Mr. Glenn Sunkett
CDC # AF-1727
P.O. Box 5102
Delano, California 93216
In Pro Per

IN THE UNITED STATE DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GLENN SUNKETT. Petitioner, v. MR. MARTIN BITER WARDEN, KERN VALLEY STATE PRISON. Respondent,	**FEDERAL WRIT OF HABEAS CORPUS: no. C 14-0069 RS (PR)** Previous Case No.'s: CALIFORNIA SUPREME COURT NO. S206250 **AND** NO. S223175 COURT OF APPEAL NO. A130086 MENDOCINO COUNTY SUPER. CT. NO. SCUKCRCR 09-89877

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE FOR PETITIONER

* (Evidentiary Hearing Requested)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE..........................9
Statement of the Case...9
Statement of Facts...11
Trial and Post-trial Facts..11
Habeas Facts...11
A. Ineffective Assistance of Counsel Claims...11
B. Due Process and Fairness of Trial Claims..13

TABLE SHOWING EVIDENCE RELIED UPON BY RESPONDENT, AND REBUTTAL BY CLEAR AND CONVINCING CONTRARY EVIDENCE..........14

Legal Argument..21
AEDPA Standard of Review..21
A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.............................23
I. WAS SUNKETT'S TRIAL ATTORNEY INEFFECTIVE FOR BELATEDLY ATTEMPTING TO CALL TO TRIAL AN EYEWITNESS IDENTIFICATION EXPERT?...23
Petitioner's Argument, Citations, and Supporting Case Law..24
Respondent's Argument and Petitioner's Rebuttal..27

II. WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS DUSTY MILLER'S IDENTIFICATION OF SUNKETT?...35

Petitioner's Argument, Citations, and Supporting Case Law..35
Respondent's Argument and Petitioner's Rebuttal..39

III. WAS PETITIONER'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN TRIAL COUNSEL FAILED TO MOVE TO DISMISS THE FOUR KIDNAPPING CHARGES?...43

Petitioner's Argument, Citations, and Supporting Case Law..43
Respondent's Argument and Petitioner's Rebuttal..45

IV. DID THE STATE COURTS REASONABLY DENY SUNKETT'S ADDITIONAL I.A.C CLAIMS ARGUED IN HIS 9th AND 10th CLAIMS OF HIS FEDERAL HABEAS?.......................................47

Petitioner's Argument, Citations, and Supporting Case Law..47
Respondent's Argument and Petitioner's Rebuttal..48

V. DID THE TRIAL COURT ERR IN ITS CALCULATION OF THE PETITIONER'S AGGREGATE PRISON SENTENCE,

AND WAS HIS APPELLATE ATTORNEY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL?....61

Petitioner's Argument, Citations, and Supporting Case Law....62
Respondent's Argument and Petitioner's Rebuttal....63

VI. DO THOMPSON'S ALLEGED CUMULATIVE ERRORS AND DEFICIENCIES COMBINED WARRANT RELIEF?....64

Petitioner's Argument, Citations, and Supporting Case Law....64
Respondent's Argument and Petitioner's Rebuttal....66

B. DUE PROCESS AND TRIAL FAIRNESS CLAIMS....67

VII. DID THE TRIAL COURT UNREASONABLY DENY SUNKETT'S MOTION TO PRESENT EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION?....67

Petitioner's Argument, Citations, and Supporting Case Law....67
Respondent's Argument and Petitioner's Rebuttal....69

VIII. WAS PETITIONER'S TRIAL RENDERED CONSTITUTIONALLY UNFAIR BY THE EYEWITNESS IDENTIFICATIONS, AND THE SUGGESTIVE I.D. PROCEDURES THAT ELICITED THEM....77

Petitioner's Argument, Citations, and Supporting Case Law....77
Respondent's Argument and Petitioner's Rebuttal....78

IX. DID THE TRIAL COURT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS WHEN IT INSTRUCTED THE JURY WITH CALCRIM No. 315?....83

Petitioner's Argument, Citations, and Supporting Case Law....83
Respondent's Argument and Petitioner's Rebuttal....85

X. IS THERE ENOUGH EVIDENCE TO SUPPORT THE KIDNAPPING CONVICTIONS; AND IF NOT, WAS PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS VIOLATED?....87

Petitioner's Argument, Citations, and Supporting Case Law....87
Respondent's Argument and Petitioner's Rebuttal....90

XI. WAS THE EVIDENCE PRESENTED AT TRIAL SUFFICIENT TO SUPPORT VERDICTS OF GUILTY BEYOND A REASONABLE DOUBT?....93

Petitioner's Argument, Citations, and Supporting Case Law....93
Respondent's Argument and Petitioner's Rebuttal....94

FINAL STATEMENT..**96**

CONCLUSION...**97**

VERIFICATION and CERTIFICATE OF SERVICE.......................................**98**

SUPPORTING DOCUMENTS.

EXHIBIT A--Dr. Davis Declaration & Questionnaire.................................100-107
EXHIBIT B--Dr. Davis' Curriculum Vitae...108-135
EXHIBIT C--Eyewitness Suggestive Identification...(Article)....................136-159
EXHIBIT D--Hotel Records...160-163
EXHIBIT E--Juror Interview..164-165
EXHIBIT F--Sunkett's letters to Thompson...166-216
EXHIBIT G--Matrix of Case Files & Custodian of Records Declarations...217-244
EXHIBIT H--County Jail Visiting Records...245-247
EXHIBIT I--Detective Van Patten's Emails to Miller................................248-251
EXHIBIT J--Picture Comparison of Sunkett v. Barry Bonds.......................252-255
EXHIBIT K--Outline of Penal Code Section 686.3....................................256-261
EXHIBIT L--Thompson's email to Mr. Kid...262-263
EXHIBIT M--Mr. Kid's email to Thompson...264-265
EXHIBIT N--Thompson's complete file of investigation...........................266-356

TABLE OF AUTHORITIES

Cases Cited Herein:

Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862

Avila v. Galaza, (9th Cir. 2002) 297 F. 3d 911)

Baylor v. Estelle (9th Cir. 1996) 94 F.3d 1321;

Blackledge v. Allison, 431 U.S. 63, 76 (1977)

Boling v. Chappell (E.D. Cal.; August 21, 2012, No. C.V. 99-05279)

Brag v. Galaza, 242 F.3d 1082-1089 (9th Cir. 2001

Brodes v. State (2005) 279 Ga. 435; 614 S.E. 2d 766

Brodit v. Cambra, 350 F.3d 985 1003 (9th Cir. 2003)

Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010))

Coles v. Peyton (4th Cir. 1968) 389 F.2d 224, 226)

College Hospital v.Superior Court (1994) 8 Cal. 4th 704

Commonwealth v. Santoli (1997) 424 Mass. 837; 680 N.E. 2d 1116

Cox v. Donnelly, 387 F.3d 193, 198 (2nd Cir. 2004)

Deutscher v. Whitley, (9th Cir. 1989) 884 F.2d 1152, 1160

Duncan v. Ornoski (9th Cir. 2008) 528 F.3d 1222

Earp v. Oronski, 431 F. 3d 1158, 1167 (9th Cir. 2005))

Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007)

Frierson v. Woodford (9th Cir. 2006) 463 F.3d 982, 992

Harrington v. Richter, 131 S.Ct. 780-788

Henderson v. Sargent, 926 F. 2d 706, 711 (8th Cir. 1991)

Herrera v. Collins, 506 U.S. 390 (1993)

Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998)

Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990)

In re Arena, 12 Cal.4th 695,722 (1996)

In re Cordero (1988) 46 Cal. 3d. 161, 181 n8

In Re Cordero, Supra, at p. 180

In re Edwards, (2009) 174 Cal. App 4th 387, 407)

In re Harris, 5 Cal.4th 813, 827 (1993)

In re Lucas, 33 Cal.4th 682 (2001)

In re Newly, 6 Cal.4th , 919 (1993))

In re Worship, 397 U.S. 358 (1970)

In Re Worship, 397 U.S. at 365-368

Jackson v. Virginia, 433 U.S. 307, 318-319, 99 S.Ct. 2789, 61 L. Ed. 2d 560, 573, (1979).

Juan H. v. Allen III, 408 F.3d 1262, 1270, fn. 8 (9th Cir. 2005)

Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005)

Kimmelman v. Morrison, 477 U.S. 365, 381 (1986);

Lambert v. Blodgett 393 F. 3d 943, 976 (9th Cir. 2004))

Leavette v. Brave, 682 F.3d 1138, 1141 (9th Cir. 2012)

Luna v. Cambra, 311 F. 3d 928, 960 (9th Cir. 2002))

Makal v. State of Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976)

Manson v. Brathwaite, Supra, 432 U.S. 98, 106)

Mason v. Hanks, 97 F.3d. 887, 902 (7th Cir. 1996);

Miles v. Martel, 696 F.3d at p. 906, fn. 9 (9th Cir. 2012)

Miller-El v. Cockrell, 537 U.S. 322, 346 (2003)

Nation (1980) 26 Cal. 3d 179)

Ortiz v. Stewart, 149 F. 3d 923, 934 (9th Cir. 1988)

Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001))

People v. Bell (2009) 179 Cal.App.4th 428, 435).

People v. Brandon (1995) 32 Cal. App. 4th 1033. 1044

People v. Corcoran (2006) 143 Cal.App. 4th 272, 279)).

People v. Diaz (2000) 78 Cal. App. 4th 243, 247

People v. Duvall, supra, 9 Cal.4th at p. 475 (1995)

People v. Fossleman (1983) 33 Cal. 3d 572, 583-584).

People v. Johnson (1992) 3 Cal. 4th 1183, 1231, 1232

People v. Johnson (2004) 115 Cal. 4th 186, 213

People v. Jones (2003) 108 Cal. App. 4th 455, 462

*People v. Martinez (*1999) 20 Cal.4th, at p. 237

People v. McDonald, 37Cal. 3d 351, 377 (1984))

People v. Nation (1980) 26 Cal.3d 169, 178-182).

People v. Pope, Supra 23 Cal. 3d at p. 425).

People v. Prieto (2003) 30 Cal. 4th 226, 247

People v. Rodriguez (1977) 68 Cal. App. 3d 874. 881

People v. Shadden (2001) 93 Cal.App. 4th 164, 167, 169-170

People v. Snow (2003) 30 Cal. 4th 43, 70)

People v. Watson, supra, 46 Cal. 2d 818, 836

People v.Ledesma, Supra, at pp. 217-218))

Renoso v. Giubino (9th Cir. 2006) 462 F.32 1099, 113).

Renoso v. Giubino, (9th Cir. 2006) 462 F.3d 1099, 1113

Riley v. Payne (9th Cir. 2003) 352 F. 3d 1313, 1321

Rose v. Superior Court, 81 Cal.App.4th 564, 573, (2000)

Sanders v. Ratelle (9th Cir. 1994) 212 F.3d 1446, 1457)

Sanders v. Ratelle (9th Cir. 1994) 212 F.3d,1446, 1457)

Simmons v. United States (1968) 390 U.S. 377, 383-384.)).

Simmons *v. United States, Supra,* 390 U.S. at p. 384)

State v. Guzman (Utah 2006) 133 p. 3d 363

State v. Long (Utah 1986) 721 p. 2d 483

Stovall v. Denno (1967) 388, U.S. 293, 301-302

Stovall v. Denno, supra, 388 U.S. at p. 302

Strickland v. Washington, 466 U.S. 668, 687-688 (1984)

Strickland, 466 U.S. 668

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064

Taylor v Maddox, supra, 366 F.3d 992, 1000-1001)

United States v. Burrows (9th Cir. 1989) 872 F.2d 915, 918)

United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989).

United States v. Span, 75 F.3d 1383, 1389 (9th Cir. 1996)

United States v. Wade (1967) 388 U.S. 218, 234)

Wiggins v. Smith, 539 U.S. 510, 526-527, 528 (2002)

Wiggins v. Smith, (2003) 539 U.S. 510

Williams v. Taylor (2000) 529 U.S. 362, 402-403

Statutes Cited Herein:

United States Code, Title 28 subsection 2254(d)

Antiterrorism and Effective Death Penalty Act

California Evidence Code Subsections: 210, 351, 352, 402

California Penal Code subsections: 207, 207(a), 211, 212.5-213(a)(1)(A), 236, 422, 459, 460(a), 654, 995, 1118.1, 1387, 2254(d)(1), 12021(a), 12022(a)(1), 12022.53(b).

Constitutional Provisions Cited Herein:

United States Constitution 4th Amendment, 5th Amendment, 6th Amendment, and 14th Amendment.

Other Authorities Cited Herein:

Judicial Counsel of California Jury Instructions:

CALCRIM 252, 315, 780

CALJIC 2.92

TREATISES.

Cutler et. al., "The Reliability of Eyewitness Identifications," Law And Human Behavior, V. 11, 1987

Wells, G.L. & Quinlivan, D.S. "Suggestive Eyewitness Procedures and the Supreme Court's Reliability Test In Light Of Eyewitness Science 30 years later," Law and Human Behavior.

POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE

STATEMENT OF THE CASE

On April 8, 2009, in Mendocino County Superior Court, Mr. Glenn Sunkett, the Petitioner was held to answer to four counts of first degree robbery (P.C. 211, 212.5, 213 (a) (1) (A)); Four counts of kidnapping (P.C. 207 (a)); Two counts of false imprisonment P.C. 236); One count of felon in possession of a firearm 12021 (a); And enhancements that Sunkett used and possessed a firearm in the commission of these crimes (P.C. 12022.53 (b), and P.C. 12022 (a) (1)).

On June 30, 2009, after approximately 9 days of actual trial days, the jury convicted the Petitioner of all charges after 1 and a half hours of deliberation.

In the months following trial, Petitioner filed a motion for a new trial, a series of Marsden Motions, and a Ferretta Motion based on Lynda Thompson's ineffective assistance of counsel, attorney-client conflict, and demands for her immediate dismissal from this case. The Marsden Motion hearings were held on September 30, 2009, October 23, 2009, January 8, 2010, January 22, 2010, February 24, 2010, and March 2, 2010. The trial court denied each of Sunkett's Marsden Motions, but granted his Ferretta Motion on March 2, 2010. Approximately, 2 months later, the trial court re-appointed Sunkett representation with defense attorney David Eyster. Mr. Eyster represented Sunkett at his Motion for a new trial hearing and sentencing. On October 25, 2010, the trial court denied Mr. Sunkett's Motion for new trial as well as his state habeas petition. He was then sentenced to 63 years in California state prison. (These hearings are referenced and cited herein.)

On October 15, 2010 Sunkett filed a notice of appeal, and was represented on direct appeal by attorney Roger Curnow. On October 25, 2010, Sunkett filed in pro per, a state Habeas Corpus Petition in the First Appellate District of Appeals which the court then considered with the Opening Brief. On September 28, 2011, the First Appellate Court denied both the direct appeal and the habeas petition.

On October 25, 2012, Sunkett filed a Petition for Review in the California Supreme Court. On January 3, 2013, the California Supreme Court returned a 'postcard' denial of the Petitioner's petition for review without providing an independent opinion or case law.

On January 6, 2014, the Petitioner filed a federal writ of habeas corpus in The northern District Court of California. However, this court found that Sunkett's petition was mixed. This court then stayed this petition, and allowed Sunkett to return to the State court to exhaust arguments 1, 2, 8, 9, 10, 11, and 12 in the petition.

On March 25, 2015, the California Supreme Court issued Sunkett another 'postcard' denial on the merits of these particular claims.

On June 2, 2015, Sunkett amended an updated habeas petition (which include the now exhausted claims) to his stayed habeas petition in this district court. The court re-opened this case and ordered the Respondent to answer. The respondent filed his response to Sunkett's habeas on December 9, 2015.

Sunkett now reasonably responds on Traverse and rebuts the Respondent's Answer in this Memorandum of Points and Authorities.

STATEMENT OF FACTS

Trial and Post-trial Facts.

Although the Respondent only partially stated the facts of this case by ignoring or failing to mention all of the pretrial, trial, and post-trial facts in the record the Petitioner cited in his federal habeas, Petitioner believes the Respondent accurately excerpted the general facts of this case as recited by the Court of Appeal on direct review. However, in regard to one specific and very key piece of evidence highly considered by the Appellate Court in its Opinion and cited in the Respondent's Answer, both the Court of Appeal and the Respondent have mistakenly misread, misunderstood, and/or wrongfully concluded that the GPS evidence presented at trial showed that a tracking device owned by Sunkett left the crime scene and ended up at Sunkett's office/apartment 3 hours later. If this were in fact true, this could be considered corroborating evidence that strongly suggest the Petitioner is guilty, just as the Appellate court unfairly implied in it's opinion. But there is no evidence that can be found in the record, GPS or otherwise, that shows this ever occurred. Also, the Court of Appeal never considered the factual allegations and supporting evidence bearing on Sunkett's core claim of ineffective assistance of counsel, and the California Supreme Court's 'post-card' denial of these claims didn't contain any findings of fact or conclusions of law. Moreover, Respondent's Points and Authorities contains no summary of the facts and exhibits asserted and provided by the Petitioner on habeas supporting his due process, ineffective assistance of counsel, and conviction unsupported by the evidence claims.

Habeas Facts:

A. Ineffective Assistance of Counsel Claims.

1). Petitioner was denied due process and the effective assistance of counsel entitled under the 4th, 5th, 6th and 14th Amendment, when public defender Lynda Thompson failed to 'timely' move the court to admit expert testimony on eyewitness identification; the central issue of this case.

2). Petitioner's 5th, 6th and 14th right to effective assistance and due process was violated when Sunkett's public defender failed to move the court to suppress Dusty Miller's identification testimony, and the "highly suggestive" pretrial identification procedure that elicited it.

3). Sunkett's 5th, 6th and 14th Amendment rights to effective assistance of counsel and due process were violated when public defender Thompson failed to move the court pursuant to either 995 or 1118.1 (at the close of the prosecutions case) to dismiss the four kidnapping charges due to the insufficiency of evidence to support penal code 207 (a).

4). Petitioner's 5th, 6th, and 14th Amendment rights were violated when P.D. Thompson failed to investigate, interview, and call to trial a key alibi witness who's name was included on the defense witness list, and whose testimony was critical to establishing the alibi.

5). Petitioner's constitutional rights to due process and effective assistance of counsel were violated when Thompson failed to communicate with Sunkett to elicit all matters of defense, failed to introduce exculpatory evidence showing Sunkett's innocence, failed to move the court to dismiss suggestive evidence seized from Sunkett's office that was not positively identified or had a direct link to this case, and failed to perform the basic duties expected of a competent and diligent advocate for the defendant.

6). Petitioner's 4th, 5th, 6th, and 14th Amendment rights were violated when the Trial Court made multiple errors when determining and calculating the Petitioner's sentence of 63 years, and appellate attorney Roger Curnow failed to raise and argue this issue on direct appeal.

7). Cumulative errors and combined deficiencies of public defender Lynda Thompson violated

Petitioner's 4th, 5th, 6th, and 14th amendment rights to due process and effective assistance of counsel, and warrants relief.

B. Due Process and Trial Fairness Claims

1). The trial court abused its discretion by denying the defense's motion to introduce a cross-race eyewitness identification expert to provide testimony highly relevant to the central issue of this case.

2). The identifications made against Petitioner at trial were tainted and made untrustworthy by the erroneous and highly suggestive pretrial eyewitness identification procedures conducted by law enforcement that elicited them.

3). The trial court instructed the jury with a prejudicial instruction on eyewitness identifications of a Defendant made at trial.

4). Four charges of Penal Code section 207(a), kidnapping, are not supported by the trial evidence; thus the evidence is insufficient to sustain guilt beyond a reasonable doubt.

5). Prosecution evidence presented at trial supported the Petitioner's alibi defense and was insufficient to demonstrate guilt beyond a reasonable doubt as determined by the jury.

