. Inmate White hand blood on the palm of his hand and Inmate Faumi had a little cut on him also as well as an abrasion on his right knuckle. (R.T. 10187-11659).

It is clear that the results on these tests, at least, as they applied to petitioner was vital. Both Jordan and Bonville had confessed to being responsible for the murder of Edward Brooks, and they both had blood and cuts on their hands, evidence that clearly involved them in the attack. The Blood tests could have proved that one or both of them held those weapons, thus corroborating their confessions while at the same time proving that Petitioner was not involved in the attack and was in fact playing basketball when the incident took place. Petitioner's trial counsel never explored nor investigated this potential Meritorious defense, but left it to the prosecutor who had no reasons to help prove the innocence of Petitioner. The Prosecutor stated at trial that he had requested blood samples be taken, but he never received them.

It was the duty of Petitioner's trial counsel, as Petitioner's legal advocate, to pursue potential evidence that could exonerate his client.

Petitioner assigns this error as ineffective assistance of counsel.

The United States Constitution guarantees each citizen a fair trial through the due process clause of the Fourteenth Amendment. The substantive elements of a fair trial, including the right to the effective assistance of counsel, are found largely in the Sixth Amendment, and Article 7, Section 15, of the California Constitution. (Strickland V. Washington, (1984) 446 U.S. 668, 684-685). The Sixth Amendment provides in relevant part, that in all criminal prosecutions the "accused shall enjoy the right ... to have the assistance of counsel construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance." (People V. Ledsema, (1987) 43 Cal. 3d 171, 215; see Strickland V. Washington, supra, 466 U.S. at pag. 685,686-688).

In effective assistance has been demonstrated where it is shown that defense counsel's performance resulted in the withdrawal of a potentially meritorious defense. People V. Nation, (1980) 26 Cal. 3d 169, 179; People V. Pope. (1979) 23 Cal. 3d 412, 425), or where there is a reasonable probability that the accused would have received a better result had the counsel performed to a constitutionally adequate standard. People V. Ledesma, supra, 43 Cal. 3d at pg. 217; People V. Fosselman, supra, 33 Cal. 3d at pg. 583-584).

In this context, a "reasonable probability" is one which undermines confidence in the results of the criminal proceeding. (Strickland V. Washington, supra, (1984) 466 U.S. at pg. 693). "It is not required that defendant establish that the adjudication would necessarily be in his favor." (Witkin and Epsteiin, Cal. Crim. Law, (3d ed. 1989) §2790m og, 3370).

With the case at bar, the blood stain test results would have only benefited the Petitioner's case. The test results could have corroborated codefendant Jordan's testimony/confession that he committed the murder for personal reason. (RT 10537-10539). With other physical evidence on him (Jordan) and several other inmates sustaining cuts on their hands which are

consistent with using a prison made weapon, tended to prove that Petitioner did not commit this crime.

There was obviously no "critical reason" why trial counsel failed to pursue this potentially meritorious defense, which could have ultimately proved Petitioner's innocence, or at the least, showed that there was no physical evidence to link Petitioner to the crime. It deserves repeating here that Petitioner didn't have any cuts, scratches, blood, nor any injury to his person, which is amazing since Brooks was observed to be bleeding profusely. It's highly probable that his attackers had his blood on them. (R.T. 11498).

Even if one indulges the questionable presumption that the trial counsel may have thought he had some "strategic" reasons for his omissions, more is required by the Sixth Amendment. Any such alleged "tactical decision" must fall within the realm of reasonably competent trial tactics to survive an ineffective assistance of counsel claim. (Strickland V. Washington, (1984) 466 U.S. 668, 687; see People V. Pope, (1970) 23 Cal. 3d 412, 425; Deutscher V. Whitley, (9th Cir. 1989) 884 F. 2d 1152, 1160.)

It is therefore not enough to merely presume that trial counsel may have had some half-baked theoretical tactical purpose for trial counsel's failure to adequately investigate this potentially meritorious defense. The tactics so presupposed must fall within the range of reasonable trial tactics, i.e., those tactics which a reasonably competent attorney might employ. In this case, trial counsel's "acts and omissions were outside the wide range of professionally competent assistance." (Strickland V. Washington, supra, 466 U.S. at pg. 690.)

PETITIONER WAS PREJUDICED.