* The Petitioner has included a graph of trial evidence intended to assist this court in its review. It lists all evidence, Petitioner's rebuttal to the evidence, and necessary citations related to this case. This graph of evidence is included below.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE SHOWING EVIDENCE RELIED UPON BY RESPONDENT, AND REBUTTAL BY CLEAR AND CONVINCING CONTRARY EVIDENCE.

(See 28 USC § 2254(e).)

#	PROSECUTION EVIDENCE **AGAINST** PETITIONER	REBUTTAL & EVIDENCE **FOR** PETITIONER
1.	Mathew Graves Pre-Trial and in-court identification of Mr. Sunkett (For Prosecution Identification Evidence, please see: (pg. 9, of the Appellate Court Opinion).	According to P.C. 683.3, 686.3 and guidelines found in the California Criminal Law Procedure and Practice (CEB), almost all facets of the identification process used by Detective Van Patten to elicit Graves identification of Mr. Sunkett is unlawful, suggestive, and conducted erroneously. The taint in this procedure compromised the reliability of the identification and ultimately prompted a false identification of Mr. Sunkett (For details on the identification process used by Det. Van Patten, please see Petitioner's memorandum of points and authorities attached to his habeas petition at pgs. 35-40; also See Detective Van Patten's testimony regarding his I.D. process at 3 RT 727-729; 4 RT 859, 863; 7 RT 1576). Originally, Graves described suspect #1 as being 5'11, having a beefy build, weighing approximately 230 lbs., had no facial hair, and "looked like Barry Bonds." He also said suspect #1 was not the tallest of the 3 men. At trial, Graves description remained almost the same, but he raised the suspect's height to 6'0 (For Graves original description of suspect #1, given 5 days after the crime occurred, see Transcript of interview #1, pgs. 12, 25-26, 28; also see EXHIBIT J, p.252-255; Picture comparison of Petitioner v. Barry Bonds attached to this traverse). The error in the identification process and the likely-hood of error in his identification of Mr. Sunkett was spotlighted during Graves' trial testimony. When asked how he recognized Mr. Sunkett as a perpetrator in this crime, he stated that he recognized him "..on facial features that I can recognize", "The subject no. 1 exhibits negroid features.", "There's no---anything Caucasoid.", "He has a standard squared, isocephalic skull shape." When asked if Mr. Sunkett looks as if he weighs 230 lbs., Graves stated "No Ma'am." He was then asked did Sunkett look the same way there in trial as his did the night of the crime. Graves responded, "No. On July 10 he was clean shaven, no mustache, no beard." (See Mathew Graves' Testimony regarding these statements and the identification evidence at 2 RT 344, 345, 393, 394, 404, 405, 406, 486).
2.	Dusty Miller's in-court identification of Mr.	Miller was subjected to the same unlawful pre-trial identification process conducted with Graves by Detective Van Patten. Yet, unlike Graves, she

	Sunkett. (For Prosecution Identification Evidence, see: (pgs. 8-10, of the Appellate Court Opinion).	failed to identify Mr. Sunkett as a perp at that time. Five days after the crime occurred, Miller described suspect #1 as being 6'1, "really huge," approximately 27 years old, "very black" or dark-skinned, "all shaven," and the hair on his head was cut very "close to the scalp." She also added that suspect #1 was the tallest of the three suspects. (For Miller's original description of suspect #1, 5 days after the crime occurred, see Transcript of Interview #2 on pgs. 14-15, 29-31). Then, approximately 3 months before the start of Mr. Sunkett's trial, lead Det. Van Patten subjected Miller to another unlawful procedure when he emailed her two (2) singular booking photos of Mr. Sunkett along with his full name. He informed her that he was the only person arrested, charged, and bound for trial for this crime, and referred to Mr. Sunkett several times as "the defendant." He then emailed her photos of evidence seized from Mr. Sunkett's office that he believed was possibly linked to the crime. Miller still did not identify Mr. Sunkett as being a perp in this crime. Although, she did indicate that some of the items shown to her looked similar to the items she saw during the crime. (See Van Patten's testimony at 3 RT 724-747; 4 RT 839, 874-878; 7 RT 1576; also see EXHIBIT I at p. 248-251; Detective Van-Patten's e-mails to Miller attached to this traverse). Then, at trial, and after retaining possession of Mr. Sunkett's booking photos for over 3 months, Miller altered her description of suspect #1 as now being 6'2 or 6'3, and having sideburns on his face. She also attempted to retract her original statement that suspect #1 was "really huge," before she proceeded to identify Mr. Sunkett in court as being suspect #1. (See Miller's testimony at 2 RT 210, 211, 250-252, 255, 256, 306-311, 314).
3.	Testimony of witness Max Stover, a victim in this crime.	Max Stover did not identify Mr. Sunkett as a perpetrator in this crime neither pre-trial or at trial. (See Stover's trial testimony at 1 RT 132-134).
4.	Records of a GPS tracking device owned by Mr. Sunkett that placed the device at the crime scene. (For Prosecution GPS Evidence, see: (pg. 12, of the Apellate Court Opinion).	Mr. Sunkett testified that he used this device to track the transport of marijuana he purchased from the city of Fort Bragg California, and this device was in possession of transporters during it's entire route to and from Fort Bragg. (See Sunkett's trial testimony at 4 RT 1004-1005, 1021, 1022, 1047). This device was never found to be in the possession of Mr. Sunkett during any of the dates and times related to this crime. In fact, these GPS records and it's coordinates combined with bank, hotel, and email records, along with prosecution witnesses testimony, directly places Mr. Sunkett in separate locations during the days and times in question. (See GPS records and coordinates in Exhibit 'J' attached to the habeas petition pgs. 180-181; also for an outline of the device's exact location and Mr. Sunkett's exact location during the days and times in question based on the evidence on record, please see habeas petition at pgs. 24-26). Mr. Sunkett testified that the GPS was always in the possession of transporters hired to drive 30 lbs. of marijuana he purchased from one city to another. GPS and Yahoo email records show Mr. Sunkett logged into his

		GPS Covert Track account using his email address and password to track the location of the device within an hour of the crime occurring. (For GPS account and email log-in records, please see Petitioner's federal writ EXHIBIT J, p. 180-181).
5.	Hotel records and several bank debit/credit card records placing Mr. Sunkett in the city in which the crime occurred. (For Prosecution Evidence please see: (pg. 12, of the Appellate Court Opinion).	At no time in this case did Mr. Sunkett ever deny being in the city of Fort Bragg. He also admitted to being the person who rented these hotel rooms as well as the person who owned and used his bank cards to pay for them. He also claimed responsibility for all other retail purchases made using these bank cards during all of the dates and times in question. In turn, these records in combination were actually beneficial to the defense because these records/receipts always showed Mr. Sunkett to be in a separate location than the GPS device and the people he claimed possessed it. (See Sunkett's trial testimony at 4 RT 1001-1004, 1036, 1044; also for an outline of these records of evidence and their significance, please see habeas corpus petition at pgs. 24-26).
6.	Prosecution witness Gabriella Salazar identified Mr. Sunkett as being the man she checked out of the Beachcomber Hotel. She also stated that she saw two other men in the lobby with him at the time of check out. (For Prosecution Witness Evidence please see: (pg. 12, of the Appellate Court Opinion).	Mr. Sunkett never denied being the person who checked out of this hotel. He and Jamila Thomas both testified that they were the two people who checked in and out of the Beachcomber hotel. (See Sunkett's trial testimony at 4 RT 1036; also see Thomas's testimony at 4 RT 915, 917). The hotel receipt shows that the room rented contained one bed. It also shows that it was two occupants that the hotel employee checked into this room around midnight of July 10. (For Hotel records/receipt, please see Exhibit D, p. 160-163, attached to this traverse). Mrs. Salazar was the clerk who checked him out of this hotel later that morning at approximately 11:30 a.m. That being, her testimony was very relevant to the defense and to the question of a reliable identification made by the victims because she interacted and saw Mr. Sunkett on the same day the crime occurred. She testified that Sunkett looked exactly like his driver's license photo on this day and he wore a mustache, beard, and hair on his head at the time he departed her hotel. (See Mrs. Salazar's trial testimony at 3 RT 562). *Once again, the victims testified that on this day the perpetrator they believed to be Mr. Sunkett, had a clean shaven face and scalp.
7.	Prosecution witness Mrs. Edith Silva identified Mr. Sunkett as the man she checked into the Ocean View Hotel on the day the crime occurred. (For Prosecution Witness Evidence please see: (pg. 12, of the Appellate Court Opinion).	Mr. Sunkett admitted to being the person who checked into this hotel. Mrs. Jamila Thomas also testified to being present and a witness to this fact. (See Sunkett's trial testimony at 4 RT 1044; also see Thomas's testimony at 4 RT 916, 921-925. Mrs. Silva was another prosecution witness who's testimony corroborated with the defense that Mr. Sunkett did not fit the description of the man the victims claimed was a perpetrator in this crime. Mrs. Silva also had an opportunity to view Mr. Sunkett just hours before the crime was committed and her identification testimony also conflicted with the victims description of Mr. Sunkett. Mrs. Silva was the second prosecution witness who testified that Mr. Sunkett wore a mustache, beard, and hair on his head on the day

		the crime occurred. (See Silva's trial testimony at 3 RT 599-601). Jamila Thomas also stated that Sunkett looked this way during her trip with him to Fort Bragg and stated that she'd "never seen him without any facial hair and without hair on his head." Also defense witness Guy Sunkett testified that he saw Sunkett a couple hours after the crime commenced, fitting this same description given by both Silva and Thomas. All three witnesses went even further and testified that Sunkett looked the exact same way on the day of the crime as he did right there in trial. (See Guy Sunkett's testimony at 4 RT 904, 905). Silva also added that she witnessed Sunkett return to his car and leave the premises immediately after he purchased the rental without first going to his room. Silva said she never saw Sunkett return to the hotel nor did he check out. This evidence corroborated with Sunkett's and Thomas's testimony that after Sunkett rented the room, he immediately returned to the car, left the premises, headed back to the Bay Area where they picked up Guy Sunkett, and never returned to the hotel or the city of Fort Bragg. Sunkett testified that he rented this room in the event the transporters need a place to wait safely for the announcement of the marijuana pickup.
8.	Two pair of black steel-toe boots seized from Mr. Sunkett's office were similar in description as to the boots worn by the intruders. (For Prosecution Evidence related to these items see: (pg. 11, of the Appellate Court Opinion).	At trial, Mathew Graves was asked if he could identify the boots worn by the suspects. Graves replied, "Probably not, No." (See Graves testimony at 2 RT 347). Dusty Miller stated that she "..could not be definite that these boots are the same boots worn by the intruders." (See Miller's testimony at 2 RT 217). Max Stover stated that these boots "looked familiar" because they were black in color. (See Stover's testimony at 1 RT 194). Mr. Sunkett testified that he is a Union worker and a member of LOCAL 251, a Laborers Union in San Francisco California. He also testified that he was part owner of a towing service in Richmond, Ca. He stated that he wore these steel-toe boots for safety purposes related to his construction and towing jobs. (See Sunkett's testimony at 4 RT 990, 991-992).

9.	A pair of camouflage sweatpants seized from Mr. Sunkett's office were similar in description as to the pants worn by the intruders. (For prosecution Evidence related to this item, see: (pg. 10-11, of the	Graves testified that these particular pants were not the same pants he saw worn by the intruders. He stated that the pants shown to him in trial we're "sweatpants style" B.D.U.'s. "The other ones were military style B.D.U.'s, like the police or military officials use during training operations." He also added that he specifically recalled exterior pockets being located on the pants worn by the intruders. Graves was never shown these pants at trial for him to attempt to identify. (See Graves testimony at 2 RT 346, 408). Miller stated that the pants worn "looked like the same pants" worn by the intruders. But it should also be noted that at no time during the pretrial

	Appellate Court Opinion).	stages did Miller state to Detectives that the pants worn by the intruders were camouflage sweatpants. (See Miller's testimony at 2 RT 216). Stover testified that he only saw a photo of these pants and that the camo pattern looked similar to the pants worn by the intruders. He also stated that the pants worn by the intruders had pockets on the sides. Stover was never physically shown these pants in trial for him to observe in person. (See Stover's testimony at 1 RT 195). Sunkett testified that these were pants he occasionally wore to work as a construction worker. (See Sunkett's testimony at 4 RT 990, 993). *****Note, there were no pockets whatsoever on the sweatpants seized from Sunkett's office.
10.	A pair of blue and white gloves seized from Mr. Sunkett's office. (For Prosecution Evidence related to this item, see: (pg. 11, of the Appellate Court Opinion).	Graves was never shown these gloves at trial for identification purposes. But Graves did testify that the Gloves worn by the intruders were black in color and looked like mechanics or baseball style gloves. (See Graves testimony at 2 RT 344). Miller was shown these gloves by email and she stated she did not recognize these gloves. At trial, Miller testified that the gloves worn by the suspects were "black gloves," "kind of a soft leather." (See Miller's testimony at 2 RT 259, 315). Stover was shown these gloves at trial and he testified that he'd "never seen them before." He stated that the only gloves he saw worn by the suspects were black. (See Stover's testimony at 1 RT 194-195). Sunkett testified that these were gloves he used for work purposes related to his full time job in construction. (See Sunkett's testimony at 4 RT 990, 994).
11.	A butane bar-b-que lighter seized from Mr. Sunkett's office was similar in description as to a small torch used to threaten the victims in this crime. (For Prosecution Evidence related to this item, see: (pg. 10-11, of the Appellate Court Opinion).	This lighter was different in either shape, style, or color as the small torch described as being used by the intruders. Graves testified that the torch looked similar to the one possessed by the intruders. But the top part of the torch that emits the flame appeared different. (See Graves testimony at 2 RT 358). Miller did not recognize the lighter shown to her in trial. When asked if she recognized the lighter, Miller stated, "No, I do not," "..the one that was used was red." (See Miller's testimony at 2 RT 226). Stover testified that the butane lighter shown to him at trial looked similar, but it had it's differences. When asked "So your not even able to tell us if this is consistent with what you saw?", Stover responded "No, I can't." (See Stover's testimony at 1 RT 131). Sunkett testified that this was a lighter he used for work purposes related to his full time job in construction. (See Sunkett's testimony at 4 RT 990, 1070).

12.	Two rolls of duct tape seized from Sunkett's office was similar to a style of tape used on the victims during the commission of the crime. (For Prosecution Evidence related to these items, see: (pg. 11, of the Appellate Court Opinion).	These items were not shown to any of the victims for identification purposes because the tape used on the victims originated from the victim's own home and was recovered at the scene. (See Detective Van Patten's testimony regarding the recovery of the tape at 3 RT 717-718). Sunkett testified that these rolls of tape were used for work purposes related to his full time construction job. (See Sunkett's testimony at 4 RT 990, 994, 996).
13.	A handcuff key seized from Mr. Sunkett's apartment that was similar in color only to a set of handcuffs found at the crime scene. (For Prosecution Evidence related to this item, see: (pg. 11, of the Appellate Court Opinion).	This handcuff key was not shown to have any direct link to the handcuffs found at the crime scene. This particular key was a universal key that was capable of unlocking any set of novelty cuffs. This fact was demonstrated at trial by defense investigator, Mr. William Kidd using a pair of unrelated handcuffs bought from a random military surplus store. (See Kidd's testimony at 4 RT 978-981).
14.	A black 9 millimeter handgun found in the purse of Mrs. Aziza Washington at the time of Mr. Sunkett's arrest. (For Prosecution Evidence related to this item, see: (pg. 10-12, of the Appellate Court Opinion).	The handgun was found in the possession of Ms. Aziza Washington. Washington denied ownership of this weapon. She claimed she had never seen this gun before nor did she see Sunkett possess or put this gun inside her purse. Although Washington stated that she'd never saw this gun before, she told Detectives shortly after it's recovery that her prints may possibly be found on the gun. (See Washington's testimony at 4 RT 795-796, 873-874). Mrs. Linda Senteny, an expert in latent print analysis, collected fingerprints from the gun, the cartridge, and the bullets inside it. None of the prints recovered from these items matched Sunkett's prints. Also, during the search of Sunkett's office, no ammunition or other firearm related material was found there. This gun could not be directly linked to Mr. Sunkett or this crime. Graves testified that this gun looked familiar, but there are many, many firearms similar" to this one. "I'm going to say I can't identify this object directly and say without a doubt that this is the firearm that was directed at my face." (See Graves testimony at 2 RT 347). When shown this gun at trial, Miller testified, "I couldn't tell specifically if it's the exact one." (See Miller's testimony at 2 RT 318). Stover testified that the gun looked familiar to the one possessed by the intruders. But unlike the one collected as evidence and used at trial, Stover stated that the grips or handle of the gun used by the intruders was wooden. (See Stover's testimony at 1 RT 137, 195).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

		Sunkett testified that this was not his gun and that he'd never saw it before. (See Sunkett's testimony at 4 RT 1051, 1069).
15.	A flashlight and a spotlight seized from Mr. Sunkett's office. (For Prosecution Evidence related to these items, see: (pg. 10-11, of the Appellate Court Opinion).	Graves recalled a flashlight being shined in his eyes during the incident. He later found an unfamiliar mag light style flashlight at the scene of the crime that he believed could've been the one used by the intruders, and he promptly turned it over to authorities. (See Graves testimony at 2 RT 479-480). Miller recalled a flashlight being shined in her eyes. But previously stated that she had no recognition of that happening. She could not identify these flashlights seized from Sunkett's office as the ones possessed by the intruders. (See Miller's testimony at 2 RT 313-314). Stover stated that no flashlight was ever shined in their eyes. (See Stover's testimony at 1 RT 175). Sunkett testified that he used these flashlights for work purposes related to his towing business. (See Sunkett's testimony at 4 RT 1072).
16.	A copied receipt of three neoprene masks and a pair of camouflage sweatpants purchased at a Navy supply store by Mr. Sunkett days before this crime occurred. (For Prosecution Evidence see: (pg. 13 of the Appellate Court Opinion).	Mr. Sunkett testified that on July 4th he was invited to a paintball event scheduled for July 11th, by Mr. Alan Gordon. Sunkett testified to purchasing the items found on the receipt for the purpose of wearing for protection and safety at this event. He stated that these items were not the same style, color, and physical description as the masks described by the victims. (See Sunkett's testimony at 4 RT 1032-1033). The masks linked to this receipt were never recovered or brought to trial as evidence by the prosecution. Sunkett stated that these masks were always in the possession of Mr. Alan Gordon since the day of purchase. Mr. Gordon brought the three mask and the original receipt of purchase to the Public Defenders office during trial to present as evidence and testify to this fact, but trial Counsel Thompson and/or her investigator Kidd failed to meet with and interview him to weigh the value of this evidence and his testimony. Trial Counsel ordered her office to send Mr. Gordon away and inform him that he would not be needed before first speaking with him and viewing and evaluating the weight and value of the evidence he possessed. (See Exhibit 'B' attached to federal writ of habeas corpus at pgs. 154-157, Mr. Alan Gordon's affidavit; Also see 7 RT 1608, 1688-1689, Trial Counsel Lynda Thompson and Defense Investigator William Kidd's testimony. *It should be noted that Gordon was placed on the defense witness list by Trial Counsel Thompson to testify at trial about this exact evidence she was aware he had in his possession prior to trial.

LEGAL ARGUMENT

AEDPA Standard of Review.

In it's Points and Authorities, Respondent accurately summarizes the general AEDPA standard of review of state court judgements. However, a presumption of correctness as to a factual determination made by a state court is restricted to pure questions of historical fact. (*Lambert v. Blodgett* 393 F. 3d 943, 976 (9th Cir. 2004)). In the instant case, the California Supreme Court's one-word denial of Petitioner's state habeas (containing 8 arguments included in Petitioner's federal habeas), and Petitioner's request for review on direct appeal (containing the other four arguments in federal Habeas), is necessarily devoid of any findings as to pure questions of historical fact (see Petitioner's federal writ, EXHIBIT K, p. 182-183; Court's Order). Accordingly, there are no specific facts to which any presumption of correctness could possibly attach (see *Taylor v Maddox, supra,* 366 F.3d 992, 1000-1001; also *Wiggins v. Smith,* 539 U.S. 510, 526-527 (2002).

First, all allegations in a petitioner's petition must be "taken as true" *People v. Duvall, supra,* 9 Cal.4th at p. 475 (1995); see also *In re Harris,* 5 Cal.4th 813, 827 (1993) ["One seeking relief on habeas corpus need only file a petition for the writ alleging facts which, if true, would entitle the petitioner to relief."]. More specifically, when the claims in a petition for habeas corpus demonstrate a threshold showing of ineffective assistance of counsel and establish a prima facie cause for relief, an order to show cause must issue, followed by an evidentiary hearing. (*People v. Duvall,* 9 Cal.4th 464, 475 (1995); *Rose v. Superior Court,* 81 Cal.App.4th 564, 573, (2000). As this court held in *Taylor v. Maddox,* 366 F.3d 992, 1001-1002 (9th Cir. 2004), a state court makes an "unreasonable determination of facts" when it fails to consider and weigh relevant evidence that was properly presented to it:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

> The state court's fact-finding process is undermined where the state has before it, yet apparently ignores, evidence that supports petitioner's claim. *Id.,* citing *Miller-El v. Cockrell,* 537 U.S. 322, 346 (2003).

Hence, and because any challenged facts are entitled to a hearing, the state court unreasonably determined the facts when it ignored them by issuing a summary denial instead of granting a hearing following Petitioner's writ. Regardless, the Petitioner adamantly asserts that the state courts fact finding process is fatally undermined because the state court overlooked evidence that is "highly probative and central to the Petitioner's claims." (see *Taylor v. Maddox, supra,* 366 F.3d). If a material factual finding of the state court is objectively unreasonable, a writ of habeas corpus may be granted under 28 U.S.C. 2254(d)(2). (*Juan H. v. Allen III,* 408 F.3d 1262, 1270, fn. 8 (9th Cir. 2005). This court reaffirmed this principal when it held that claims need to be evaluated after taking the petition "at face value" and then "review it for sufficiency. (*Miles v. Martel,* 696 F.3d at p. 906, fn. 9 (9th Cir. 2012). *In Miles,* the court determined that, where the state court, after reviewing for sufficiency, rejected a prima facie case of ineffective assistance of counsel without any fact-finding, this constituted an unreasonable determination of the facts under subsection 2254(d)(2) because the state court, should have made a finding of fact but neglected to do so." *Ibid;* see also *Boling v. Chappell* (E.D. Cal.; August 21, 2012, No. C.V. 99-05279). ["[U]nder clearly established Supreme Court precedent, *Strickland,* 466 U.S. 668, [petitioner] did state fully and with particularity the facts supporting his contentions of deficient performance by [trial counsel]."].)

In a similar vein, because the California Supreme Court merely issued a one word "postcard" denial rather than disclose its reasoning in rejecting Sunkett's claims, this court has nothing to which it can defer. (*Luna v. Cambra,* 311 F. 3d 928, 960 (9th Cir. 2002)). Accordingly, this court "must conduct an

independent review of the record to determine whether the state court clearly erred in it's application of controlling federal law." Ibid [emphasis added].

Additionally, Respondent fails to address at all whether Sunkett is entitled to an evidentiary hearing. Such a hearing must be ordered "where the Petitioner establishes a colorable claim for relief and has never been accorded a state or federal hearing on his claim." (*Earp v. Oronski,* 431 F. 3d 1158, 1167 (9th Cir. 2005)). Addressing the latter element first, Sunkett was never accorded an evidentiary hearing in state court, even though he requested one (See *Taylor v. Maddox,* 366 F. 3d 992, 1001 (9th Cir. 2004) [although federal hearing is not required where Petitioner "failed to develop the facts", this limitation does apply where Petitioner has attempted to develop the facts in state court but has been prevented from doing so because the state court has refused to grant him an evidentiary hearing]). As for stating a "colorable claim for relief", a petitioner is only required to allege specific facts which, if true, would entitle him to relief. (*Earp,* supra, citing *Ortiz v. Stewart,* 149 F. 3d 923, 934 (9th Cir. 1988); see also *Blackledge v. Allison,* 431 U.S. 63, 76 (1977) ["A hearing must be granted unless the movant's allegations, when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal."]).

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

I. WAS SUNKETT'S TRIAL ATTORNEY INEFFECTIVE FOR BELATEDLY ATTEMPTING TO CALL TO TRIAL AN EYEWITNESS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IDENTIFICATION EXPERT?

Petitioner's Argument, Citations, and Supporting Case Law:

Public defender Lynda Thompson violated the Petitioner's 5th, 6th, and 14th Amendment rights to due process and effective assistance of counsel when she failed to introduce expert testimony in a timely manner, for defense against the most important evidence of the prosecution's case. The "most important defense" in this case was to show that the eyewitness identifications were unreliable, thus false. In short, Public Defender Thompson "has a duty to investigate the defendant's 'most important defense." (*Brag v. Galaza,* 242 F.3d 1082-1089 (9th Cir. 2001); also *In re Arena,* 12 Cal.4th 695,722 (1996) ["tactical decisions must be informed, so that before counsel acts, he or she 'will make a rational informed decision on strategy and tactics founded on adequate investigation and preparation."].)

In this case, Sunkett personally requested Thompson retain a cross-race identification expert approximately 6 months before trial (see EXHIBIT F, p. 171-172; Sunkett's January 29, 2009 letter to, and received by Thompson). Thompson's lead investigator William Kid also expressed to Thompson the need to contact an eyewitness expert about 6 months before trial (7RT 1612-1613). At Petitioner's motion for a new trial hearing, Thompson admitted that she was aware from the beginning of her appointment that eyewitness identification was the central issue of this case, and the descriptions given by the witnesses did not accurately match her client Sunkett (7RT 1639). Thompson stated that she was also aware of cross-race identification issues, suggestive and tainted identification procedures, and other complicating factors widely known to cause a witness to misidentify a defendant. She also claimed knowledge of experts and case studies that effectively demonstrate how these complicating factors, especially in combination with other issues, impacts a witness' identification of a suspect/defendant (7RT 1640, 1641,1662, 1664-1665). Thompson also testified that she knew it was highly likely that the jury in this case would consist of all Caucasians and it was her belief that "most Caucasians have a

difficulty" making accurate cross-racial identifications (7RT 1645-1646). Yet, although Thompson acknowledged knowing of all this information before trial, most of it unfavorable to the defense, Thompson repeatedly admitted that she did not conduct any pretrial investigation whatsoever into retaining or simply speaking with a cross-race identification expert for any purpose at all (see *Wiggins v. Smith,* 539 U.S. 510, 527-528 (2002)). Considering all of this, Thompson failed to present an effective defense of false identification because the jury was not apprised of the way in which eyewitness testimony can be affected by stress, cross-racial identification, the witness' degree of certainty, and other factors listed in CALCRIM 315.

To claim Thompson was ineffective, Petitioner must show that her performance fell below an objective standard of reasonableness (*Strickland v. Washington,* 466 U.S. 668, 687-688 (1984); also see *Cheney v. Washington,* 614 F.3d 987, 995 (9th Cir. 2010)). Petitioner must also establish that he was prejudiced by counsel's deficient performance or inadequately presented a potentially meritorious defense (*Strickland,* 466 U.S. at 693-694; *In Re Cordero,* Supra, at p. 180; *People v.Ledesma,* Supra, at pp. 217-218)). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland,* at 694).

The Petitioner understands that courts strongly presume that counsel's performance falls within the wide range of professional assistance, and that counsel exercised acceptable professional judgment in all significant decisions made (See respectively, *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986); and *Hughes v. Borg,* 898 F.2d 695, 702 (9th Cir. 1990) (both cases citing *Strickland,* 466 U.S. at 689)). In addition, *Strickland* deference presupposes that defense counsel's conduct was the result of a tactical or strategic decision (see *Leavette v. Brave,* 682 F.3d 1138, 1141 (9th Cir. 2012) [The decision to call an expert witness to testify is one of trial strategy and deserves heavy difference]. Hence, the Petitioner's case brings directly into play an important qualification imposed by *Strickland,* namely that decisions by counsel are only as reasonable as the investigation on which they are based. A strategic decision is a

conscious, reasonably informed decision made by an attorney with an eye to benefiting his/her client (see *Cox v. Donnelly,* 387 F.3d 193, 198 (2nd Cir. 2004) (quoting *Pavel v. Hollins,* 261 F.3d 210, 218 (2d Cir. 2001)). Whether counsel's actions were tactical or not is a question of fact (*Edwards v. Lamarque,* 475 F.3d 1121, 1126 (9th Cir. 2007). There is no evidence in the record which demonstrates that Thompson actually had *any* strategy whatsoever in failing to retain (timely) a cross-race eyewitness identification expert's testimony. Any finding made otherwise would be fundamentally flawed because the court would be merely speculating that trial counsel had a strategy (without any basis at all in the record) that in calling the expert for the defense would have undermined anything that Thompson was doing or attempting to do in order to effectively defend Sunkett. Therefore, simply characterizing a decision by a trial counsel as a "trial strategy" or a "tactic" does not "automatically immunize an attorney's performance" from a sixth Amendment challenge (see *United States v. Span,* 75 F.3d 1383, 1389 (9th Cir. 1996); also *Brodit v. Cambra,* 350 F.3d 985 1003 (9th Cir. 2003) ["[C]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective."]

However, as noted in *Renoso v. Giubino,* (9th Cir. 2006) 462 F.3d 1099, 1113 (citing *Sanders v. Ratelle* (9th Cir. 1994) 212 F.3d 1446, 1457), the law continues to be that, "Ineffectiveness is generally clear in the context of complete failure to investigate, because counsel can hardly be said to have made a strategic choice when she/he has not yet obtained the facts upon which such a decision could be mabe." This same decision, *Renoso v. Giubino,* holds that "the duty to investigate is especially pressing where..the witnesses and their credibility are crucial to [the Prosecution's] case. (Also see *Huffington v. Nuth,* 140 F.3d 572, 580 (4th Cir. 1998); *United States v. Burrows* (9th Cir. 1989) 872 F.2d 915, 918); and *Deutscher v. Whitley,* (9th Cir. 1989) 884 F.2d 1152, 1160 [holding that counsel did not make a strategic decision where the defense was based on petitioner's psychiatric problems, yet counsel failed to even consider investigating evidence which could have bolstered that defense."] Even more, whether or

not Thompson believed eyewitness expert testimony would be helpful, she still had a duty to investigate (see *Duncan v. Ornoski* (9th Cir. 2008) 528 F.3d 1222 [When defense counsel merely believes certain testimony might not be helpful, no reasonable basis exists for deciding not to investigate."]. Thus, where counsel's omission constitutes ineffective assistance, the omission is prejudicial if it results in the withdrawal of a meritorious defense (*People v. Pope,* Supra 23 Cal. 3d at p. 425).

Respondents Argument and Petitioner's Rebuttal:

Respondent agrees with the Appellate Court Opinion that Sunkett's public defender Lynda Thompson was not ineffective when she failed to introduce expert testimony in a timely manner at trial because:

1). At the Petitioner's motion for a new trial and habeas petition hearing, P.D. Thompson stated that she did not think that...an expert [on eyewitness identification] would be helpful to the defense or that the expense would be reasonable because she believed, based on experience, that such a witness "would likely be disregarded" by the jury in the circumstances of this case (see Appellate Opinion at p. 26; and Respondent's Answer at p. 33).

Rebuttal:

Trial counsel Thompson committed perjury and/or intentionally mislead the Petitioner and purposely failed to disclose conflict when she, at Sunkett's motion for a new trial hearing, testified that she did not believe testimony from an eyewitness expert would be helpful nor would the expense be reasonable to the defense. Thompson admitted to only having one prior experience using an identification expert, and representing only one other African American at trial during her entire 12 year career. However, based on that experience, Thompson believed an identification expert's testimony would likely be disregarded by this jury, but yet she chose to call an expert late in the trial anyway just to appease Mr. Sunkett.

First, there is an abundance of court records in this case covering this issue such as, Thompson's own investigation file, Personal notes between her and lead investigator William Kidd, trial transcripts (request for 402 hearing), and transcripts of several Marsden hearings. There is absolutely no record of or any indication given by Thompson that she believed, at any point, that the eyewitness expert was useless and unnecessary. Thompson was given several opportunities to express to the Petitioner, Dr. Davis herself, and/or the trial court that she did not agree with the Petitioner's adamant request to introduce a cross-race identification expert's testimony and whether she believed it was relevant or not. Actually, all court records in this case are quite contrary to Thompson's testimony given at the motion for new trial hearing:

a). In the middle of trial, Thompson requested a 402 hearing to introduce expert testimony that was relative to the cross-race identification and psychological factors that impact identification. Thompson addressed the court and stated that prior to trial, when Graves was the only identification witness, "..initially I was not inclined as a tactical decision to put on an expert witness. Based upon information that has come before this jury, in light of Miller's I.D. of my client here in court, I am going to be requesting permission for a 402 Hearing to introduce the expert witness testimony relative to cross-race I.D., the psychological factors that impact on identification." (5RT 1084) Now, Thompson was already well aware that Miller marked several photographs at her pre-trial photo lineup, including Sunkett's, as a person "maybe" being involved in this crime. Therefore, as she herself stated, "In light of Miller's I.D. of my client..," it was her own lack of foresight that warranted her failure in bringing to trial the expert's testimony, timely. In addition, she expresses the need and relevance of this expert evidence when she stated that this "expert witness testimony [is] relative to cross-racial I.D., [and] the psychological factors that impact on identification." (5RT 1084)

b). Counsel's lead investigator William Kidd also provided testimony at Petitioner's motion for a new trial hearing. Kidd stated that after reading the discovery, he believed early on that a cross-race

identification expert would be useful. He then shared his opinion with Thompson and "talked to her about it." (see 7RT 1612-1613). Thompson did not give her lead investigator Kidd any indication that she believed such an expert would be useless, and the expenditure of funds needed to retain this expert would be unreasonable. However, Kidd did go on to add that it was well known that the Public Defenders office normally had financial issues when attempting to retain experts.

c). After trial ended, the Petitioner filed two separate Marsden motions and one Farretta motion. Extensive hearings were held for all three motions, and Sunkett addressed the court and entered into evidence various exhibits regarding his claim that Thompson failed to the eyewitness identification expert in a timely manner. At the January 8, 2010 Marsden Hearing, Thompson responded to the Petitioner's claim by telling the court "As to the cross-race I.D. expert, I would indicate that we discussed it. More intently after the May conversation. I believe that based upon the fact that only one witness purportedly was able to identify him and it was completely at odds with the physical description of the perpetrators, that we could approach it that way." (sealed RT 1442) (note: Although Sunkett raised this issue at his 2nd Marsden Hearing also, as well as at his Farretta Hearing, Thompson did not provide the court with any statement at all in her defense). Here, Thompson's statement is clearly telling the trial court that she basically believed the expert was appropriate and relevant, **and** was obviously telling the Petitioner the same thing. None of her statement's thus far gives any indication that Thompson believed putting on this expert was unnecessary and unreasonable, or that she was only attempting to do so to appease the Petitioner. Thompson's statement came approximately one and a half years after the conclusion of trial, and was proceeded by multiple hearings based on this issue, after Sunkett filed a complaint against her to the California Bar Association, and after Sunkett attacked her competence and effectiveness at Petitioner's motion for a new trial hearing.

d). Sunkett submitted all of his letters received by Thompson's office, to the Trial and Appellate courts. One letter in particular, dated January 29, 2009, Sunkett requested that Thompson, in light of the

inconsistencies and varying identifications of suspect number one, investigate and bring to trial a cross-race expert (see Exhibit F, p. 171-172; Sunkett's letter to, and received by Thompson). There is no evidence, including Thompson's testimony, that she expressed to Sunkett that this expert would not be helpful or relevant.

e). The trial court ordered Thompson to turn over her personal file of investigation in this case to the court (see EXHIBIT N, p. 266-356; Thompson's entire investigative file). After review, the court then released it to Sunkett. In it, there are no records or personal notes that give any indication that Thompson investigated or simply gave careful consideration into the idea of introducing an expert before she could make such a determination as to whether an identification expert's testimony would not be helpful or relevant.

f). As Thompson's duty as a diligent advocate acting on her client's behalf, there is no record that Thompson disclosed a conflict to the trial court that she and Sunkett were at odds over several things, including whether or not to use an identification expert, and that she would only move to do so simply to appease Sunkett.

Second, during her testimony at Petitioner's motion for a new trial hearing, Thompson stated that due to her prior experience with using an eyewitness identification expert, she believed that the jury would disregard this expert evidence. However, the reviewing court must note, Thompson testified that she'd only attempted to use one eyewitness identification expert in her entire career as a Mendocino County Public Defender, and during her 12 year career, she'd only defended one other African American defendant at trial (and that one other defendant was a woman) (7RT 1640, 1682-1684, 1686). Having only one other attempt to use such an expert, and one other occasion representing another African American in a span of 12 years, far from qualifies as being sufficient experience on scientific evidence and eyewitness expert testimony to draw such a conclusion. Contrarily, her limited knowledge and

experience in regard to this issue resulted in her making a highly unreasonable and uninformed decision that ultimately prejudiced the defense because her closing statement (making a case of false identification) was not corroborated or supported by (scientific or legal) facts available to the Petitioner. As a consequence, when the case concluded, the jurors' hands were tied because they were given absolutely nothing substantial by the defense that could prove their claim of possible misidentification.

2). Thompson ultimately requested to call an eyewitness identification expert on cross-racial identification "to appease" Sunkett, who had insisted that such a witness was necessary and whose family was willing to pay for the expense (see Appellate Opinion at p. 26; and Respondent's Answer at p. 33).

Rebuttal:

If this court so happens to accept Thompson's claim that she only attempted to introduce this expert to appease the Petitioner late in trial, then the court must then consider whether Thompson purposely mislead the Petitioner (and his family who paid for the expert) throughout the course of pretrial, trial, and post trial, and consciencely hid this conflict from the trial court. They also must examine whether Thompson failed to act as a diligent advocate for Sunkett. All evidence presented by the Petitioner thus far shows that she did all three things. This court would then be obliged to call in to question Thompson's integrity, intent, and whether her effort based on the facts was valiant enough to be considered as sufficiently acceptable in defending the Petitioner.

3). The trial court found that "the method adopted by the public defender to attack the identification issue and whether to use an out-of-county cross-race identification expert were tactical decisions which the court will not second-guess." (see Appellate Opinion at p. 26; Respondent's Answer at p. 33).

Rebuttal:

The trial court unreasonably ruled that the "method adopted by the public defender to attack the identification issue and whether to use an out-of-county cross-race identification expert were tactical

decisions which the court will not second-guess," because the court, given the evidence, failed to recognize and lawfully consider the fact that Thompson **admittedly** conducted absolutely **no** investigation into the subject of eyewitness identification as a whole, thus demonstrating extreme negligence and incompetence being that eyewitness identification was the central issue of this case. It is widely known that the investigative methodology is the most important consideration when evaluating the accuracy of the identification, and the trial court's ruling, and the higher state court opinions on this issue are contrary to the law they themselves site. The Appellate court stated then cited, "In light of all the circumstances, particularly counsel's decision, based on experience, to focus on vigorous cross-examination, as well as on closing argument, to question the eyewitness identifications of appellant (see pt. I.B., *ante*), we cannot say that counsel's initial decision not to call an identification expert to testify establishes incompetence." (See *Strickland, supra* 466 U.S. at p. 688; see also *People v. Bolin* (1998) 18 Cal.4th 297, 334 ["Whether to call certain witnesses is... a matter of trial tactics, unless the decision results from unreasonable failure to investigate"].) (see Appellate Opinion at p. 26)). However, the courts failed to acknowledge and consider that Thompson attempted to present a defense of mistaken identity without anything of substance or legally sufficient to make such a case. This shortcoming resulted from her complete failure to investigate the defense. "In assessing the reasonableness of an attorney's investigation, howerever, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further... *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy." (See *Wiggins v. Smith* (2003) 539 U.S. 510). All evidence shows that Thompson's so called "tactical decision" resulted from not just an unreasonable failure to investigate, but from no investigation at all. None of the state courts indicated that they

considered this fact, then applied it to the federal cases they cite and rely on. Therefore all state court rulings on this matter are improper and unlawfully contrary to clearly established federal law.