An accused has demonstrated prejudice as the result of ineffective assistance of counsel where it shown that counsel's performance resulted in the withdrawal of a "potentially meritorious defense." People V. Nation, (1980) 26 Cal. 3d 169, 179; People V. Pope, (1979) 23 Cal. 3d

412, 425), or where there is a reasonable probability that the accused would have received a better result had counsel performed to a constitutionally adequate standard. People V. Ledesma, supra, 43 Cal. 3d at pg. 217; People V. Fosselman, supra, 33 Cal. 3d at pg. 583-584.) In this context, a "reasonable probability" is one which undermines confidence in the result of the criminal proceeding. (Strickland V. Washington, supra, 466, U.S. at pg. 693.) "it is not required that defendant establish that the adjudication would necessarily be in his favor.) [A] defendant need not establish that the Attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland." (Nix V. Whiteside, (1986) 475 U.S. 157, 175.) "we have never intimated that the right to counsel is conditioned upon actual innocence.) (Lummelman V. Morrison, (1986) 477 U.S. 365, 380.) see, also, Kyles V. Whitley, (1995)--U.S.--, 115 S. Ct. 1555-1566.) "in statistical terms ... Strickland requires a significant but something-less-than-fifty-percent likelihood of a more favorable verdict." (People V. Howard, (1987) 190 Cal. App. 3d 38, 41.)

The omission of the blood stain results, severely prejudiced the Petitioner because the results would not only benefited the petitioner, (see discussion ante at pp. 31-34). A Fortiori, the performance of trial counsel prejudiced Petitioner under the lesser showing reqiured by the Sixth Amendment, and certainly "undermines confidence" in the outcome. (Strickland V. Washington, supra, 466 U.S. at pg. 693; quoted with approval in People V. Ledesma, (1987) 93 Cal. 3d 171, 217-218.)

POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

VI.

PETITIONERS SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN TRIAL COUNSEL FAILED TO THOROUGHLY PREPARE FOR TRIAL, OMITTING CRUCIAL EXCULPATORY EVIDENCE FROM THE DEFENSE.

Under both the United States Constitution, Sixth Amendment, and the California Constitution, Art I, Sec. 15, a criminal defendant has the right to the effective assistance of counsel. Specifically, the defendant is entitled to the reasonably competent assistance of an attorney acting as a diligent and conscientious advocate. This means that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. In re Cordero, 1988) 46 Cal. 3d 161, 180; People V Lesesma (1987) 43 Cal. 3d 171, 215 citing from In re Marquez (1992) 1 Cal. 4th 584). The United States Supreme Court in U.S. V Cronic (1984) 466 U.S. 448; 80 L. ED. 657, 660, clarified a defendants right to effective assistance of counsel at a crucial stage of his trial:

"The presumption that counsel's assistance is essential requires the conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly if counsel entirely fails to subject the prosecutor's case to a meaningful adversarial testing then there has been a denial of Sixth Amendment rights ..." U.S. V Cronic, at pg. 660.

The Court went on to say that some errors by counsel are so egregious, that it compels an application of the per se prejudice presumption. Which is an exception to the two prong test of Strickland V Washington (1984) 466 U.S. 668, 684-685, requiring a showing of error and how the prejudice effected the out come of the trial.

The Per se presumption of prejudice announced in Cronic, supra, is applicable whenever counsel fails to subject the presecution's case to meaningful adversarial testing. See also Unites States V. Swanson, 943 F. 3d 1070-1072, (10th Cir. 1991). The per se presumption of prejudice applies when the error involves actual or constructive denial of counsel during a critical stage in the proceedings. Cronic, supra, at pg. 660. ("Actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice"). Toomey V. Bunnel, 898 F. 2d 741, n. 2 (9th Cir. 1990).

With the case at bar, trial counsel was privy to possible exculpatory evidence through discovery, and failed to adequately investigate it. On September 13, 1984, the District Attorney's Office received a preliminary investigative report from the Laboratory of Forensic Science. In this report, the Criminalist explained that a piece of the metal taken from cell #9, which was solely occupied by co-defendant Rickey Bonville, measuring 6½ ft., matched one of the prison made weapons found at the scene. (see exhibits C and E). The Criminalist saw that the knife had the same paint sequence as the metal removed from Bonville's cell, and concluded:

> "It was not possible to identify the knives as having originated from either piece of metal by physically matching the (ends together) ..." The width and thickness of the prison made knife and the pieces of metal were found to be the same.: (see exhibits C and E).

No further test were conducted on these items. Trial counsel failed to pursue this obvious exculpatory evidence that would have corroborated at an early stage of the Pre-trial proceedings, the confession of co-defendant Rickey Bonville. Scientific (Forensic) examination of the knives and metal taken from Bonville's cell, would have corroborated the confession made by Bonville to Officer Stafford one day after the murder of Brooks. Bonville told Stafford, that it was him (Bonville) stabbing Brooks and not the petitioner (Burks). (see exhibits F and D - Affidavit of Rickey Bonnville).