4). The identifications were strong and corroborating, and other evidence was "overwhelming" of Sunkett's guilt, therefore there is no possibility of prejudice from any deficient performance (see Appellate Opinion at p. 26; and Respondent's Answer at p. 33).

Rebuttal:

As outlined in the graph of trial evidence above, the certainty expressed in the identifications of Sunkett by both Graves and Miller does not automatically make these identifications "strong" and "corroborating" evidence against the Petitioner. Two of the lower state courts have clearly stated that they took into consideration how "certain" both Graves and Miller were in their identification of Sunkett at trial, and the GPS evidence corroborated the identifications. The courts' opinions are unreasonable and erroneous because (a) scientific evidence proves that the certainty expressed by a witness (especially when cross-race issues and other known complicating factors are present) has little to no validity, and (b) as also previously discussed, the Appellate Court erred in it's finding that the GPS evidence shows the tracking device returned to Sunkett's residence three hours after the crime. There is no evidence that exists that demonstrates this (see Petitioner's federal habeas corpus, Exhibit J, p. 180-181; GPS Coordinates and beginning and ending transmissions).

5). Sunkett failed to show prejudice under the second prong of *Strickland*. (see Appellate Opinion at p. 26; and Respondent's Answer at p 33-34).

Rebuttal/Prejudice:

Expert Dr. Davis' curriculum vitae talks generally, but yet specifically about the scientific studies relative to cross-race identifications and other psychologically complicating factors such as suggestive or erroneously conducted identification procedures, stress, fear, weapons focus, and poor lighting can impact an eyewitness's identification and are commonly responsible for prompting false identifications

of defendants (see EXHIBIT B, p. 108-135; Dr. Davis' curriculum vitae). Her testimony would also have helped the defense explain how discrepancies in the victims descriptions of the suspects is a common occurance and why this happens, as well as explain how Miller mysteriously began identifying items seized from Sunkett's office that had no connection to the crime (such as a pair of solid black tactical pants she believed one of the suspects wore, which conflicted with her earlier statement that all three suspects wore camouflage pants). The jury consist of lay people, not expected to be knowledgeable or versed in scientific studies that demonstrate falibility in eyewitness identifications, especially when such complicating factors found in this case are present and preceded the identification. Hence, the jury was never given the opportunity to hear and fairly consider the research and science developed on the issues of cross-race identification, witness confidence, stress, fear, weapons focus, erroneously conducted identification procedures, and suggestive and/or improper influence by law enforcement on key witnesses during the investigation and pretrial stages of the identification process. All of which were present in this case. An identification expert would have informed the jury on the empirical evidence showing the significant rate of error made in eyewitness identifications even under the most optical conditions, as well as explain the significant increase in the rate of error which occurs when identifications are made cross-racially, and when a high level of fear or excitement is experienced (see *People v. Brandon* (1995) 32 Cal. App. 4th 1033. 1044 [the eyewitness identification expert explained how the accuracy of a person's identification decreases when the person is frightened or when a weapon is present]. Thompson's intentional exclusion of this expert evidence is most importantly significant in relation to the only interviewed juror's statement that the jury found Sunkett guilty in large part due to the Prosecution's identification evidence. Thompson gave the jury very little facts to counter and consider in support of the defense's theory of misidentification.

Had the jury heard this expert evidence, and was properly educated on complicating factors found in this case known to cause false identifications of defendants and the untrustworthiness in the 'certainty'

expressed in a witness's identification, then properly weighed this identification evidence with the GPS records, Hotel record, Bank records, and Email records that show Sunkett was never in possession of or shared the same location as the GPS device placed at the crime scene, great doubt would have been cast on whether Sunkett was an actual perpertrator in this crime. The jury would have then had to take a serious look at the five other witnesses (including Sunkett and two prosecution witnesses) who described Sunkett on the day the crime as having a full head of hair, mustache, and beard, conflicting mightily with both Graves and Miller's identification of suspect number one. The jury would have been given a sufficient amount of evidence that corroborated and factually supported the defense's theory of misidentification, and they by law would have had no other option than to render not guilty verdicts in this case. (See EXHIBIT E, p. 164-165; interviewed jury informed the defense that the identification evidence was 'big' in their evaluation of this case.

II. WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS DUSTY MILLER'S IDENTIFICATION OF SUNKETT?

Petitioner's Argument, Citations, and Supporting Case Law:

The Petitioner was in fact denied effective assistance of counsel and due process, in violation of his 5th, 6th and 14th Amendment rights, when his public defender failed to move to suppress an unduly suggestive photo identification procedure conducted by law enforcement that ultimately illicted Miller's in-court identification of Sunkett.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Upon Thompson's appointment to this case, she learned that Miller had evinced great difficulty with pretrial photo identification. However, Thompson testified that she knew Miller, during her first photo lineup procedure, marked Sunkett's photo and several other elimination suspects as "maybe", "possibly", and a "very slight possibility" of being a suspect in this case (To this regard, this court must note that Miller testified that suspect number one's face-believed to be Sunkett-was the only suspects' face she saw that night, the other two suspects wore masks and hats. The photos Miller marked were African-American men of all different shades, sizes, and distinctions, with very little to no similarities). Approximately 8 months after her initial appointment, and prior to Miller's identification of Sunkett, Thompson received discovery evidence that Detective Van Patten emailed Miller two singular booking photographs of Sunkett accompanied with his name, and told Miller that Sunkett was the one person arrested for this crime, and he was bound over for trial to answer to the charges held against him (see EXHIBIT I, p. 248-251; Detective's emails to Miller-photos not included). Even more troubling, the detective also emailed Miller numerous photographs of evidence the Detective told her were seized at Sunkett's apartment that appeared similar to items Miller described the suspects wore or possessed. Miller then, as Thompson knew, remained in possession and under the spell of this suggestive evidence for three months before ultimately providing an in-court identification of Sunkett.

Any competent attorney acting as a diligent advocate for their client knows that it's vital to take every action legally necessary to ensure the integrity of the identification of the defendant and it's process, and preserve their client's Constitutional right to effective assistance of counsel and due process of law. The identification process Detective Van Patten employed on Miller has long been known throughout the legal community to be widely condemned (*Manson v. Brathwaite*, Supra, 432 U.S. 98, 106). Therefore, the Respondent's claim that had Thompson made a motion to suppress, the motion would have been meritless, thus ultimately dismissed, is unreasonable, inaccurate, and contrary to clearly established federal law. Thompson had a pretrial duty to attack this suggestive identification

procedure on the ground that the confrontation was unfair; and because the potentially meritorious objection would have been litigated outside the presence of the jury. Because of that, there can be no satisfactory tactical reason for trial counsel's failure to raise the objection (*Nation* (1980) 26 Cal. 3d 179). Instead, now, what was in reality just shoddy police work became an evidentiary windfall for the People because Thompson failed to investigate, thus never challenged the unduly suggestive procedure pretrial or at trial via expert testimony.

The trial court itself, in a separate ruling, believed that the identification procedure employed on Miller was indeed "highly suggestive" (7RT 1756). This demonstrates that the motion to suppress, when argued effectively, had a likely chance of being granted. However, had Thompson made the move to suppress and the trial court dismissed the motion, Thompson then had a duty to object to Miller's identification of Sunkett at trial, immediately after Miller made the identification. The court would have then shifted the burden to the Prosecution to prove that Miller"s identification had a source independent of and untainted by, the suggestive nature of the identification procedure (see *People v. Rodriguez* (1977) 68 Cal. App. 3d 874. 881; and Simmons *v. United States, Supra,* 390 U.S. at p. 384). To establish this, the prosecution would have had to convince the court that despite the unnecessarily suggestive identification procedure, Miller's identification was reliable under the totality of the circumstances, taking in to account such factors as the amount of time that elapsed between the crime and the identification procedure and the level of Miller's pretrial identification certainty. Against these factors, the trial court would also have had to weigh the corrupting effect of the suggestive identification itself, including Miller's being under the spell of the suggestive identification procedure daily, for three months leading up to her in-court identification of Sunkett at trial (*Manson v. Brathwaite, supra,* 432 U.S. at p. 114).

The trial court would have then found that Miller's identification did not have a source independent of and untainted by the suggestive nature of the identification procedure because Miller was never able

to identify Sunkett in the pretrial photo lineup shown to her prior to the second suggestive singular photo showing. The court would have determined that Miller's identification was not reliable under the totality of the circumstances because the identification was made approximately one year after the crime occured, and it preceded by the suggestive identification procedure. The court would have also found that Miller expressed uncertainty in her first pretrial identification photo lineup, and that the second suggestive identification procedure prompted Miller to begin identifying items seized from Sunkett's apartment that clearly contridicted her earlier statements and descriptions; thus showing this suggestive procedure had taken some form of psychological toll on Miller's memory of what she actually saw the night of the crime.

Had Thompson moved the court to suppress Miller's identification testimony, and the trial court granted the motion, the jury would have been left to determine the reliability of only one eyewitness' identification, Graves', which would have the greatly reduced the burden of defense. This is so, because Graves' provided impeachable testimony in which he positively identified Sunkett by his standard "Negroid features," as well as his being subjected to complicating factors such as stress, fear, weapons focus, cross-race factors, and his own erroneously conducted pretrial identification procedure.

It is unreasonable for the state courts to opine that counsel's error was harmless because federal law has long ago established that the exact identification procedure law enforcement employed on Miller is highly suggestive and is widely condemned, and science has shown that such a process can be harmful and impact the reliability of a witness's identification. Miller"s identification accounted for exactly 50% of the identification evidence presented, and as previously discussed in previous argument, a juror was interviewed immediately after the trial and stated that the jurors reached their verdicts mainly based on the identification evidence they were given to consider (see EXHIBIT E, p. 164-165; juror interview).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respondent's Argument and Petitioner's Rebuttal:

The Respondent agrees with the lower state courts' rulings that public defender Lynda Thompson was not ineffective when she failed to move to suppress Dusty Miller's identification of the Petitioner at trial because:

1). Despite the suggestiveness of the second photo display, Miller's identification of the Petitioner is reliable (see Appellate Opinion at p. 29: and Respondent's Answer at p. 35-36).

Rebuttal:

In light of the second suggestive photo procedure, Miller's identification was not reliable because prior to this "condemned" procedure, Miller expressed great uncertainty and did not identify Sunkett in the first photo lineup presented to her 9months earlier. She was then provided singular pictures of Sunkett, accompanied by suggestive information such as record of arrest, status of court proceedings, and pictures of evidence seized from Sunkett's apartment that appeared similar to items described by Miller herself. Then, after remaining in possession of and under the spell of this suggestive identification information for three months, Miller provided an in-court identification of Sunkett at trial, approximately one year after the crime occurred.

In light of these circumstances, had Thompson moved to suppress Miller's identification, as *Rodriguez* and *Simmons* holds, the trial would have first determined whether the procedure was indeed highly suggestive. Then it would have shifted the burden to the prosecutor to establish that Miller's identification had a source independent of and untainted by the suggestive procedure. The prosecutor would then have to argue her case that Miller's identification was reliable based on factors such as the amount of time that elapsed between the crime and in-court identification, and any prejudicial factors that occurred between that time that are directly related to the identification and its process. Against these factors, the trial court would then have to had weighed the corrupting effect of the suggestive identification itself (*Manson v. Brathwaite,* supra, 432 U.S. at p. 114). The trial court would also be

obliged to consider Miller's being under the spell of the suggestive identification procedure daily for 3 months leading up to trial, and how the second suggestive identification procedure psychologically impacted Miller's true memory when she mysteriously began identifying pictures of items that contradicted her prior statements and descriptions.

Considering all the circumstances, there is no fair and/or lawful way to make the determination that Miller's in-court identification is undoubtedly reliable. To wit, none of the state courts seemed to have conducted a reliability test, therefore it is unlikely that the courts gave these factors careful consideration (if at all), and correctly applied these factors to the controlling case law cited. To that, the reliability of Miller's identification has not been demonstrated by the state courts or the Respondent, thus the reliability of Miller's identification has little to no validity.

2). It was reasonable for Thompson to believe that a motion to suppress the identification would not have been granted (see Appellate Opinion at p. 29; Respondent's Answer at p.35-36).

Rebuttal:

The Appellate court's assumption that Thompson had a reasonable reason to believe a motion to suppress Miller's identification would be dismissed is unfair and is not based on actual facts. In order to make a fair assumption that this motion would've been dismissed, one must show the motion is meritless. There is an abundance of case law (previously cited herein) that clearly states that the identification process of which Miller was subjected to is unduly suggestive and widely condemned. There is a history of cases overturned in favor of the petitioner due to these very same circumstances. So a knowledgeable and competent attorney doing his/her due diligence would've and should've known that such a motion made under these circumstances is a very meritorious claim with a reasonable likelihood of the motion being granted.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

First off, dating back to several post-trial proceedings, Sunkett raised this issue to the trial court at two separate Marsden motion hearings, one Ferretta motion hearing, and at his motion for a new trial and hebeas corpus hearing. At each hearing, Thompson was given an opportunity to state or indicate that she made a knowledgeable decision to leave the suggestive identification issue unchallenged because she thought it was either meritless, or she simply didn't believe the court would grant it. She did not state or give the court any indication that either of these things were the case. In fact, during the Marsden and Farretta hearing, Thompson said nothing and provided absolutely no defense at all against Sunkett's claim that she was ineffective for failing to challenge Miller's identification. At Sunkett's motion for a new trial hearing was the only time Thompson made any reference to her failure to file motions in this case in Sunkett's defense. During her testimony, Thompson was asked, once she received the information regarding the emails sent to Miller, did she "..file any motion to suppress or a common law motion to attack the taint or the influence that it might have had on future identification-particularly the in-court identification made by Miller?" Thompson replied, "I did not file a motion to suppress, whether a statutory or non-statutory motion." (7RT 1663). To add, Thompson was then asked did she file **any** motions in Limine in Sunkett's defense, Thompson responded, "I don't believe I did." (7RT 1664). At no point in time, given several opportunities, did Thompson give the trial court any explanation as to why she failed to move to suppress Miller's identification. So it's the Petitioner's contention that the Appellate court abused it's authority and discretion when it attempted to *think* for the public defender and create an excuse for her failure, even after she herself hadn't taken the opportunity to do so. Thompson gave no indication the she believed the motion was meritless, yet the Appellate court claimed it was reasonable for her to believe so.

3). Petitioner has not shown that Thompson's failure to file a motion to suppress Miller's identification constitutes ineffective assistance of counsel (see Appellate Opinion at p. 29; and Respondent's Answer at p. 36-37).

Rebuttal:

Thompson's failure to file a motion to suppress Miller's identification constitutes ineffective assistant of counsel because at the time Thompson received this evidence, Miller had yet to identify Sunkett. Once Thompson learned of this taint, she then had the opportunity and a duty to take every necessary action to ensure the integrity of the identification and it's process, and protect Sunkett from any prejudice. Most importantly, her failure to do so resulted in Miller's in-court identification of Sunkett after Miller was held under the spell of this highly suggestive evidence for 3 months leading up to Sunkett's trial. Had Thompson made this motion pretrial or immediately after Miller's in-court identification, and this motion was granted, the jury would have been left to consider Graves' lone identification testimony which was impeachable because Graves identified Sunkett in-court based on standard negroid features he believed Sunkett also exhibited. Graves was also subjected to various complicating factors during the crime widely known to cause false identification such as cross-race issues, stress, fear, weapons-focus, poor lighting, and an erroneously conducted eyewitness identification process conducted approximately two weeks after the crime. Combine these facts with the GPS records, hotel records, bank records, email records, and five eyewitness identifications of Sunkett that favored the defense theory, and it is reasonable to believe that had Thompson made the motion to suppress, and it was granted, the Petitioner would have likely received a verdict more favorable to the defense.

Prejudice:

Federal law has long ago established that the identification procedure employed on Miller is highly suggestive and is widely condemned, and science has long ago proven that this procedure is extremely harmful and significantly impacts the accuracy of a witness's identification of a suspect/defendant. Miller's identification accounted for 50% of the identification evidence, and the jury highly considered this identification to be reliable (see EXHIBIT E, p. 164-165; juror interview after trial).

III. WAS PETITIONER'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN TRIAL COUNSEL FAILED TO MOVE TO DISMISS THE FOUR KIDNAPPING CHARGES?

Petitioner's Argument, Citations, and Supporting Case Law:

It has long been required that to suffice for Penal Code 207(a) kidnapping, a person must be unlawfully stolen, held, and moved whether by force or fear, into another country, state, or county, or to another part of the same county. The detention and movement must be made despite the person's protest of this movement, and the movement was for a substantial distance. The Trial Court, the Appellate Court, and the Respondent have all intentionally ignored Petitioner's assertion that none of these requirements to convict on 207(a) can be legally fulfilled based on the evidence provided in this case.

At Petitioner's motion for a new trial hearing, Public defender Lynda Thompson testified that she re-appointed herself to Sunkett's case on January 13, 2009. She stated that upon her appointment, she reviewed the preliminary hearing transcripts undertaken by Sunkett's private attorney (7RT 1636). The

Petitioner contends that a competent defense attorney knowledgeable of the law would have easily and promptly determined that none of the circumstances centered around the detention and movement of the victims sufficed for P.C. 207(a), and then challenged that P.C. 207(a) was inappropriate in this case based on the evidence. However, Thompson testified that she did not make any attempt to challenge, whether by way of a a motion pursuant to 995 or otherwise, the asportation aspect of a 207(a). (7RT 1636). At no other time in this proceeding did Thompson provide any other statement or give an explanation on why she failed to challenge something so obviously challengeable, in the kidnapping charges. At Petitioner's January 8, 2010 Marsden Hearing, Thompson avoided addressing Sunkett's claim that she was ineffective for failing to move to dismiss these charges due to insufficient evidence (sealed RT 1419-1420). However, approximately 9 months prior to her testimony at the motion for new trial hearing, Thompson did address this issue at Petitioner's Marsden Hearing held on February 24, 2010. Thompson stated that she chose not challenge these four kidnapping charges pre-trial or post-trial because she "believed Mr. Sunkett, and I believed his alibi witnesses and who had not have bode well for either one of us if I looked the jury in the face and said Mr. Sunkett wasn't there. But if you find that he didn't commit the kidnapping---I believed he wasn't there. I argued that and that's how we went forward." (Augment RT p. 9-10).

From this statement, Thompson does not appear to have served as a competent and diligent advocate, making knowledgeable and effective decisions on Sunkett's behalf, based on her investigation, and careful review of all facts and law. First, Thompson neglects to recognize that her duty was to thoroughly investigate and litigate this issue in limine, prior to trial, before the issue was left for the jury to determine. Then, had the trial court made an adverse ruling on this issue, Thompson would have preserved the Petitioner's rights on appeal. Second, had the trial court denied the motion to dismiss, Thompson next had an obligation to raise a legal defense against these charges at trial, and make a case to the jury that four kidnappings according to the law defined in P.C. 207(a) did not occur in this case.