Although Bonville has admitted to cutting and sharpening one of the knives used to kill Brooks, its highly probable that both knives were made

by him.

The prosecution made the two knives a crucial point in his closing arguments attempting to refute Jordan's confession:

> "The business of the two knives. You probably didn't notice it the first time, but I suggest when you go back and you listen to that confession again all through the tape recorded confession, there's only a mention of one knife. Mr. Jordan doesn't talk about the second knife." (R.T. 2819).
>
> And again:
>
> "Well, what about this business of this other knife? How did that get on the yard? What did you do with that? Did you give it to Mr. Brooks, did you give it to some compatriot, did you throw it over the fence? (R.T. 2819).
>
> Then the (Prosecutor) goes on the say:
>
> "He wanted to muddy the waters to the extent that whoever had to make some decision on whether the case might be prosecuted would be faced with a contradiction, two people observed during the stabbing and a third individual, who is not observed during the stabbing, confessing out of the blue,... (emphasis added) (R.T. 2820).

If trial counsel would have fully prepared petitioner's defense, both Jordan and Bonville's confessions would have been corroborated by the abundance of physical evidence linking them to the murder of Edward Brooks. (see argument 5, supra.) Blood samples were never taken which could have placed the weapons in Jordan and Bonville's hands due to the cuts they sustained during the attack on Brooks. No scientific examination was ordered on the knives to determine the origin of the knives. Connecting blood found on the weapons to Jordan or Bonville would certainly have changed the outcome of the trial. Determining the origin of the weapons to have originated from the metal in Bonville's cell would have changed the out come of trial. There was an ample amount of evidence available to trial counsel long before trial commenced that would have exonerated petitioner. Failure by trial counsel to pursue this evidence and to fully prepare a defense for trial rendered him ineffective under the per se prejudice presumption announced in Cronic, supra. There was no physical evidence that connected petitioner to this crime. There was no blood nor cuts found on

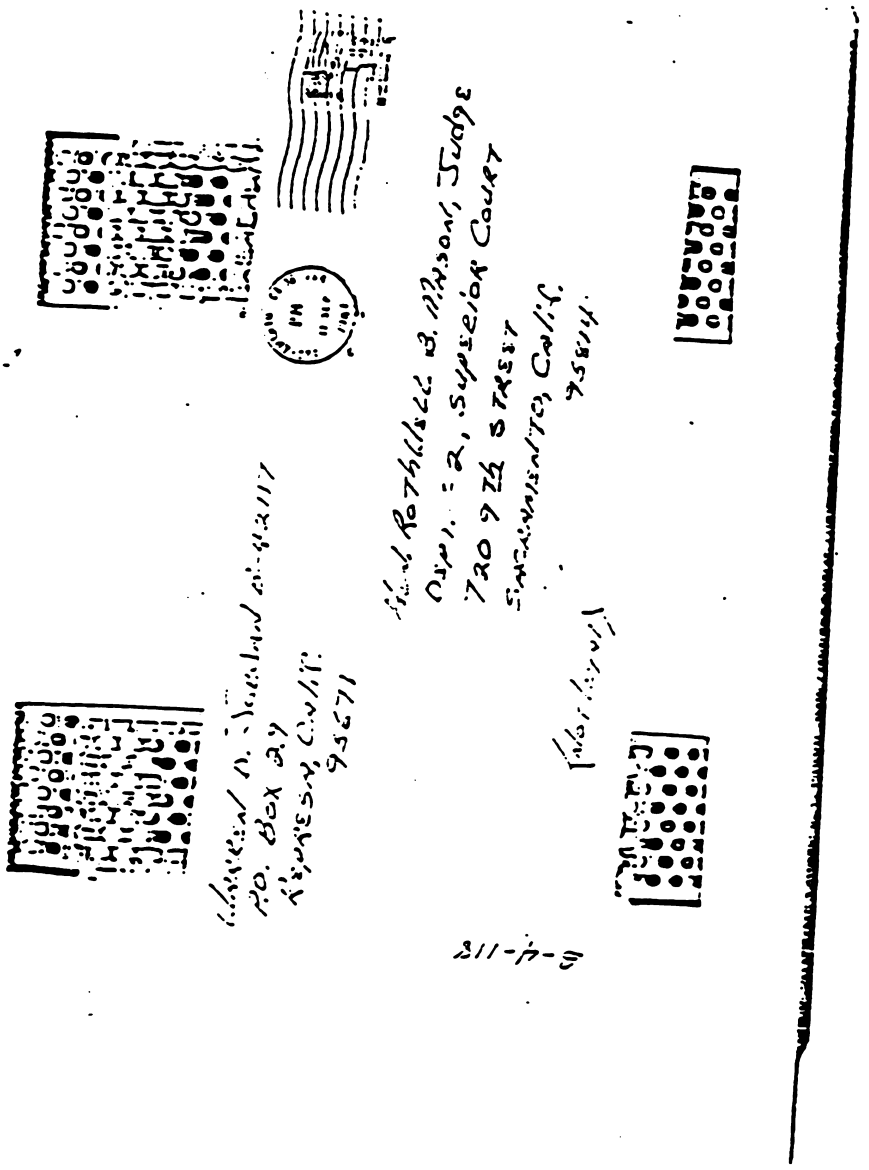
his person to indicate he was involved in the incident or any type of fight. Not so with Jordan and Bonville. As a result of the ineffective assistance of counsel at trial petitioner was left to the mercy of the prosecutions circumstantial evidence, and his star witness who was described by the prosecutor as 'a bumbler'. (R.T. 2998). For the reasons stated herein, petitioner is entitled to a reversal.

VII.

CO-DEFENDANT CELESTINE JOINS IN THOSE ISSUES RAISED BY PETITIONER BURKS NOT RAISED BY CELESTINE AND ADOPTS BY REFERENCE THOSE ARGUMENTS WHICH WOULD BENEFIT PETITIONER

Co-Defendant Celestine Joins in all issues raised by Petitioner Burks which Co-Defendant Celestine did not raise and adopts by reference all Petitioner's arguments which benefit Petitioner Burks. (California Rules of Court, Rule 13; People V. Smith, (1970) 4 Cal.App. 3d. 41, 44; People V. Stone, (1981) 117, Cal.App. 3d. 15, 19, fn. 5.).

EXHIBIT "A"



Sept. 6-87

[illegible]
[illegible]

Dear Judge R. Mason,

Just thought I'd write to thank you for the kind and respectful manner in which you treated me throughout the whole trial, and of course before hand. I realized that you had anticipated ages ago that my conduct was suppose to be completely different from what it was. Well Judge, that is what usually accuses with "here-say" and past documents. I admire you for not over re-acting like alot of D.A.'s & other Judges have done in past years.

Naturally, I was (still am) opposed to the inexperienced Jury verdicts, that was a grave miscarriage of justice that will bother me for the rest of my days. Those 12 folks did not follow the evidence and [illegible] [illegible] - you should realize that fact. I'll never be able to understand how & why a Jury can put a knife in anyone's hand, when a witness [illegible] had testified he never saw any weapons. Who would think that the Jury was on the [illegible] 3-24-84; not to mention the buttoned up blue coat the victim was "suppose" to be wearing - all of this is a sad situation; now two (2) innocent people may end up on death row & with the re-structuring of the Supreme Court - they may well lose their lives for something that I committed; coupled with this, it is quite apparent the Jury also drew the conclusion that the two innocent people also made & transported said weapons. You knew better than that your honor! I gather they (the Jury) felt sorta sorry for me, my situation in general, but through their sympathy

EXHIBIT A

...is directed towards a person who cares less abo-
such things in life. The D.A. (John) once told me that I
was on trial for my life ect, but he failed to realize
that it was "him" that was on trial, because I've
lived with death & on its edges all my life; I
just doesn't shake nor move me like it
would the normal person within society, so thus-
ly I'm always calm & indifferent when confronted
with minor issues, such as death. Of course John
was correct with one statement, & that was—
he has never met a person like me ect. The
truth is, he never will meet another in his life
who can face "adversity" head on, with
absolutely no legal aid. That is merely one of
my styles, after all Judge Mason — I'm the field
marshal of the Black Guerrilla Family in
the State of California, I'm use to walking a-
lone when the odds are against me — I'll survive
the prison holocaust, but not the two innocent
people. Well, take care Judge Mason, please tell
Sandy & Barbara I said hello, tell the D.A.
John O'Mara — he missed me again & I am guilty
of killing E. Brooks, but that is facing adversity
& the truth of ones convictions, whisper to Joe
"until we meet again" because I don't believe in
good-byes. You still owe me a ride in your air
plane Judge Mason!! smile!!

Take Care / Thanks for everything
Judge Mason.

Warren D. Jordan

EXHIBIT O

OFFICE OF THE

DISTRICT ATTORNEY

SACRAMENTO COUNTY

JOHN DOUGHERTY
District Attorney

KATHRYN GAL
Chief Cri

July 17, 1984

Folsom State Prison
P.O. Box W
Represa, CA 95671

LAB NO: A84-156
VICTIM: BROOKS C-17009
GAULDEN C-21707
JENSEN C-12451
SUBJECT: CELESTINE B-53119
BURKS B-64401
BONVILLE B-89067
OFFENSE: 187 PC
AGENCY NO: 84-715

EXHIBIT "B"

ATTENTION SERGEANT W. DES VOIGNES

PHYSICAL EVIDENCE EXAMINATION REPORT

On March 29, 1984, at 1010 hours, Director Kenneth Mack received the following exhibits from Officer Stan Hada and subsequently turned them over to the undersigned.