ABA Standard for Criminal Justice Prosecution Function and Defense Function 3d Ed. 1993, at p. 181 states "Defense counsel should conduct prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." The ABA commentary goes on to state that "failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel." (Ibid., citing *Strickland, supra,* 466 U.S. at p. 691). *In Re Cordero* (1988) 46 Cal. 3d. 161, 181 n8, and *Riley v. Payne* (9th Cir. 2003) 352 F. 3d 1313, 1321, states that a defense Attorney is required to explore all meritorious defense before making a tactical choice about what defense, if any, to present. Thompson can hardly be said to have made a strategic choice when she has not yet obtained the facts on which such a decision can be made (see *Frierson v. Woodford* (9th Cir. 2006) 463 F.3d 982, 992, citing *Sanders v. Ratelle* (9th Cir. 1994) 212 F.3d,1446, 1457).

Thompson was given several opportunities during motion hearings to declare to the court that her failure to challenge the kidnapping charges and the asportation aspect was a tactical decision she made after she completed a thorough investigation into all facts and law. Thompson gave absolutely no legally reasonable explanation, in her defense, as to why she failed to challenge the kidnapping charges and prevent Sunkett from being tried on charges unsupported by the evidence. This court must now presume that Thompson had no legal and reasonable reason to leave the four kidnapping charges unchallenged, and conclude that Thompson's failure to investigate rusulted in ineffective assistance of counsel. (See *Renoso v. Giubino* (9th Cir. 2006) 462 F.32 1099, 113).

Respondent's Argument and Petitioner’s Rebuttal:

The Respondent agrees with the lower state courts that the Petitioner's constitutional right to effective assistance of counsel was not violated by the public defender's failure to move to dismiss the four kidnapping charges because:

1). As the Respondent argued in the previous argument, the Trial Court and the Appellate Court both found that the evidence was sufficient to support the kidnapping charges. Thus, a motion to dismiss these charges would have been futile (see Appellate Court Opinion at p. 45; and Respondent's Answer at p. 42).

Rebuttal:

As the Petitioner thoroughly argued in the previous argument, the evidence in this case did not suffice for kidnapping according to law, as defined in Penal Code section 207 subdivision (a). Here, the victims were not unlawfully stolen, held, and moved into another country, state, or county, or into another part of the same county. The victims did not protest this movement, nor were they physically or verbally threatened with harm if they failed to comply with the movement. The movement itself was a trivial 24 feet inside Bennett's home. The home was located on Bennett's 15 acres of private property and was far removed from public visibility, leaving no chance of public interference. The victims were left bound in a storage room inside the home, which had a large hole in the wall with a fan set in it. The victims made there escape out of the room within minutes of the intruders departure by kicking the fan out of the framing.

Prejudice:

The circumstances found in this case do not suffice for a lawful conviction of P.C. 207(a) kidnapping. A motion to dismiss these four charges is indeed a reasonable request, with obvious potential of being granted. Thompson's failure to challenge these charges pre-trial, and/or present a legally based defense against these charges at trial, resulted in Sunkett being unlawfully found guilty of these charges, adding an additional 40 years to Sunkett's prison term. (See *In Cordero, supra,* at p. 180; *People v. Ledesma, supra,* at pp. 217-218; and *People v. Fossleman* (1983) 33 Cal. 3d 572, 583-584). [Petitioner must show either counsel failed to present or inadequately presented a potential meritorious

defense or that it is reasonably probable that a more favorable result would have been obtained had counsel performed adequately].

IV. DID THE STATE COURTS REASONABLY DENY SUNKETT'S ADDITIONAL I.A.C CLAIMS ARGUED IN HIS 9th AND 10th CLAIMS OF HIS FEDERAL HABEAS?

Petitioner's Argument, Citations, and Supporting Case Law:

The Respondent elected to combine two separate, I.A.C. claims in Petitioner's federal habeas corpus, and argue against them inside of one claim. The issues raised in these claims are complex, and required a more detailed discussion opposing each specific piece of evidence the petitioner provided in support of his claims. Choosing to ignore, or failing to address the evidence individually leaves the presumption that the Respondent was unable to "argue away" significant facts and evidence favoring the Petitioner.

Still, Sunkett contends that his 6th and 14th Constitutional rights were indeed violated by public defender Lynda Thompson's ineffective assistance of counsel which ultimately prejudiced him at trial when she failed to call to trial available alibi witnesses Alan Gordon and Britney Flow, failed to timely confer with Sunkett to learn his alibi and prepare a formidable defense, failed to investigate and introduce exculpatory evidence supporting Sunkett's defense, failed to file necessary motions to dismiss suggestive evidence based on relevance, and failed to adequately perform the most basic pre-trial duties expected of a competent and diligent trial attorney(listed individually below). (See *Strickland, supra;* also see Petitioner's federal habeas at pp. 109-141)). To add, Thompson's own investigation file clearly shows that Thompson didn't really begin to prepare a defense in this case until approximately 3 weeks

before the start of trial (see EXHIBIT N, p. 266-356; Thompson's investigative file). (Also see *Williams v. Taylor* (2000) 529 U.S. 362; [counsel did not begin to prepare for that phase of the proceeding until a week before the trial]).

Respondent's Argument and Petitioner's Rebuttal:

The Respondent agrees with the Appellate Court's Opinion that Sunkett's remaining I.A.C. claims were reasonably denied because:

1). Public defender Thompson's testimony given at Sunkett's motion for a new trial hearing shows that Thompson's failure to interview and call to trial defense alibi witness Alan Gordon was the fault of Gordon, and his proposed testimony would not have changed the verdict. Equally, counsel was not ineffective for failing to interview and call to trial defense alibi witness Brittney Flow. (See Appellate Court Opinion at p. 42-43; Respondent's Answer at p. 42-43).

Rebuttal:

Thompson was indeed ineffective in failing to introduce Alan Gordon as a defense witness. Thompson was provided Gordon's name, contact information, and told Gordon was in possession of evidence pertinent to this case, approximately 6 months before trial (see EXHIBIT F, p. 171-172; Sunkett's January 29, 2009 letter to Thompson).

First, according to witnesses, no more than two camouflage style neoprene masks were worn by the intruders. Sunkett purchased three masks from an army surplus store two days before the crime was committed. Sunkett testified that he purchased these items strictly for a prescheduled paintball event, But the masks he purchased were very different in color and style than the masks the witnesses described. Sunkett stated that the masks he purchased had a "smiley joker face" printed on two of them, while the other was a "fluorescent" colored mask (4RT 1032-1033). The two masks worn by the

suspects, and the three masks purchased by Sunkett were never recovered and brought to trial for evidence and identification purposes.

Thompson and her lead investigator William Kid both testified that they first learned of Sunkett's alibi and of Alan Gordon's role in that alibi approximately one month before the start of trial on May 14, 2009 (7RT 1600, 1677). Sunkett informed them that Gordon had always been in possession of the three actual masks purchased by Sunkett, along with their original receipt of purchase, since the date of purchase. Kidd testified that he tried to contact Gordon by telephone, but Gordon did not return his call (7RT 1608). Both Thompson and Kidd admitted that he made no other attempt to contact Gordon by any other means, as in placing additional calls and/or travel to Gordon's home or business address to interview this witness. (7RT 1607-1608, 1654-1655, 1688). Although Thompson and Kidd admitted to not making contact and interviewing this witness, Gordon was subpeonaed and his name placed on the defense witness list (see Petitioner's federal habeas, EXHIBIT C, at pp. 158-159; witness list).

The law office of David Easter, Sunkett's sentencing attorney, collected the affidavit drafted and signed by Gordon addressing this issue, which was then submitted to the state courts for their consideration (see Petitioner's federal habeas, EXHIBIT B, at pp. 154-157; Gordon's affidavit). Gordon stated that William Kidd left him a voicemail stating that he would be subpeonaed to appear as a witness for the defense in this case. He then contacted the Public Defender's office to announce his participation at trial but Thompson, nor anyone else representing the Public Defender's office returned the contact. There was no other attempt made to interview him or inquire about the evidence in his possession. Still, Gordon did as Kidd asked of him on his voicemail message. Gordon drove approximately 2-3 hours from San Francisco to the Mendocino County Courthouse, and went directly to the Public Defender's office to provide his trial testimony. There, with the evidence-masks and receipt of purchase-in hand, Gordon was informed by the office that Thompson was not going to call him as a witness and that he could leave. Both Thompson and Kidd acknowledged Gordon's presence at the Public Defender's office

during trial (7RT 1608, 1688-1689). Thompson was presented the opportunity to interview Gordon, and seize the evidence he carried in his possession without Thompson going out of her way or making extreme efforts to do so. Gordon was already on the witness list so it wasn't as if Thompson had to file a motion to introduce him late in trial. Thompson was told by her investigator Kidd that he'd been informed that Gordon was coming to trial, so Thompson had every reason to expect his presence (see EXHIBIT L, p. 248-251; Emails between Thompson and Kidd regarding Gordon's intent to appear at trial). Yet Thompson failed in her duty, once again, to thoroghly investigate, evaluate, then present all evidence available and necessary in support of the defense (7RT 1688-1689).

It should be noted, that a pearson who takes the time to take a 3 hour drive from the bay area to the Mendocino county courthouse, does not appear to be a person who is being uncooperative, and making himself unavailable, as Thompson stated. Thompson had a basic obligation to Sunkett to investigate all possible defenses of fact and law favorable to his defense. Sunkett explained to Thompson the significant role Gordon, and the actual masks purchased, played in his alibi defense. He gave Thompson Gordon's full name, all telephone numbers, email, and home and business addresses approximately 6 months prior to trial, and again 27 days before trial. A phone call and voicemail message made by Mr. Kidd to Gordon's cellphone, does not suffice as a thorough investigation and interview process, nor simply a reasonable effort to locate and make contact with this alibi witness. Yet still, Thompson was given an opportunity to interview this witness in person at her office and put him on the witness stand, and she turned Gordon away without first meeting with him and viewing the evidence he had there in his possession that was relevant to Sunkett's alibi (see *Henderson v. Sargent* 926 F.2d 706, 711 (8th Cir. 1991) [Trial Counsel has a duty to investigate all witnesses who allegedly possessed knowledge concerning the defendant's guilt or innocence]). Thompson atleast had a duty to interview him. Only then could Thompson make a sound tactical decision whether or not to use him as a witness. Gordon's testimony was admissible, contested prosecution evidence, and was a crucial element in proving

Sunkett's alibi defense. Thompson's need to investigate and call to trial favorable alibi witnesses, such as Gordon, is not only Thompson's ethical obligation and professional duty to protect Sunkett's constitutional rights under the 6th Amendment, but is extremely necessary if she is to present the most effective defense at trial. (See *Baylor v. Estelle* (9th Cir. 1996) 94 F.3d 1321; also *Sanders v. Ratelle* (9th Cir. 1994) 212 F.3d 1446). "At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."*United States v. Gray,* 878 F.2d 702, 711 (3rd Cir. 1989).

The state Courts ruling (denial) was improper because it gave no independent reason or supporting case law that would demonstrate why Thompson was not effective for failing to meet with and interview Gordon when he showed up at her office during trial. His name was already on the witness list and his testimony was admissible. Such a denial by the courts should be accompanied by a reasonable determination of the facts, circumstances, and federal law.

Brittney Flow was another alibi witness who prepared and signed an affidavit through Sunkett's sentencing attorney David Eyster, on behalf of Sunkett (see Petitioner's federal habeas petition, EXHIBIT F, at pp. 169-171). Flow also stated that she made several attempts to contact Thompson at the Public Defender's office, and no one ever returned her calls. Brittney Flow stated that she could have testified and showed proof of a lengthy telephone conversation she had with Sunkett during the time this crime was allegedly occurring. Her testimony, though not as significant to the defense as Gordon's, would have helped show that Sunkett was driving back to the Bay Area at the time of the crime, which cooroberated Sunkett's and Jamila Thomas's testimony. (See *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862 [Failure to call a witness who could have established date and time of alibi). Thompson's duty to Sunkett and the supporting case law listed above, applies to this witness as well.

Prejudice:

Prejudice occurred here because the jury was not fairly informed or shown that the masks Sunkett purchased two days before the crime were not related to or used in this crime as the prosecution implied. Nor was the jury privy to the fact that there was another witness corroborating Sunkett and Thomas's testimony that Sunkett was on his cell phone driving back to the Bay Area during the time of the crime. These two witnesses would have corroborated Sunkett's alibi, bolstering the defense, and making the jury's job easier in finding Sunkett not guilty.

2). Thompson's testimony shows that Thompson's failure to confer with Sunkett to learn his alibi and establish a defense is the fault of Sunkett, thus counsel was not ineffective. (See Appellate Court Opinion at p. 42-43; Respondent's Answer at p. 43).

Rebuttal:

Thompson's failure to 'timely' confer with Sunkett to elicit all matters of defense was solely the fault of Thompson (see Petitioner's federal habeas at p. 114-123). Standard 4.3.2 of the ABA standards for "Interviewing the Client" states:

> (a) As soon as practible, defense counsel should seek to determine all relevant facts known to the accused. In doing so, defense counsel should probe for all legally relevant information...

Standard 1.4[2] of the Oregon State Bar, Principals and Standards for Counsel in Criminal Cases, provides that obtaining all the facts from the client is critical to the framing of any rational trial strategy:

> It is critical for defense counsel to obtain all the relevant facts about the case, including both exculpatory and seemingly inculpatory information. Only when all the facts are obtained from the client can a defense strategy be developed.

Similarly, federal and state case law interpreting *Strickland* requires that a lawyer consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *In re Lucas,* 33 Cal.4th 682 (2001).

Sunkett was incarcerated in the Mendocino County jail the entire 15 months Thompson acted as his Public Defender. The jail is less than 5 minutes from Thompson's office. In those 15 months, Thompson visited Sunkett at the jail only 3 times; once, days after her appointment to this case, the second was 3 months after her appointment and days after this case was dismissed then refiled, and the 3rd was less than 30 days before the start of trial (see EXHIBIT H, p. ; Jail visiting log and staff confirmation of these visits). The first two visits lasted less than 30 minutes. In addition, Sunkett claimed he made Approximately 200 calls to Thompson's office, and never spoke to her once over the phone. Sunkett also provided the state courts all letters he'd written and were received by Thompson, in which he was literally begging for Thompson to meet with him at the jail to elicit all matters of defense (see EXHIBIT F, p. 166-216; All of Sunkett's letters to, and received by Thompson).

The trial court and both state reviewing courts purposely avoided or simply failed to address the evidence proving Sunkett was doing everything his circumstances allowed him to do in attempting to communicate pretrial with Thompson. At Sunkett's January 24, 2010 Marsden Hearing, Sunkett told the trial court that there was no communication between he and Thompson. He stated that he never received a response "at all" from Thompson regarding his letters and abundant phone messages (see sealed RT p. 1397-1398). In response, Thompson did not deny or dispute Sunkett's claims about her failure to respond to Sunkett's multiple letters and phone calls. However, she did give a very bizarre explanation about the jail visits. Thompson, who was the number two attorney in her office for several years, stated that the jail always has a hard time identifying her when she visits clients and they tend use alias names for her when they log her into the jail visiting log (7RT 1427, 1623). This statement is so obviously false, and Thompson failed to provided the court evidence proving that this is a normal occurrence. To

consider this statement as truth would call in to question first, how tight is the security of the jail holding hundreds of inmates, second, is the jail staff properly trained to effectively monitor the movement of traffic going in and out of the jail, third, where are the guidelines that controls who is permitted inside the jail to visit inmates in a private and privileged setting, and fourth, what attorney or any other professional frequenting the jail on a regular basis would continue to allow jail officials to use a fake name when entering her/him into the jail? Simply, this is too farfetched a scenario to believe.

It took Thompson almost one year and a half after the trial, and after several Marsden motion hearings to craft the story that Sunkett was the one being unavailable to the defense, and that she did everything required of her despite his lack of cooperation. Once again, Thompson did not provide any evidence whatsoever to support any of this. Sunkett however, did provide the court documents, verified by Thompson and jail staff, that overwhelmingly supports his claims asserted here, and totally debunks Thompson's theory of events (these same documents have previously been referenced are included here as exhibits).

For instance, in one particular letter Sunkett sent Thompson dated January 29, 2009 (approximately 6 months before trial), Sunkett wrote:

> "I just wanted to inform you that I have spoken to a few of my witnesses that I plan to use in trial that can testify to my alibi, and they said that they can be reached by you at any time. I have left several messages for you on your voicemail and I've given you all of their names an contact information. So you should make an attempt to contact them as soon as possible just in case you may need to meet with them in regard to evidence or information they posses that you might want to obtain or investigate."

(See EXHIBIT F, p. 171-172, Sunkett's 1/29/2009 letter to Thompson).

Thompson received this letter on February 2, 2009. It is clear that Sunkett attempted to contact Thompson on several occasions, gave her several witnesses names and contact information, and requested that she meet with them immediately to obtain all information and evidence they may have in their possession (Note, information supplied by client critically affects what investigation decisions are reasonable; also a client's uncooperativeness does not diminish counsel's duty to investigate crucial witnesses, once the identity of those witnesses is made known to counsel; see *Strickland,*466 U.S. at 691, 104 S.Ct. at 2066).

In another letter dated February 3, 2009, Sunkett wrote:

> "I think it's extremely urgent that we meet and discuss your current status.."
>
> "I have yet to speak with you since you became my attorney."
>
> "I am requesting a visit from you as soon as possible..."
>
> (See EXHIBIT F, at p. 173-174; Sunkett's 2/3/2009 letter to Thompson).

Thompson received this letter on February 6, 2009. This letter clearly demonstrates that Sunkett was requesting that Thompson, whom he hadn't heard from since the day she appointed herself to his case, "visit" him asap so that they may talk defense. In a letter written on March 9, 2009, and received by Thompson on March 11, Sunkett wrote:

> "I've had evidence in my possession for months that has yet to be submitted to the court (as well as evidence being held by one of witnesses). I don't have any idea if the things I asked your investigator to investigate has been done. And interviews with witnesses I intend to use have yet to be scheduled."
>
> (See EXHIBIT F, p. 177-78; Sunkett's 3/09/2009letter to Thompson).

(Emphasis added)

Sunkett wrote several more letters to Thompson leading up to his trial (also found in EXHIBIT F). All of which clearly shows him begging for Thompson to meet with him and proving her failure to do so. But one letter specifically proves critical in proving Sunkett's claim. In a letter written one month before the start of his trial, Sunkett wrote:

"It is now May 11, 2009, 27 days before my trial is set to begin, and i have yet to speak with you or meet with you since these charges have been refiled. You have not contacted me about what evidence I want submitted at my trial, what witnesses I want interviewed and subpoenaed, or what my alibi even is in this case."

(See EXHIBIT F, p. 181-184; Sunkett's 5/11/2009 letter to Thompson).

Thompson testified that on the day she received this letter from Sunkett, she visited Sunkett at the jail and learned his alibi and witnesses contact information (7RT 1647-1648, 1685).

To add, in an Email document (found in Thompson's case investigation file) between Thompson and her lead investigator William Kidd dated May 5, 2009 (approximately 30 days before trial), Thompson confirmed what Sunkett had been telling the courts all along. Thompson stated:

"I have not gone to see him since we set the trial date."

(See EXHIBIT M, p. 264-265; Thompson's email to Kidd).

(emphasis added)

The trial date was set on March 12, 2009. Thompson's own personal email highly contradicts her testimony that she visited Sunkett frequently, just under different alias names. Sunkett's letters to Thompson dated from January 2009-March 2009 indicates Thompson had made contact with him on

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

only one occasion. After this court carefully reviews all of Sunkett's letters, jail visitation records, Thompson's testimony, Thompson's case investigation records, and all other referenced exhibits, it will be clear that Thompson was constantly absent to the Petitioner during all stages of the trial process, and that Thompson's failure to timely confer with Sunkett resulted in Thompson piecing together a rag-tag and insufficient defense in 27 days (*Coles v. Peyton* (4th Cir. 1968) 389 F.2d 224, 226) [trial counsel has an obligation to confer with their client without undue delay and as often as possible to elicit all matters of defense].).