Item 25. One sealed manila envelope containing one prison-made knife

Item 26. One sealed manila envelope containing one prison-made knife

RESULTS AND CONCLUSIONS

On May 8, 1984, at 0930 hours, the knotted fabric handles on the two prison-made knives were removed from the metal blades by Officer Wernicke of the Sacramento Sheriff's Department Latent Fingerprint Section and the undersigned to facilitate processing for latent fingerprints. Officer Wernicke processed the two prison-made knives for latent fingerprints and no useable latents were developed. The prison-made knives, Items 25 and 26, were returned to the laboratory freezer. Blood grouping determinations will be conducted on the stains at a later date.

DISPOSITION OF EVIDENCE

Items 25 and 26 will be preserved in the laboratory freezer.

KENNETH J. MACK
DIRECTOR

Don Stottlemyer
DON STOTTLEMYER
CRIMINALIST

LABORATORY OF FORENSIC SERVICES
4400 V Street • Sacramento, California 95817-1496
(916) 732-3840

DS/mw
cc: DA Investigator
Ray Schultze

442

O'Mara

OFFICE OF THE

DISTRICT ATTORNEY

SACRAMENTO COUNTY

JOHN DOUGHERTY
District Attorney

KATHRYN CANLIS
Chief Deputy

October 15, 1984

Folsom State Prison
P.O. Box W
Represa, CA 95671

LAB NO: A84-156(S)
VICTIM: BROOKS C-17009
CAULDEN C-21707
JENSEN C-12451
SUBJECT: CELESTINE B-53119
BURKS B-64401
BONVILLE B-89067
OFFENSE: 187 PC
AGENCY NO: 84-715

EXHIBIT "B"

ATTENTION SERGEANT W. DES VOIGNES

PRELIMINARY REPORT/RESULTS AND CONCLUSIONS

Human bloodstains on the following items were examined in the ABO blood group system with the following results:

Item	Item/Stain No.	ABH
Knife	25 A	B, weak H
Cloth handle	25 B 1	B
	25 B 2	B, H
	25 B 3	B
	25 B 4	B, H
Cloth handle	25 C 1	B
	25 C 2	A, B
	25 C 3	B, H
Knife	26 A 1	A, B
	26 A 2	A, B, H
Cloth handle	26 B 1	B, H
	26 B 2	B, H
	26 B 3	B, H
Cloth handle	26 C 1	B, H
	26 C 2	A, B, H
	26 C 3	A, B, weak H

The above results indicate that at least two individuals are responsible for the stains examined.

The lab presently only has a known blood sample from victim Brooks. It is requested that blood samples from the remaining victims and suspects be submitted for comparison purposes.

Also, due to the limited quantity of some of the stains, it will be necessary to screen the known bloods of all concerned in order to determine which systems will yield the most information upon further typing of the stains.

KENNETH J. MACK
DIRECTOR

Ray A. Bartneck

RAY A. BARTNECK
CRIMINALIST

RAB/mw

cc: DDA John O'Mara

EXHIBIT "B"

OFFICE OF THE
DISTRICT ATTORNEY
SACRAMENTO COUNTY
JOHN DOUGHERTY
District Attorney

KATHRYN CANLIS
Chief County

September 13, 1984

Folsom Prison
P.O. Box W
Represa, CA 95671

LAB NO: A84-156 (S)
VICTIM: BROOKS C-17009
CAULDEN C-21707
JENSEN C-12451
SUBJECT: CELESTINE B-53119
BURKS B-64401
BONVILLE B-89067
OFFENSE: 187 PC
AGENCY NO: 84-715

EXHIBIT "C"

ATTENTION SERGEANT W. DES VOIGNES

PHYSICAL EVIDENCE EXAMINATION REPORT

On August 7, 1984, at 1610 hours, the undersigned received the following exhibit from Officer Stan Hada.

Item 36. Two 1" x ¼" pieces of metal approximately 6¾ feet in length and labeled as having been taken from cell #9

RESULTS AND CONCLUSIONS

The prison made knife, Item 26, and one of the pieces of metal, Item 36, have the following layers of paint in the same sequence and are of the same color shade: light green outer, dark green, dark grey, light grey, orange, and black inner.

The prison made knife, Item 25, has black paint only, and the thickness is not the same as the thickness of the two pieces of metal, Item 36. It is possible other layers of paint were removed from the metal and the thickness of the metal blade altered by a grinding process.

It was not possible to identify the knives, Items 25 and 26, as having originated from either piece of metal, Item 36, by physically matching the ends together.

The width and thickness of the prison made knife, Item 26, and the pieces of metal, Item 36, were found to be the same.

DISPOSITION OF EVIDENCE

Item 36 will be retained in the laboratory until called for by a member of your department. Items 25 and 26 will be retained in the laboratory.

KENNETH J. MACK
DIRECTOR

DON STOTTLEMYER
CRIMINALIST

DS/mw

EXHIBIT "C"

EXHIBIT "D"

For The County of Kern,)
n The State of California.) SS. Rickey A. Bonville
)

I, Rickey Anthony Bonville, Declare:

1. That the crime in question, the murder of Edward Brooks at Folsom State Prison in the 4-A Security Housing Unit on the #1 Yard known as SHU-1. On March 24, 1984, I took part in the stabbing assault on Edward Brooks.

2. I knew that a fight was going to take place between Warren Jordan and Edward Brooks, and that Jordan had given Brooks one of the two knives he (Jordan) had smuggled to the exercise yard in a pair of green shower thongs.

3. One of the weapons, I, myself, was responsible for manufacturing from metal I had cut from a part of strapping metal in my cell. Cell #9, solely occupied by me. I sharpened the metal to a point with a double edge.

4. I positioned myself near the chin up bars to be close by to assist if Jordan needed it.

5. Jordan stood by watching Brooks do chin-ups, as Brooks completed a set and stepped down, Jordan attacked Brooks. Jordan stabbed Brooks, and I watched as Brooks moved backwards trying to fight Jordan off.

6. I noticed the other prisoners saw what was going on and the friends of Brooks began moving towards the fight. And were met by other risoners and a big fight ensued between them. I stepped towards Brooks who had his hands up in a fighting position when I made my assault from his left side as he was trying to ward off Jordan.

7. I swung at Brooks with my hands. I swung at him several times hitting him in the face and knocking him into the heavy punching bag which caused fall backwards to the ground.

8. Brooks was focused on Jordan, so my attack was unexpected and I believe the blows stunned Brooks and rendered him unconscious.

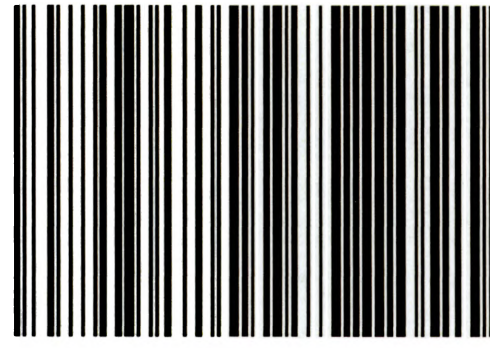
9. I made statements supporting this affidavit to Correctional Officer D. L. Stafford, on March 25, 1984. I told him that he had almost everything down in his report, but that he was completely mistaken about Jeffrey Burks, being involved. I was the one along with Warren Jordan, who was assaulting Edward Brooks.

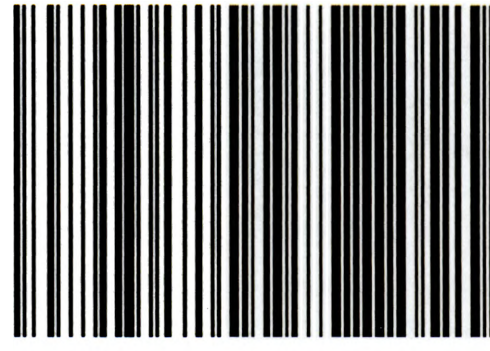
I declare that I am of sound mind and health, and that I am not under any duress or compulsion to dictate and sign this affidavit, other than the desire to see justice done in this case where two men were wrongfully charged and convicted for a crime they did not commit.

I further declare under penalty of perjury that the foregoing is true and correct. And, if called to testify, I will testify as such. Executed this 5 day of March 1998. At C.C.I. Tehachapi, P.O. Box 1902-A, Tehachapi, Ca 93581