Prejudice:

Prejudice occurred in Thompson's failure to timely confer with Sunkett because, as the jury concluded, the lateness in which the defense witnesses became involved in the defense weakened their credibility (see EXHIBIT E, p 164-165; jurors interview after trial). The state courts failed to give these facts proper consideration.

3). Thompson's pre-trial investigation was sufficient. (See Appellate Court Opinion at p. 43-46; Respondent's Answer at p. 43-45).

Rebuttal:

Sunkett contends that Thompson's pre-trial investigation was indeed insufficient and was prejudicial to Sunkett's defense at trial. To support this claim, Sunkett has attached Thompson's entire 'case investigation' file the trial court ordered her to turn over as evidence at Sunkett's motion for a new trial hearing (see EXHIBIT N, p. 266-356; Thompson's 'case investigation' file). Once reviewed, this court will conclude that Thompson's file displays very little investigation in this case. This court will also find that Thompson's records reflect that the large majority of her investigation started 27 days before the start of Sunkett's trial, and investigation into the central issues (or most serious charges) of the prosecutions case is absent. Also absent is investigation into exculpatory evidence Thompson had in her

possession that demonstrated a high probability that Sunkett was not a participant in this crime. Further, Thompson and William Kidd both testified that neither of them conducted any pretrial investigation into relative matters of this case such as cross-race identification, unlawful identification procedures, expert witnesses, alibi witnesses, an audio recorded confession by a possible suspect in this crime who claimed Sunkett was not involved, and a coded letter written by one of the suspects eliminating Sunkett as a suspect, and Thompson's 'case investigation' file proved this. This court will also find absent in this file is that Thompson did not file any of the necessary motions expected of a diligent advocate, to challenge and/or suppress all issues unfavorable to the defense and/or protect Sunkett's constitutional rights, and failed to meet with and prepare defense alibi witnesses (including Sunkett) for trial testimony for credibility purposes.

Particularly, there are not many things more damaging to a defendant at trial than an attorney's failure to conduct pretrial investigation into known and available evidence demonstrating the defendant's innocence. In short, "counsel have an obligation to pursue diligently those leads indicating the existence of evidence favorable to the defense." (*Lucas, supra,* citing *In re Newly,* 6 Cal.4th , 919 (1993)). Here, Sunkett alerted Thompson, approximately 6 months before trial, of the existence of a taped confession of one of the suspects in this crime who clearly stated that Sunkett was not a participant. in a letter from Sunkett to Thompson dated January 29, 2009, Sunkett informed Thompson of the recordings existence and provided her the name and contact information of Aziza Washington, the person possibly in possession of the tape (see EXHIBIT F, p. 171-172; Sunkett's letter to Thompson).

At Petitioner's motion for new trial hearing, Thompson admitted her awareness of the tape's existence very early in her appointment to this case, and that she never personally made an effort to investigate the information Sunkett provided her or locate the tapes whereabouts (7RT 1674-1675). At some point, Thompson provided her lead investigator William Kidd with this information. But Kidd did not attempt to make contact-by telephone-with this person possibly in possession of the tape until 3

weeks before the start of Sunkett's trial (see Petitioner's federal habeas, EXHIBIT I, p. 178-179; Aziza Washington phone interview). After interviewing Washington over the phone, Kidd did not conduct any further investigation into locating this tape, the recording party, or the suspect on the tape. Nor did Kidd conduct a follow-up phone call with Washington to exhaust the probability of any chance of additional or late information that may have come about.

However, Due to Thompson's failure to diligently investigate and locate this tape, the recorder, Danielle Hamilton ultimately sent the tape and her signed declaration to the District Attorney's office on June 17, 2009, after the start of Sunkett's trial. Upon its arrival, the D.A. Immediately declared the tape a fake and attempted to identify the voices on the tape as Alan Gordon and Jamila Thomas. The tape was then played for Sunkett to identify the voices. Sunkett did not recognize the voices and requested Thompson retain experts specializing in voice analysis and tape/audio recording authentication who could then authenticate the tape and compare the voices on the tape to the several dozen recorded phone conversations between Sunkett, Gordon, and Thomas. Although Thompson later claimed that she never believed the voices on the tape were Gordon or Thomas, Thompson seemed lost on the idea of how to investigate and/or locate such experts (Augment RT p. 9). At Petitioner's Marsden hearing conducted on January 8, 2010, Thompson stated:

> "As to any voice analysis expert, what was I supposed to compare the voice on this alleged tape to? I---I don't understand that."
>
> "I never received any idea of who the person was on the other end of the line. I---so I did not deal with a voice analysis expert and not have under these circumstances."
>
> (Sealed RT p. 1436)

Once again, Thompson's own words questions her competence as a defense attorney. Thompson fails to grasp the fact that the purpose of introducing these two experts was not to identify the persons voices on the tape, but that the voices were not that of Alan Gordon and Jamila Thomas as the Prosecution was arguing. The experts would also have proven whether or not the tape was a re-dub, recorded over, and if any of the recordings lying beneath the main conversation has any significance to proving its credibility. Thompson's failure to atleast do the minimal investigation into experts requested by the Petitioner that could authenticate evidence proving he was not a participant in this crime is one of the most accurate demonstrations of what insufficient investigation by a trial attorney looks like. To add, based on Thompson's own statement, she can not say that her decision was a tactical one because she admitted under oath that she conducted no investigation into the use and benefit of these experts (see *Duncan v. Ornoski* (2008) 528 F.3d 1222 [Where defense counsel merely believes certain testimony might not be helpful, no reasonable basis exist for deciding not to investigate]; also see *In re Edwards,* (2009) 174 Cal. App 4th 387, 407). At Sunkett's motion for new trial hearing, Sunkett's attorney David Eyster questioned Thompson in regard to this issue. The record reflects:

> Q. "Besides talking to Sunkett, did you do---have any attempt to have an expert look at the tape to see if it was a---there's ways to find tapes are frauds, re-dubbed, things of that sort. Did you make any Investigation regarding that?"
>
> A. "I did not."

Even more, Thompson's investigation was also deficient when she failed to investigate and introduce a coded yet threatening letter sent from a suspect to Sunkett while he was incarcerated. This letter and its return address was turned over to Thompson upon her appointment to this case. The letter, once decoded

by Sunkett, read "Didn't know GPS was on car, sorry you got blamed, but if you snitch you die." (See Petitioner's federal habeas, EXHIBIT H, at p. 176-177; letter sent by suspects). Thompson took possession of this threatening letter and never made mention of it again until the trial was well over with. In the 6 months she held on to it prior to trial, Thompson never made any attempt to locate, identify, and possibly make contact with the person or address on the envelope the letter arrived in. Nor did she think to have it fingerprinted and, if found, run those prints through the criminal database to possibly identify one of the suspects in this crime. Thompson even ignored Sunkett's request to investigate whether an expert specializing in code would be helpful in anyway. Her failure to do these things resulted in the withdraw of this alibi evidence at trial.

Prejudice:

There were additional pretrial investigation deficiencies of which Thompson and Kidd admitted to that Sunkett thoroughly covered and cited in his habeas (see federal habeas pp. 130-140). Such a performance by Thompson must undermines one's confidence in the Petitioner's conviction. Thompson's gross misconduct by failing to perform investigation and seek the admission or dismissal of key evidence carried severe consequences and prejudiced Sunkett who, though innocent, was convicted of this crime. (See *Avila v. Galaza,* (9th Cir. 2002) 297 F. 3d 911) [Trial counsel failed to investigate and introduce evidence that crime was committed by defendant's brother or other person]. Had Thompson investigated and moved to introduce evidence that suggests Sunkett was not a perpetrator in this crime, the jury would have been given reason to seriously consider rendering "not guilty" verdicts.

V. DID THE TRIAL COURT ERR IN ITS CALCULATION OF THE PETITIONER'S AGGREGATE PRISON SENTENCE,

AND WAS HIS APPELLATE ATTORNEY INEFFECTIVE

FOR FAILING TO RAISE THIS ISSUE ON APPEAL?

Petitioner's Argument, Citations, and Supporting Case Law:

Petitioner's aggregate sentence is grossly excessive and is unconstitutional on its face. The trial court's misapplication of section 654 violated Sunkett's 8th Amendment right to be free from cruel and unusual punishment because the court's error resulted in an additional 40 years unwarrantly added to his prison sentence. This claim was not raised on Direct Appeal, but was presented to The California Supreme Court. This claim is cognizable on federal review because the Petitioner clearly raised a federal violation of which the California Supreme Court, in its 'postcard' denial, offered absolutely no Opinion or case law to support its denial, or imply an approval or disapproval on the merits of the claim.

The issue in this case is that the trial court determined that the kidnapping charge was more serious a crime than the robbery by combining (as one) all four kidnapping charges as an aggregate. The court defeated the purpose of what 654 is designed to do. The 654 analysis is that the sentencing court must look at each crime separately, and determine which of those individual crimes is applicable to each victim, then determine which one of those crimes is the most serious offense. Only after the court decides the 654 issue as applied to each seperate victim, can it move to consider consecutive sentencing. The Petitioner reasonably asserts that the sentencing court erred when it failed to review the charges singularly as required to determine the aggregate offense (7RT 1767). The Supreme Court then failed to correct this error or lawfully dispute the merits of the Petitioner's claim on the state level.

The sentencing court also erred when it determined that 12021 and 12022 were independent, and had a seperate objective to the robbery.

Penal Code section 654 prohibits multiple punishments for a single act or an indivisible course of conduct. Whether a course of conduct is indivisible depends on the Defendants intent and objective.

In Sunkett's case, the trial court decided that, with the exception of 12021 and 12022, all of the crimes committed in this case were incidental to the objective of robbery (7RT 1763-1764). The robbery charge carried a penalty of 19 years as opposed to the 18 years the kidnapping charge carried. The robbery, when considered independently, no doubt carries the most severe punishment of all the charges, and the court had a responsibility to assign the robbery as the principal term.

In addition, being that the court determined that the sole objective of the crime was robbery, it can not then be determined that the 12021 and 12022 are indivisible motivations and should have been run concurrent. The evidence shows that the guns were brought and used to better effectuate the robbery. It's all part and parcel. The guns were not used in seperate crimes or in different places. They were used strictly in this particular course of conduct.

The Petitioner also asserts that appellate counsel Roger Curnow's failure to raise this claim on direct appeal was prejudicial, and any forfeiture of the claim resulted from ineffective assistance of counsel. Curnow had a responsibility to review the trial and sentencing transcripts and argue on appeal issues on record, whether raised or not, that were violations of of the appellant's rights. At sentencing, Sunkett raised this issue to the court, and an extensive debate followed. Mr. Curnow either overlooked, or simply failed to raise this issue to the Appellate Court. Thus the Petitioner was prejudiced by this failure because he was not afforded his due process right to be heard on an issue carrying a penalty of 40 years wrongfully assessed to the Petitioner's sentence.

Respondent's Argument and Petitioner's Rebuttal:

This court has no warrant to recalculate Sunkett's sentence because:

1). Federal habeas corpus relief is unavailable for alleged errors in the interpretation or application of state sentencing laws by either the state trial court or appellate court, unless it appears that its obvious

subterfuge to evade federal consideration, cruel and unusual punishment, racially or ethnically, and/or enhanced by indigency. (See Respondent's Answer at pp. 46-47).

Rebuttal:

The Petitioner is entitled to relief in this court because the state trial court's misapplication of penal code section 654 unfairly increased the Petitioner's sentence 40 years. This unconstitutional and grossly excessive aggregate sentence is a violation of the Petitioner's 8th Amendment right to be free from cruel and unusual punishment. Thus the Petitioner's claim of a federal constitutional violation is indeed a matter of which can be heard in this federal court (see *Makal v. State of Arizona,* 544 F.2d 1030, 1035 (9th Cir. 1976).

Prejudice:

The trial court's error was prejudicial because the Petitioner was wrongfully sentenced to an additional 40 years in state prison, and denied the proper review necessary to remedy this situation. Sunkett's appellate attorney failed to raise this issue on direct appeal, and the California Supreme Court issued a 'postcard' denial on the merits of this claim. Where the record and other facts show that the trial court proceeded with sentencing on an erroneous misapplication of law, remand is necessary and the Petitioner is entitled to resentencing.

VI. DO THOMPSON'S ALLEGED CUMULATIVE ERRORS AND DEFICIENCIES COMBINED WARRANT RELIEF?

Petitioner's Argument, Citations, and Supporting Case Law:

The Petitioner has shown, by use of citations of the record, exhibits, and case law, that Public Defender Lynda Thompson demonstrated a obvious pattern of deficiencies and failures that resulted in her inability to present a sufficient and effective defense against key elements of the prosecution's case.

For instance, the identification of Sunkett was the central issue of this case. As Petitioner has shown in Arguments I, II, VII above, Thompson failed to conduct any investigation whatsoever into false identification and the contributing factors and suggestive police procedures that elicit them, failed to file pretrial motions challenging the reliability and proving the falibility in the identifications and the unlawful process that elicited them, failed to introduce a cross-race identification expert witness to educate the jury on why and how there is such a high falibility in cross-race eyewitness identification, thus failed to present an effective defense to prove the defense's theory of misidentification.

Sadly, all of that only pertains to one issue raised by the Petitioner. Thompson's performance and conduct was equally deficient on other issues such as challenging the legality of the kidnapping charges, failing to investigate, interview, and call to trial alibi witnesses, failing to present exculpatory evidence demonstrating the likelihood of Sunkett's innocence, and filed absolutely no 995 motions challenging any of the evidence in this case harmful to the defense. The Petitioner has also provided evidence to this court that clearly shows that Thompson was absent to Sunkett and failed to meet with him as often as necessary to elicit all matters of defense.

Once this court reviews all records of evidence presented by both Petitioner and Respondent, the court will conclude that Thompson did very little to investigate and introduce available evidence to support Sunkett's alibi and the defense's theory of misidentification. This court will also see that Thompson made no attempt during any part of this case to move to limit, object to, or request curative or limiting instructions to any and all evidence unfavorable to Sunkett. Sunkett's letters to Thompson clearly shows this court that Thompson made herself so unavailable to Sunkett that her failure to confer

resulted in evidence being investigated and properly presented, and her inability to present a meritorious defense based on available facts and law.

As the Petitioner has already shown in previous argument, Thompson provided testimony at Petitioner's motion for a new trial hearing admitting to most of these things stated herein. It would be unreasonable to conclude that so many serious failures and deficiencies by Thompson cumulatively had no prejudicial effect on the Petitioner's trial.

Respondent's Argument and Petitioner's Rebuttal:

There is no basis for federal relief because of cumulative trial error because:

1). The Court of Appeal reasonably found virtually no material trial errors and no reasonable possibility of prejudice for any and all of the claims. (See Respondent's Answer at pp. 49-50).

Rebuttal:

Sunkett contends that the Appellate Court's Opinion that no material trial errors or any possibility of prejudice existed was in itself a violation of Sunkett's constitutional right to due process and a fair procedure. It is no more clearer than in this case that the multitude of failures and deficiencies shown by the Petitioner to have been made by Thompson resulted in prejudice, and the withdraw of a meritorious defense against key elements of the prosecution's case.

Sunkett raised this claim of cumulative error to the California Supreme Court. The court issued a 'postcard' denial on this claim without providing any opinion as to whether it agreed with the Appellate court's assessment of the evidence, or render its own conclusion as to the merits of Sunkett's claim of cumulative error by trial counsel rendered his trial constitutionally unfair. (See *Harrington v. Richter,* 131 S.Ct. 780-788; The denial of relief was unreasonable under *Strickland v. Washington,* 466 U.S. 688 (1984).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Prejudice:

Public Defender Thompson's contribution and diligence in this case, as well as her availability to Sunkett, was so limited and practically non-existent that it deprived Sunkett of a reliable result at trial and the preservation of arguments on appeal. See *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064). Also, appellate attorney Roger Curnow failed to outright raise or adequately raise issues on reversible error noted in Argument IX deprived Sunkett his right to relief on appeal. (See *Mason v. Hanks,* 97 F.3d. 887, 902 (7th Cir. 1996); Where Petitioner might have well won his appeal on a significant and obvious question of state law that his counsel omitted to pursue, the court is compelled to conclude...that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable). Combined, these errors made by both attorneys denied Sunkett due process and a fair trial, and relief would have been reasonably likely on appeal had the omitted or partially raised issues been raised fully.

B. DUE PROCESS AND TRIAL FAIRNESS CLAIMS.

VII. DID THE TRIAL COURT UNREASONABLY DENY SUNKETT'S MOTION TO PRESENT EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION?

Petitioner's Argument, Citations, and Supporting Case Law:

The trial court denied Sunkett the right to present a defense on the central issue of this case when it denied his request to introduce eyewitness identification expert Dr. Deborah Davis (who was present in court) for her scientific expertise on known factors found in Sunkett's case that historically prompts false

identifications of defendants (see EXHIBIT A, p 100-107; Dr. Deborah Davis' Declaration & Questionnaire). The trial court was provided Dr. Davis' curriculum vita which contained Dr. Davis' educational background, her résumé of work, credentials, and an overview of what subjects she could and would be testifying to (see EXHIBIT B, p. 108-135; Dr. Deborah Davis' curriculum vita). In particular, her testimony and power point presentation would have demonstrated that the likelihood of a defendant being wrongly identified is extremely high and the identification evidence is untrustworthy in cases where the defendant is of a different race than the witness, the witness does not know or has never before seen the defendant, the witness was subjected to a highly suggestive and/or erroneously conducted identification procedure which preceded the identification, the witness was experiencing stress, fear, weapons focus, and poor lighting at the time of interaction with the suspect, and eyewitnesses gave conflicting descriptions of the defendant. All of these things occurred and/or is present in the Petitioner's case.

However, the Trial Court, Appellate Court, California Supreme Court, and the Respondent have all refused to discuss, mention, or even acknowledge the existing science and the abundance of case studies that demonstrate the suggestive and prejudicial effect these factors, all found in this case, are known to have on an identification and in a defendant's trial. Also, none of the state courts as well as the Respondent have yet to acknowledge the presence of these factors in the Petitioner's case. There is also no indication that the trial court and both state courts properly and carefully considered other eyewitnesses testimony, and the GPS, Hotel, Bank, and Email records that support Sunkett's alibi.

To that, it must be concluded that the lower courts have not given careful consideration as to whether these factors individually or commulitively may have had the possibility of impacting the identifications, thus the Petitioner's trial. Further, none of the state courts and responding parties appear to have considered and/or properly applied the guidelines controlling eyewitness identifications and procedures outlined in P.C. sections 804, 683.3, and 686.3, the guidelines outlined in the CEB section 22.15, and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

cases such as *People v. Nation, Manson v. Brathwaite, People v. Vu (*along with an abundance of other cases) in their ruling and/or argument. Nor did the trial court and state courts declare their degree of knowledge and/or experience on the subject of cross-race identification and identification procedures to be great enough as to lack it's need to consider and evaluate the science, expertise, relevence, and probative value of an eyewitness identification expert's testimony and/or published case studies. Thus, the trial court unfairly denied the Petitioner due process, a fair trial, and a reasonable opportunity to present a defense, and the Appellate court and California Supreme Court perpetuated this error by failing to give careful examination and provide proper application of all facts and law.

Respondent's Argument and Petitioner's Rebuttal:

The Respondent sides with the Appellate Court Opinion that the Trial Court's denial of eyewitness expert testimony was reasonable because:

1). The decision to allow such testimony lies within the discretion of the trial court (see Appellate Court Opinion at p. 20; and Respondent's Answer at p. 27).