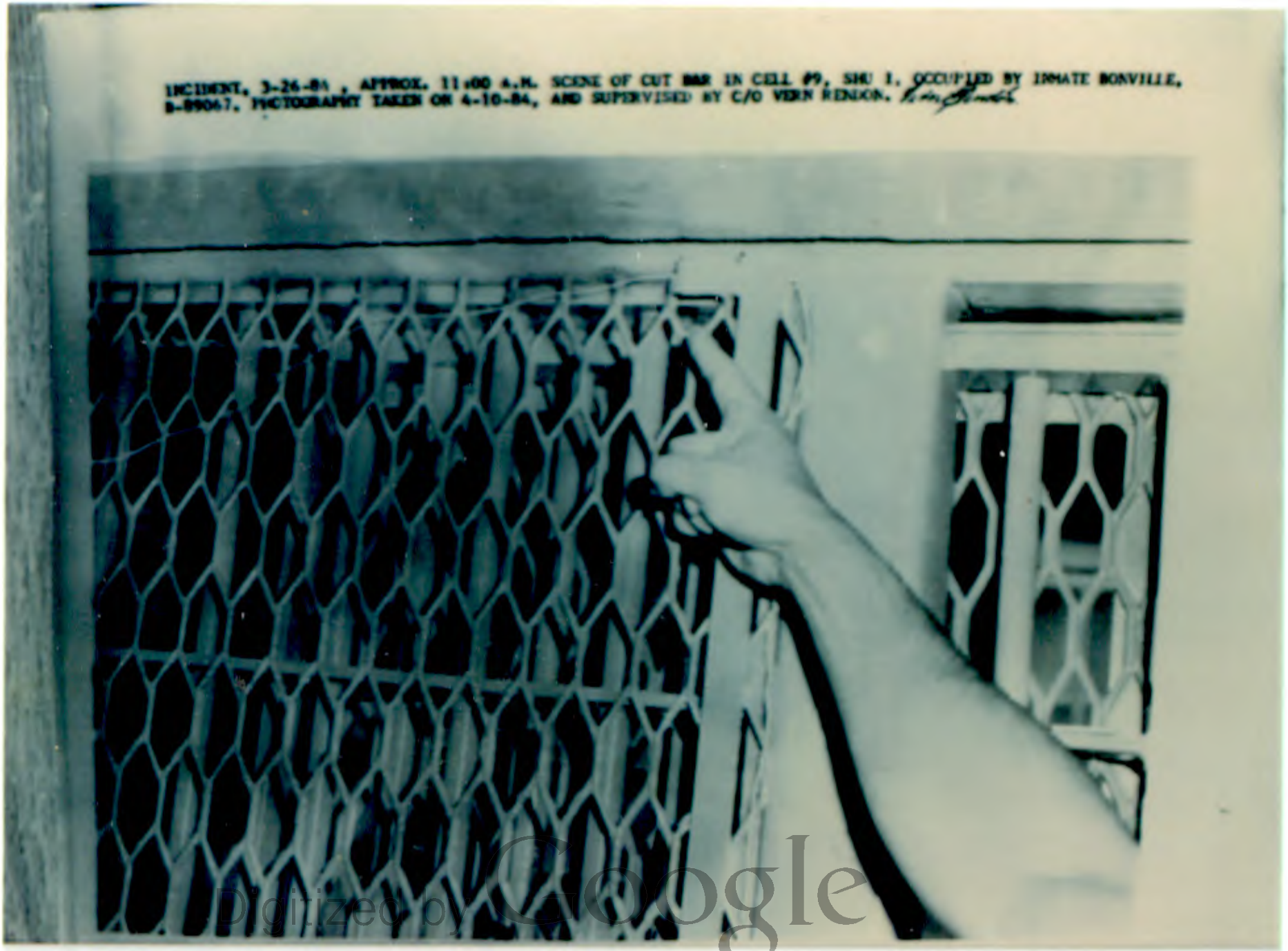
[signature] Badge # 38288 — [signature] B-89067

WITNESS SIGNATURE — RICKEY ANTHONY BONVILLE, #B-89067





INCIDENT, 3-26-84 , APPROX. 11:00 A.M. SCENE OF CUT BAR IN CELL #9, SHU 1, OCCUPIED BY INMATE BONVILLE, B-89067. PHOTOGRAPHY TAKEN ON 4-10-84, AND SUPERVISED BY C/O VERN RENDON.



BURKS


1
2
3
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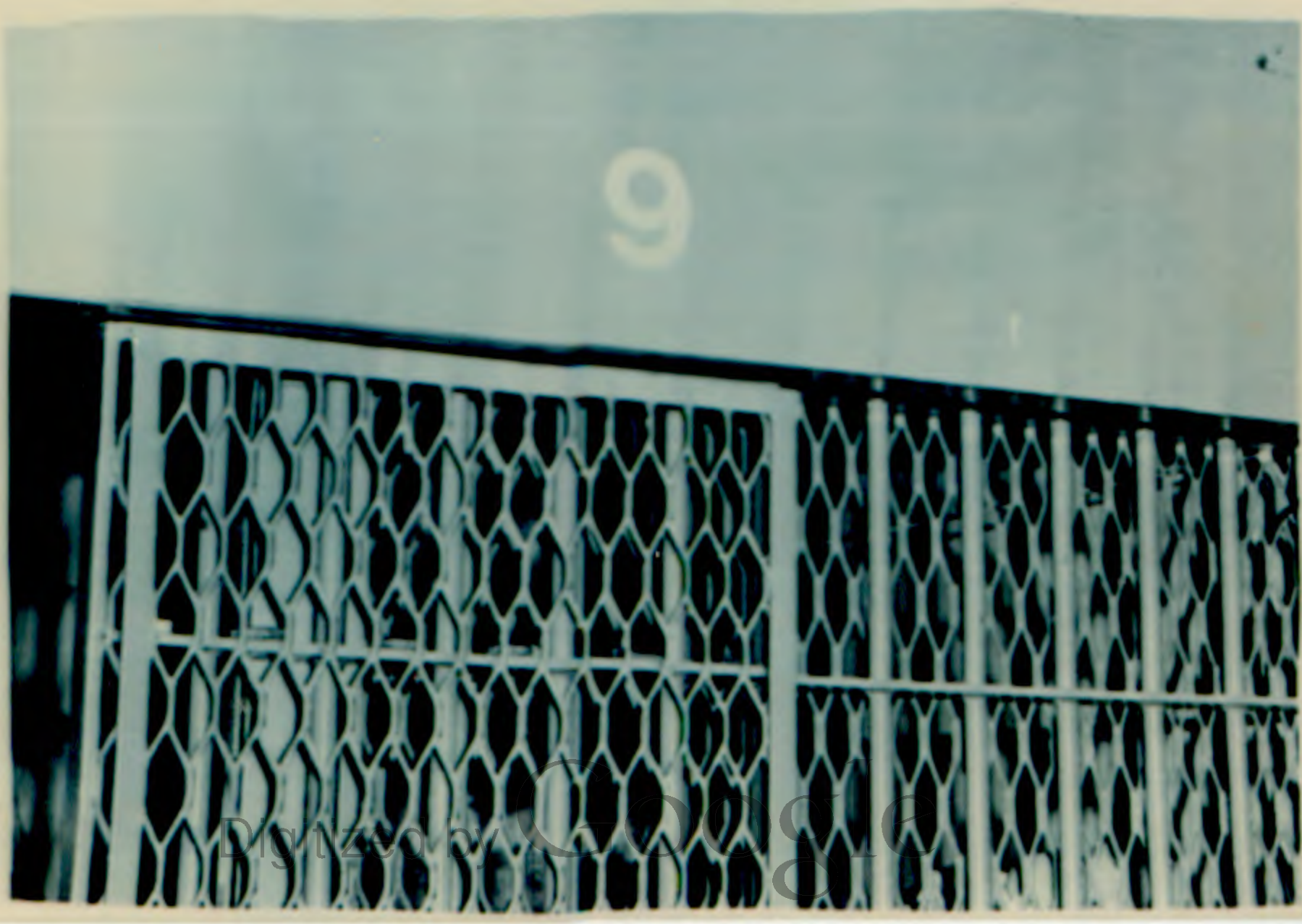
INCIDENT, 3-26-84, APPROX. 11:00 A.M. SCENE OF CUT BAR IN CELL #9, SHU I, OCCUPIED BY INMATE BONVILLE, B-89067. PHOTOGRAPHY TAKEN ON 4-10-84, AND SUPERVISED BY C/O VERP RENDON.



Burks

State of California

Memorandum

EXHIBIT "F"

Date : May 2, 1984

To : D. L. Martin
Associate Warden Special Housing

From : Folsom State Prison, Represa 95671

Subject:

On Sunday, 3-25-84, while on duty as Canteen Officer, inmate BONVILLE, B-89067, Cell #9 yelled, "Hey Stafford, can I talk to you for a minute?" When I approached BONVILLE, he remarked, "Hey, off the record about yesterday". I said, "OK, off the record". BONVILLE then remarked, "Other than BURKS, being the one stabbing BROOKS, you have things down pretty much to a "T". But instead of BURKS stabbing BROOKS, it was me. Why do you think I kept moving after you fired. I kept trying to get closer to the toilets to get rid of one of the knives". I remarked,"If thats true, and BURKS never really had a weapon in his hand, then you should come forth with a confession, because I saw all of you in the immediate area of attack but I remember CELESTINE and BURKS faces best. BONVILLE replied, I'm not copping to no murder beef". I remarked, "My report stands".

D. L. Stafford

D. L. STAFFORD
Correctional Officer
Post #216, #17 Tower

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