Rebuttal:

Petitioner agrees that the decision to allow expert testimony lies within the descretion of the trial court (*People v. McDonald,* 37Cal. 3d 351, 377 (1984)). But the Petitioner contends that an effective exercise of descretion requires accurate knowledge of the issue, and the court's decision must not deny the defendant a reasonable opportunity to defend (see *People v. Snow* (2003) 30 Cal. 4th 43, 70). Here, the trial court was provided Dr. Davis' 180 page curriculum vitae. Approximately five minutes later, the court ruled that it would not allow this expert testimony due to "..the lateness of the hour and weighing the potential probative value of that evidence versus the evidence that has been presented, relevency, et cetera.." The question is whether the court gave a careful examination of this expert's curriculum vitae before deciding to exclude this evidence from being considered by the jury. There is no indication on

record that the trial court, as well as the following two state courts, reviewed and carefully considered the information Dr. Davis provided the court relating to the commonality of false identifications of defendants. Thus, the trial court abused it's discretion and unfairly denied the Petitioner this evidence.

2). Witness Graves and Miller expressed certainty in their identification of Sunkett as being the first intruder (see Appellate Court Opinion at p. 21; and Respondent's Answer at p. 27).

Rebuttal:

The 'certainty' expressed by both Graves and Miller in their in-court identification of Sunkett has been scientifically proven to have very little to no validity, especially in cases where specific circumstances or complicating factors, as found abundantly in this case, precludes the identification. Thus, the trial court's instruction for the jury to consider such a 'certainty' factor was extremely prejudicial. First, the trial court did not even consider taking the necessary time to review Dr. Deborah Davis' curriculum vitae and the attached Article addressing the fallibility in eyewitness identification, therefore it can not be said to have made a legally knowledgeable decision to exclude this scientific evidence and instruct the jury to consider the witnesses' certainty in their identification of the defendant (see EXHIBIT C, p. 136-159; attached Article: "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 years later"). Second, the Appellate Court ignored or looked past this scientific evidence the Petitioner presented as an exhibit on Direct Appeal. By doing so, the court opinion was prejudicial because the court also took into consideration the certainty expressed in both *cross-race* witnesses' identification, and concluded that such *certainty* gave these identifications of the Petitioner validity. The Appellate court believed that the trial court did not abuse its discretion to exclude expert testimony because "..Graves expressed absolutely no doubt about his identification of Sunkett..," and Miller stated based on his appearance, his demeanor, it's him." The California Supreme court then concurred with the lower court Opinion. But

these opinions demonstrate the exact reason why expert testimony was detrimental to the defense in this case. There is high falibility lying within the 'certainty factor,' especially when complicating factors are present that are historically known to taint a witness's identification. Both the jury and the state courts needed to be educated to this science of how these complicating factors frequently prompt false identifications, and renders the certainty expressed in a witness' identification untrustworthy.

3). Witness Stover provided a similar description of suspect number one (see Appellate Court Opinion at p. 21; and Respondent's Answer at p. 27).

Rebuttal:

Max Stover did provide a similar physical description of suspect #1 as compared with the descriptions provided by Graves and Miller. And just as the case with Graves and Miller, Stover spent approximately 3 hours in the company of suspect #1. After the crime, Stover was provided Sunkett's photo for pretrial identification. Approximately 9 months later Stover had the opportunity to view Sunkett live in court. At no point pretrial or during trial did Stover ever identify Sunkett as being the suspect he himself physically described as being suspect #1, nor did he give any indication that Sunkett could have possibly been him.

4). Other corroborating evidence gave the identifications independent reliability (see Appellate Court Opinion at p. 21-22; and Respondent's Answer at p.27-28).

Rebuttal:

The Appellate court erred when evaluating evidence it claimed substantially corroborated the identification evidence. First, the trial court stated that the GPS evidence showed the tracking device left the crime scene, "..and moved back to the Bay Area, eventually stopping at Sunkett's apartment in Oakland some three hours later." This statement is completely false and there is no evidence at all in the record that supports the Court's analysis. If this were true, then this evidence could have possibly implicated Sunkett's guilt and could be deemed 'substantially' corroborating evidence. But again, this is

not fact. Furthermore, there is no evidence that will show Sunkett's apartment was the starting point to this incident either, let alone the stopping point (see Petitioner's federal habeas EXHIBIT J, at p. 180-181; GPS COORDINATES, starting and stopping points). Even more, all additional evidence presented shows that the tracking device was never in Sunkett's possession, nor in his vacinity during July 9-11, 2008. Therefore, the Appellate court made a legal decision in this case based on fictitious and non existing information. Second, Sunkett has always admitted renting various hotel rooms in the city of Fort Bragg in the spring and summer of 2008. Yet, only two of these rentals had relevence. The two that did, had absolutely no connection to the victims, the crime, or the crime scene. These two rentals can only show that Sunkett was present in the city of Fort Bragg approximately 6 hours before the crime occurred; a fact Sunkett never denied at no point in this case. Further, all hotel records presented indicate that Sunkett always either checked in alone, or with one other person; never two or more people as Gabriella Salazar believed she saw (see EXHIBIT D, p. 160-163; Hotel Records/Receipts for the Beachcomber Motel and the Ocean View Lodge). Being in the city the crime occurred far from qualifies as being "substantially" corroborating evidence to support an identification rife with taint. Third, None of the items seized from Sunkett's apartment was identified as being the items used by the suspects. Several of the items were only described as being similar in some form, the remaining items were not identified at all (see # 8-16 in the Evidence Graph above). None of these items can be said to be substantially corroberating without atleast 1 item being positively identified by victims. Fourth, only two camouflage masks were worn by the suspects. Sunkett purchased 3 neoprene masks from a Navel surplus store that also sold black t-shirts, black military style boots, and handcuffs. There is no evidence that shows the type, style, or color/design of the three masks purchased by Sunkett. Nor is there accusations by the prosecution or evidence showing that Sunkett bought black shirts, military-style boots, and handcuffs from this store. These items purchased (3 masks) were never recovered and brought to trial by the prosecution for identification and evidence. Being that only two mask were

described as being worn by suspects, and the 3 items Sunkett purchased were described as being fluorescent in color or had a smiling 'joker-face' printed on it. This can not be said to be substantially corroborating evidence to support an eyewitness identification. Especially when Sunkett, the purchaser of these masks, was described by the witnesses as not wearing one.

5). Petitioner's alibi was implausible (see Appellate Court Opinion at p. 22-23; and Respondent's Answer at p. 28).

Rebuttal:

The Appellate Court's opinion that the Petitioner's alibi defense was "thoroughly implausible" is unfair because the late appearance of Petitioner's two primary defense witnesses was the fault of his trial counsel's neglegence, and lack of trial preperation. Even more, the jury took into consideration the late appearance of these witnesses, and factored in their lateness into their decision to find Sunkett Guilty (see EXHIBIT E, p. 164-165; Jurors' post-trial interview with the defense). Worsening matters, the lower state courts have outright ignored all evidence the Petitioner submitted showing that he provided and/or attempted to provide various alibi witnesses names and contact information to public defender Lynda Thompson almost six months before trial. Yet, as Petitioner's letters to Thompson clearly demonstrates, along with county jail visiting records, and her own investigative file/notes, Thompson did not make herself available to the Petitioner until approximately 30 days before the start of trial to retrieve this information and make contact with only some of these witnesses. Sunkett's letters to Thompson shows him begging and pleading with Thompson to visit him at the jail or simply answer or respond to his phone calls so that they can fully discuss such things (see EXHIBIT F, p. 166-216; All of Sunkett's letters sent to and received by Thompson). Her own case/investigative files do not reflect any notes or other entry information showing that she was corresponding with Sunkett, in any manner, to discuss matters of defense (see EXHIBIT G, p. 217-244; Complete Matrix of all Documents found in

Thompson's case file and Declarations by the law office employees that constructed it). County Jail visiting records also demonstrates and supports the Petitioner's claim that Thompson made herself unavailable to him (see EXHIBIT H, p. 245-247; Jail visiting log and staff confirmation). Next, contrary to Appellate court opinion, Sunkett's testimony was not "riddled with unlikely coincidences and inconsistencies." Sunkett's claim that he purchased the masks for a paintball event was not an unlikely coincidence. Only two masks were worn by the intruders in this case and both were described as being camo printed. The three mask purchased by Sunkett was described as being fluorescent and/or printed with a smiling "joker-face." Had Mr. Alan Gordon been brought to trial, his testimony would have supported the defense's theory of events, and the jury would have had the opportunity to actually see the original masks purchased. Lastly, as for the gun found in Aziza Washington's purse, there is no evidence or testimony that demonstrates that Sunkett owned, possessed, or had knowledge of this gun's existence. Further, Ms. Washington's statement she provided to detectives after her arrest reflects her own possible tie to the firearm. Washington claimed to have never seen the the gun before, but told police that her prints could possibly be found on the weapon; another point the courts both choose to ignore or fails to consider. To add, all of the GPS, hotel, bank, and email records support the Petitioner's alibi. Therefore, the state courts opinion that Sunkett's alibi defense is "thoroughly implausible," is not only unfair, but highly inaccurate in light of the supporting evidence.

6). The introduction of the eyewitness expert was late (see Appellate Court Opinion at p. 23; and Respondent's Answer at p. 28).

Rebuttal:

The late introduction of eyewitness expert testimony was trial counsel error, and beyond Petitioner's own control. However, although late, the Petitioner contends that a trial court's decision to exclude expert testimony requires accurate knowledge of the issue. The trial record reflects that the trial court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

did not read and take into consideration Dr. Davis' C.V. Therefore, the court did not first educate itself on the science and case studies that demonstrate how a variety of complicating factors found in this case can taint and produce false eyewitness identifications of a defendant. The court denied this evidence without properly considering the value this evidence would bring to the defense. Thus the court prejudicially denied the Petitioner a reasonable opportunity to defend on the central issue of this case.

7). Trial counsel's closing argument was sufficient in challenging both identifications (see Appellate Court Opinion at p. 24; and Respondent's Answer at p. 29).

Rebuttal:

Trial counsel's closing argument was not sufficient in challenging both Graves' and Miller's identifications because Thompson is a lay cross-examiner who is untrained in this field and is not qualified nor properly educated on this topic to explain to the jury how specific circumstances and complicating factors found in this case are widely known to impact the accuracy of an eyewitness's identification of a defendant, and how the the 'certainty' expressed in an eyewitness's identification under these circumstances has little to no validity. In her closing, trial counsel Thompson attempted to make the defense of mistaken identity. But without testimony from a scientific expert to identify and explain to the jury how common false identifications are, and how and why it frequently occurs, juries tend to perceive that eyewitness testimony must be correct. Thus, trial counsel's closing statement is ineffective and insufficient because without this expert testimony she could not prove or demonstrate that the defense presented was valid and had legal, psychological, and scientific support.

8). The trial court instructed the jury with CALCRIM 315 which advises jurors to consider the certainty of a witness's identification of a defendant (see Appellate Court Opinion at p. 24; and Respondent's Answer at p. 29).

<u>Rebuttal</u>:

As previously discussed, and as the Article in Exhibit C demonstrates, there is overwhelming science that proves that the 'certainty' expressed in an eyewitness's identification of a defendant has very little to <u>no</u> <u>validity</u>. Therefore, the trial court's instructing the jury with CALCRIM 315 which instructs juror's to consider an eyewitness's certainty, is highly prejudicial to the Petitioner. The trial court should have instructed the jury with CALJIC 2.92 the predecessor of CALCRIM 315, which gives a cautionary instruction in jurors considering the certainty expressed in a witness's identification, and identifications made by witnesses of a different race as the defendant.

9). The exclusion of the identification expert was harmless error (see Appellate Court Opinion at p. 24-25; and Respondent's Answer at p. 28-29).

<u>Rebuttal</u>:

As previously discussed, the exclusion of the identification expert was indeed harmful error because the jury was never educated to nor given an opportunity to consider the wide range of scientific evidence that demonstrates how eyewitness identifications are highly falible in cases such as the Petitioner's, where complicating factors present preceded and ultimately bore the identification. Hence, when a jury member was interviewed post-trial by the defense, the juror stated that their decision was based largely on the identification evidence. The jury was left to consider the prosecutions evidence alone because the defense was denied the opportunity to introduce their evidence to combat this identification evidence.

10). No Constitutional error occurred (see only Respondent's Answer at p. 29-31).

<u>Rebuttal</u>:

The trial court's decision to exclude expert testimony denied the Petitioner a reasonable opportunity to defend against the central issue of his case; violating his 5th and 14th constitutional right to due process of law.

Prejudice:

The trial court's denial in allowing the defense to introduce testimony from a cross-race identification expert denied the Petitioner an opportunity to sufficiently present a defense against the central issue of the Petitioner's case violated Petitioner's constitutional right to due process and a fair trial. This fact is supported by a post-trial interview with one of the jurors in this case. The juror stated that the identification was "big" in their opinion (see EXHIBIT E, p 164-165; juror interview).

VIII. WAS PETITIONER'S TRIAL RENDERED CONSTITUTIONALLY UNFAIR BY THE EYEWITNESS IDENTIFICATIONS, AND THE SUGGESTIVE I.D. PROCEDURES THAT ELICITED THEM.

Petitioner's Argument, Citations, and Supporting Case Law:

Petitioner contends that his trial was constitutionally unfair because of the erroneous, tainted, and highly suggestive pretrial identification procedures employed by law enforcement that ultimately elicited two eyewitness identifications of the Petitioner that the jury considered "big", thus reliable in their deliberations (7RT 1618, 1621). This issue was not raised on direct appeal. However, Petitioner did raise this issue on state habeas to the California Supreme Court, who then issued a 'postcard denial' of

this claim, failing to include its Opinion and the supporting case law necessary in evaluating the legality of its denial.

Respondent's Argument and Petitioner's Rebuttal:

The Respondent believes that, despite the eyewitness testimony elicited by the claimed erroneous and suggestive identification procedures, Petitioner's jury trial was constitutionally fair because:

1). This claim is similar to claims 4 and 5 raised in Petitioner's habeas. For all the reasons already listed above in the 'Respondent's argument' section in arguments 3 and 4, this claim fails. (See Respondent's Answer at p. 39).

Rebuttal:

The central issue in this case was eyewitness testimony by Matthew Graves and Dusty Miller, of which the Petitioner contends was born from two erroneous and/or suggestive eyewitness identification procedures. Prior to the photo lineup, and during the commission of the crime, both witnesses experienced cross-race identification, stress, fear, weapons-focus, and poor lighting, against three disguised African American intruders. Days later, Graves and Miller were interviewed by law enforcement and both gave detailed descriptions of all three suspects. The descriptions given by the witnesses of suspect number one in particular, were not identical to the other's description. Graves believed suspect number three was the tallest and largest of the three suspects at 6 foot 6 inches tall, weighing 280 lbs. He described suspect number one as 5 foot 11 with a beefy build, weighing about 230 lbs. He distinctively told investigators that suspect number one "looked like Barry Bonds" and "looked like he used steroids." He specifically described this suspect as being clean haven (see Graves pretrial interview #1, at p. 12, 25-26, 28; also see EXHIBIT J, p. 252-255; Picture Comparison of Barry Bonds and Petitioner). Miller on the other hand seen things differently. Miller believed suspect number one was the tallest of the three suspects at 6 foot 1 inches. She believed this suspect was approximately 27

years old. She also stated that this suspects facial hair was "all shaven,"and the hair on his head was cut close to the scalp." She described the other two suspects as both being under 5 foot 9 inches tall (see Miller's pretrial interview #2 at p. 14-15, 29-31). In the days that followed, both witnesses were given a photo line-up containing potential suspects. Graves identified Sunkett as one of the perpetrators in this crime, simply by marking his initials under Sunkett's picture. Miller, in a separate viewing, did not identify Sunkett as a perpetrator, but wrote "maybe" by his photo, along with a similar notice next to several other elimination suspects.

As advised in Penal Code section 683.3 and 686.3, there is no record made by law enforcement preserving any statement of confidence made by either witness at this confrontation declaring which suspect Sunkett was alleged to have been, or what roll he allegedly played in this crime (see EXHIBIT K, p. 256-261; recommended lineup protocol of P.C. 686.3). Nor is there any record in existence that can be used to evaluate the certainty and reliability of Graves identification at the time of the confrontation. Also, all records indicate that detective Gregory Van Patten lead the investigation, solely prepared the 6 pack photo array, and solely conducted all interviews and photo lineup procedures with the eyewitnesses. Hence, Van Patten faioto use a double-blind safeguard. Therefore, and as scientific research has long ago demonstrated, it's likely probable that Van Patten, whether knowingly or unknowingly, influenced Graves identification, and Miller's "possible" identification of Sunkett by his being the **sole** participant orchestrating and conducting the identification process. It is important to keep in mind that the problem of suggestibility does not necessarily imply any wrongdoing or intent to bias the results on the part of the test administrator Rather, the importance of the double-blind safeguard is the avoidance of inadvertent communication of expectancies, or suggestibility. The witness may pick up on such indicators consciously or unconsciously, which distorts the overall process. This theory is reasonable and bates validity because approximately 9 months later, Van Patten conducted another erroneous and suggestive identification procedure on Miller, which the trial court itself acknowledged

was "highly prejudicial." But these are just a few things that law enforcement failed to do to preserve any reliability and accuracy expressed by the witness that the identification was birthed from his/her own memory.

In totality, in violation of the guidelines discussed in P.C. 683.3 and 686.3, and in accordance with the CEB section 22.15 (b), the Mendocino County Sheriff's Department a) failed to have both Graves and Miller complete a standardized form describing the prep, b) failed to have the investigator conducting the identification procedure be a person who is not aware of which person in the identification procedure is the suspect, c) failed to present the photos used in the photo lineup sequentially, and not simultaneously, d) provided information to both witnesses concerning the identified person prior to obtaining the witness's statement of confidence, e) failed to have Graves write and sign a statement in his own words regarding the certainty and accuracy of his identification, and most importantly, f) failed to make a video recording of the lineup which took place at the sheriff's station. Failing to follow these specific guidelines introduced the tainted procedures that ultimately birthed two false in-court identifications of Sunkett. (Note, recording the photo-lineup, and all other procedures listed above is not only standard protocol, but is critical to evaluating the accuracy of the identification and the strength or weakness of the procedure used by law enforcement. Major recommendation by: United States Department of Justice, the California Commission on the Fair Administration of Justice, the American Bar Association, and the National Academy of Sciences).

In its determination as to whether this procedure and the testimony that followed it was unlawful and prejudicial, the Petitioner asks this court to also consider the descriptions of Sunkett given by two other prosecution witnesses-Edith Silva and Gabrielle Salazar-who both had the opportunity to physically witness Sunkett and compare him in person to the picture on his driver's license (shown to the victims), in two separate instances on the day the crime occurred. At trial, both witnesses identified Sunkett as being the same person who checked into their hotels, and was the same person they seen in the driver's

license photo. Further, both witnesses testimony confirmed the defense's theory that Sunkett wore a mustache, beard, and hair on his head on the day of the crime (3RT 562, 599; and 4RT 905, 916). Salazar went on to testify that Sunkett looked the same way in court as he did on the day she saw him in her hotel, and that Sunkett's hair was longer in length on that day than it was there in trial (3RT 601, and 4RT 905). This court should also note that at trial, Sunkett wore a mustache, beard, and an inch and a half of hair on his entire head, and his driver's license picture shows the same appearance. Neither witness gave any indication that Sunkett was "clean shaven" or that his head was bald or the hair was cut close to the scalp, or that he was beefy built or overweight as Graves and Miller indicated. Nor did these witnesses say Sunkett appeared "very, very dark" or darker skinned on the day they encountered him, then there at trial, as he was initially described by Miller. Additional descriptions of Sunkett given by two defense witnesses-Jamila Thomas and Guy Sunkett-corroborated the identifications given by these two prosecution witnesses.

To add, prior to trial, Sunkett was a stranger to, and of a different race as Graves and Miller. Graves testified at trial that he recognized Sunkett in trial by "standard" physical features he believed all "Negroid", or African Americans share, not by anything individually distinctive he recognized on Sunkett (2RT 393). Miller on the other hand, was only able to identify Sunkett at trial after law enforcement gave her two singular booking photos of Sunkett accompanied with other suggestive arrest information and pictures that Miller remained under the spell of for 3 months before her trial appearance (5RT 1087-1088). She then went on to state at trial that she recognized Sunkett by his demeanor. However, Miller never stated what specifically or distinctively stood out in his demeanor that she was able to detect from a silent, and seated defendant.

Our courts have repeatedly discussed the dangers inherent in unduly suggestive pretrial identification procedures. Mr. Justice Frankfurter once said, "What is the worth of identification testimony even when uncontridicted? The identification of strangers is proverbially untrustworthy." In *Wade,* Mr. Justice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brennen noted "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." Mistaken identification is increased when the procedure eliciting the identification was tainted. An identification which is tainted by an unnecessarily suggestive identification procedure is vindictive of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution (see *Stovall v. Denno* (1967) 388, U.S. 293, 301-302; and *Manson v. Brathwaite, supra,* 432, U.S. 98, 106). Even more, "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." (see *Stovall v. Denno, supra,* 388 U.S. at p. 302; and *People v. Nation* (1980) 26 Cal.3d 169, 178-182). "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." (see *United States v. Wade* (1967) 388 U.S. 218, 234). This condemnation extends to showing witnesses photographs of only one person, the defendant (see *Simmons v. United States* (1968) 390 U.S. 377, 383-384.)).

<u>Prejudice:</u>

Considering all facts, it can not be reasonably said and/or proven that despite these erroneous and highly suggestive procedures, that both Graves' and Miller's identification of Sunkett were reliable and born from their own independent memory of the crime. Therefore, it is reasonably probable that if not for these unlawful, erroneous, and suggestive identification procedures, witnesses may not have identified Sunkett as a perpetrator in this crime and the jury would not have had this evidence to consider in deliberations (see EXHIBIT E, at p. 164-165; juror interview).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IX. DID THE TRIAL COURT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS WHEN IT INSTRUCTED THE JURY WITH CALCRIM No. 315?

Petitioner's Argument, Citations, and Supporting Case Law:

CALCRIM 315 provides a list of factors that the jury may consider when evaluating eyewitness testimony. The list is not exclusive though and provides a catchall category "other relevant factors raised by the evidence," to allow trial counsel the opportunity to present other factors that may be relevant to the jury's analysis. However, Sunkett contends that the trial court did in fact violate his Constitutional right to due process when it instructed the jury with CALCRIM No.315, because it gives a pattern instruction meant to advise the jury to consider the eyewitness's certainty in his/her identification of Sunkett. This instruction also contains a simple statement advising jurors of witnesses and defendants of different races. However, instruction 315 only contains a few, very general remarks on both topics. This instruction does not even begin to convey to the jury the specific data compiled on cross-race identification, a witness's 'certainty', and other contributing factors that are widely known to easily diminish the accuracy and reliability of a witness's identification. (See E.G. Wells, G.L. & Quinlivan, D.S.; "Suggestive Eyewitness Procedures and the Supreme Court's reliability test in light of eyewitness science 30 years later.") Thus, the jury could not be assumed to have made a just finding after the trial court advised them to consider such factors as cross-race identification and the certainty in two witnesses identification of Sunkett without the jury first being educated about, or atleast warned of, the known scientific and empirical evidence that has proven that the certainty expressed in a cross-race identification of a previously unknown defendant (especially when other complicating factors are present such as suggestive identification procedures, fear, stress, weapons focus, poor lighting..) has very little to <u>no</u> <u>validity</u>. Based on such a scientifically proven theory, in *People v. Johnson* (1992) 3

Cal. 4th 1183, 1231, 1232, the California Supreme Court approved CALJIC 2.92 as the predecessor (and cautionary instruction) to CALCRIM No. 315. However, the court in *Johnson* never considered whether the certainty factor violated the California or United States Constitutional right to due process. Without an expert's testimony to enlighten the jury on these factors, or the court issuing the jury a cautionary instruction regarding cross-race identification issues, the 'certainty factor' expressed in a witness's identification, and other complicating factors (present in this case) attributed to misidentification, the court's instruction of CALCRIM 315 automatically weakened Sunkett's defense of false identification before the jury even began deliberating over the trial evidence (see *State v. Guzman* (Utah 2006) 133 p. 3d 363; and *State v. Long* (Utah 1986) 721 p. 2d 483 [jury must be given a cautionary instruction regarding the uncertainty of eyewitness identifications]). It has been proven scientifically, and commonly known throughout the legal circuit, that an uninformed jury will tend to greatly consider the certainty expressed by a witness in his/her identification of a defendant, and ultimately overlook most of the remaining evidence presented in the case (see Cutler, et al, 1990; study shows that witness confidence is about the only aspect of an identification that jurors consider). This instruction was proven prejudicial to the Petitioner after his defense investigator William Kidd interviewed one of the jurors' after the verdicts were rendered. The juror told Kidd that the identification evidence "was big", and it all basically came down to whether they trusted the identifications. (See EXHIBIT E, p. 164-165; Interview with juror) (also see *People v. Watson, supra,* 46 Cal. 2d 818, 836 [requires the showing that, absent the error, it is reasonably probable that the Defendant would have obtained a better result]; *College Hospital v.Superior Court* (1994) 8 Cal. 4th 704 [the California Supreme Court clarified that under *Watson*, "Probability...does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respondent's Argument and Petitioner's Rebuttal:

Respondent believes Sunkett's Constitutional right to due process was not violated by the court's instruction of CALCRIM 315 because:

1). This claim is procedurally barred on federal review because Sunkett failed to object to or request modification of the instruction in the trial court. (See Respondent's Answer at p. 37).

Rebuttal:

This claim is not procedurally barred from federal review because the California Supreme Court issued a "post-card denial" of this due process claim, without rendering an Opinion, or case law in support of its denial (see *People v. Prieto* (2003) 30 Cal. 4th 226, 247 [Instructional errors are reviewable despite the absence of objection, and to the extent that they affect the defendant's substantial (due process) rights]; also see *People v. Johnson* (2004) 115 Cal. 4th 186, 213 [..court may review any instruction even if no objection was made thereto in trial court if the substantial rights of the defendant were violated]). Therefore the Petitioner and this federal court have nothing to consider or rely on in determining whether the state court's ruling was legally based. To add, at Sunkett's motion for new trial hearing, public defender Thompson admitted that she did not go over the jury instructions with Sunkett (7RT 1657). Therefore, Sunkett was never given an opportunity to object to, or request modification of the instruction, because he had absolutely no knowledge of the jury being instructed with such a prejudicial instruction, nor could he be expected to have a clear understanding of the negative effect this instruction could have on the jury's deliberations.

2) An eyewitness's level of certainty in making an identification is a relevant fact for juries to consider. (See Respondent's Answer at p. 38).

Rebuttal:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Although the court's have very long ago recognized that the 'certainty factor' expressed in an eyewitness's identification is "a relevant fact for juries to consider," science and other empirical evidence collected over the past 3-4 decades has proven that the 'certainty factor' has absolutely no validity, especially in cases where cross-race is an issue, the witness did not know or had never seen the defendant before, law enforcement subjected the witnesses to suggestive identification procedures, and witnesses experienced fear, stress, weapons-focus, and poor lighting during the crime. Certainty is not a relevant fact to consider because 'certainty' is not factually based, therefore the trial court instructed the jury to consider evidence against the Petitioner unsubstantiated by the facts of the case. The trial court should have removed the certainty instruction, instructed the jury with CALJIC No. 2.92 (CALCRIM 315's predecessor), or at the very least instruct the jury with a cautionary instruction on the unreliability of a witness's expressed certainty (see *Brodes v. State* (2005) 279 Ga. 435; 614 S.E. 2d 766 [Georgia Supreme Court declares that the "certainty" factor should be omitted]) (*Commonwealth v. Santoli* (1997) 424 Mass. 837; 680 N.E. 2d 1116; "certainty" factor should be ommitted)).

3). Even if the "certainty factor" in CALCRIM No. 315 had been erroneous, there would be no basis for reversal under the state or federal constitutional standard of error. (See Respondent's Answer at p. 38-39).

Rebuttal:

CALCRIM 315 was indeed erroneous, and harmful error because the defense interviewed a jury after trial who stated that their verdicts were largely based on the identifications and the trustworthiness of the identifications. Without the jury being educated by a cross-race identification expert at trial on the unreliability in a witness's certainty, or a cautionary instruction given by the trial court on a witness's certainty, the jury had no individual knowledge of facts or any other evidence to consider when applying

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

such an instruction. Therefore, the court ordered the jury to consider evidence that is not backed by the facts of the case.

Prejudice:

The trial court instructed the jury to determine Sunkett's guilt based in-part on the certainty expressed in the witnesses identification of Sunkett. 'Certainty' is widely known to be unreliable and/or untrustworthy, especially in cases where complicating factors exist and the witness is of a different race as the defendant. This instruction proved damaging to the defense because, as an interviewed juror stated after trial, the eyewitness identification evidence was "big" in their determination of Sunkett's guilt. (See EXHIBIT E, p. 164-165).

X. IS THERE ENOUGH EVIDENCE TO SUPPORT THE KIDNAPPING CONVICTIONS; AND IF NOT, WAS PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS VIOLATED?

Petitioner's Argument, Citations, and Supporting Case Law:

First, the trial court instructed the jury with CALCRIM 252, which informs the jury that kidnap requires proof of intent. " For you to find a person guilty of these crimes or to find the allegation true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose." The trial court in seperate context determined that the objective of the conduct involved in this case was robbery and that

the kidnapping was incidental to the robbery or simply a means of allowing the intruders to accomplish the robbery (7RT 1764).

Second, the trial court instructed the jury with CALCRIM 1215. Petitioner contends that all necessary elements required in P.C. 207(a) were not met, and the evidence in this case supports the deficiency. The Petitioner believes that the jury erred in its evaluation of what evidence must be present to fulfill the elements required to convict on four individual counts of P.C. 207(a), and the trial Court failed to correct this error at the Petitioner's motion for a new trial hearing, and sentencing. The Appellate Court and California Supreme Court both perpetuated the error by failing to correctly evaluate the evidence pertaining to the specific circumstances of each individual victim, and properly consider their circumstances and trial evidence against all the required elements needed to satisfy all four charges of kidnappings under P.C. 207(a). (See *Williams v. Taylor* (2000) 529 U.S. 362, 402-403; [the state courts can not be said to have come to their decision based on a reasonable determination of facts or by a reasonable application of clearly established federal law.]).

Penal Code section 207 subdivision (a) provides:

> Every person who forcibly, or by any other means of instilling fear, steals, or takes, or holds, detains, or arrests any person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

None of the victims in this case were forcibly held, stolen, and moved into another country, state, or county, or into another part of the same county. Therefore, none of the circumstances in this crime can satisfy the main provision of 207(a), and as the evidence would suggest, the jury obviously failed to properly consider the main provision of P.C. 207(a) when determining whether a kidnapping, according to the specifics of the law, actually occurred here. Simply, there is no evidence and/or specific circumstances in this case that can be lawfully appropriated to the core of Penal Code section 207,

subdivision (a), therefore this charge was illegally applied to the Petitioner, whom has since been illegally detained for these four charges. Thus, any underlying elements of this charge the Respondent claims were satisfied, are irrelevant. However, the Petitioner contends that these elements, as well, lack sufficient evidence to support them.

The elements of P.C. 207(a); kidnapping are:

> "(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance."
>
> (*People v. Jones* (2003) 108 Cal. App. 4th 455, 462;
>
> also *People v. Bell* (2009) 179 Cal.App.4th 428, 435).

None of the victims were moved by the use of force or fear, or threatened with violence if they chose not to move. Also, none of the victims protested this movement, or expressed a heightened since of fear from this movement. Lastly, the movement of the victims was slight or trivial, and merely incidental to the commission of the crime. The Respondent nor the state courts have yet to demonstrate otherwise. All of the victims in this case provided their testimony at Petitioner's trial. None of them stated that the intruders forced them or threatened them to move from one room inside the house to another. None of them gave any indication that they individually or as a group, protested this movement, or stated that they experienced a heightened sense of fear before or after the movement. Stover, Miller, and Graves, all spoke very matter-of-factly about this movement; as if it were an afterthought, or was vague in their memory (1RT 145, 2RT 235, 363). There is no evidence that supports that the trivial movement of approximately 24 feet within the confines of the victim's private residence was anything more than merely incidental to the robbery or fulfiled a separate objective other than robbery (1RT 147). (See 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

U.S.C. sub. sec. 2254(d); also *In Re Worship,* 397 U.S. at 365-368; [the prosecution evidence must be sufficient to prove every element beyond a reasonable doubt.]).

Furthermore, the trial court instructed the jury with CALCRIM 252 which informs the jury that a charge of kidnap requires proof of intent. 252 reads, "For you to find a person guilty of these crimes or to find the allegation true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose." (emphasis added). Nothing in the trial record can demonstrate that the kidnapping was committed with intent. Evidence shows that the movement of the victims was merely incidental to the commitition of the robbery

Respondent's Argument and Petitioner's Rebuttal:

The Respondent agrees with the Appellate and California Supreme Court that there was substantial evidence to support the kidnapping convictions because:

1). The asportation requirement of 207 (a) was satisfied. (See Appellate Court Opinion at p. 33-35; and Respondent's Answer at p. 39-42).

Rebuttal:

The Respondent is relying on only one element, asportation, to support its claim that all elements required to support four convictions of P.C. 207(a) were legally satisfied. When evaluating the asportation requirement the California Supreme Court, in *People v. Martinez (*1999) 20 Cal.4th, at p. 237, held that a jury may consider "such factors as to whether that movement increased the risk of harm about that which existed prior to the asportation, decreased the likelihood of detection and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced

opportunity to commit additional crimes." Although the jury is allowed to take into account considerations in addition to actual distance, the Supreme Court cautioned that "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a short distance." *(Ibid)* (emphasis added). Cases decided since *Martinez* have held that short distances suffice for kidnapping when the movement substantially changes "the context of the environment." (*People v. Diaz* (2000) 78 Cal. App. 4th 243, 247; also *People v. Shadden* (2001) 93 Cal.App. 4th 164, 167, 169-170; *People v. Corcoran* (2006) 143 Cal.App. 4th 272, 279)).

First, the Petitioner was wrongfully convicted of these kidnapping charges because the movement of the victims was not committed with wrongful intent or intentionally acted out as CALCRIM 252 requires. Also, as the Petitioner has already declared, there is no evidence in this case that can justify a conviction on the main provision of P.C. 207(a), thus the Petitioner is being illegally detained on four charges of kidnapping. But even had it been, the asportation requirement is only an underlying element to the main provision, but was not undoubtedly satisfied anyway.

As the Respondent concurs, the Appellate Court believed that moving the victims 24 feet into a room with no windows, binding their legs and locking them inside, made it reasonable to infer that Sunkett made it more difficult for the victims to escape or sound an alarm, tend to an injured Bennett, decreased Sunkett's risk of detection, and allowed Sunkett and the other intruders an enhanced opportunity to commit additional crimes, given that they no longer needed to watch over the victims. The court ruled that the movement from the living room to the storage room satisfied the asportation requirement of section 207, subdivision (a). (See Respondent's Answer at p. 41) The Respondent and the Appellate Court cited case law such as *People v. Martinez, People v. Arias, People v. Shadden,* and *People v. Smith* in support of their opinion that the asportation requirement was satisfied.

However the Petitioner contends that none of these cases apply here because the facts in the Petitioner's case falls under an entirely different set of circumstances. In all these cases listed by the

Respondent, the victims were all detained in a public place and were moved away from public visibility. The evidence presented in Sunkett's case shows the victims were detained and moved about 24 feet on Bennett's 15 acres of private property, inside the secluded confines of a 2,500 square foot residence, almost entirely surrounded by tall, thick vegetation, offering no public view of the outside or inside of the home (1RT 71, 74). Thus, the asportation aspect can not be satisfied as the Respondent's and Appellate Court's cited case law provides without the victims detention occurring in a public place of which they were ultimately moved away from to avoid public visibility. In addition, there is no evidence demonstrating that the moving of the victims was intended to fulfill a seperate objective other than the robbery. The intruders made it clear shortly after they made entry into the house that their motive was robbery to which they were already in the commission of prior to moving the victims into the spare room (2RT 234).

The Petitioner does acknowledge however that the trial evidence shows that the victims legs were binded, they could not attend to Bennett, and that they were locked in a room shortly after they were bound. But contrary to the Appellate Court's observation, the room the victims were locked in had a large hole in the wall where a fan was set in its framing (in place of a window), which the victim's did eventually use to make their escape through minutes after the suspects departed (2RT 242-243, 290-291, 372). Additionally, the victim's were always watched over by the suspects until the time of their departure, and no other crimes were reportedly committed after the victims were left alone.

Prejudice:

The jury failed to follow the instruction of CALCRIM 252 by disregarding the fact that there is no evidence in this case that proves that this crime was intentionally committed. To add, the asportation requirement lacks sufficient evidence because the trial evidence can only show the presence of factors partially needed to satisfy this lone element. The Respondent failed to show by the evidence whether the

other underlying elements of 407(a) were all legally met (*In Re Worship*). It also failed to discuss whether the main provision of 207(a) was appropriate and reasonably charged. Since it has not, this court must now determine whether the Petitioner's constitutional right to due process has been violated, and whether the Petitioner is now being detained illegally on these four (individual) kidnapping charges.

XI. WAS THE EVIDENCE PRESENTED AT TRIAL SUFFICIENT TO SUPPORT VERDICTS OF GUILTY BEYOND A REASONABLE DOUBT?

Petitioner's Argument, Citations, and Supporting Case Law:

Petitioner's 5th and 14th Amendment rights to due process and a fair trial were violated by the insufficiency of the evidence expected to sustain verdicts of guilt beyond a reasonable doubt. All of the scientific and technological evidence presented by the prosection supports the Petitioner's alibi, and witnesses statements. (See Petitioner's federal habeas at pp. 21-31).

Sunkett testified at trial that he owned a GPS tracking device that he used specifically to track large purchases of marijuana that he himself would by in the city of Fort Bragg. This GPS device was ultimately found to be at the crime scene in this case. Sunkett stated that he was never in possession of the GPS device at no point in the days leading up to the crime, during the crime, or after the crime. Guy Sunkett and Jamila Thomas corroborated Sunkett's alibi that he was no longer in Fort Bragg when the crime was being committed. Sunkett took claim all the purchases made on his credit and debit bank cards during these days in question that repeatedly placed him in a totally seperate place than the GPS

device. The hotel records in this case also prove Sunkett to be repeatedly in a seperate location than the device. Yahoo email records shows Sunkett had logged in to his Covert Track account on 3 occasions to check the status of the tracking device very close in time to when the crime occured. Sunkett also claimed to have no knowledge of the presence of gun found in Aziza Washington's purse, and Washington's testimony and latent print analysis supports his claim. Sunkett also testified that he has never been clean haven or bald-headed in his entire adult life, let alone on the day the crime occured as the victims in this case claimed. Two Prosecution witnesses (hotel employees), two defense witnesses, and all pictures of Sunkett presented by the prosecution proved this fact.

Respondent's Argument and Petitioner's Rebuttal:

The Petitioner's claim fails because:

1). Sunkett did not allege that the prosecution evidence was false or facially insufficient to support the verdicts, and federal habeas corpus does not lie to "correct" a jury verdict that is supported by substantial evidence. (See Respondent's Answer at pp. 48-49).

Rebuttal:

On habeas, Sunkett did allege that the prosecution evidence was facially insufficient and clearly argued this claim (see habeas at pp 24-27). This court now has the authority to review claims that trial evidence was insufficient to establish guilt beyond a reasonable doubt. (See *Juan H. v. Allen,* 408 F.3d 1262 (9th Cir. 2005) (finding that evidence was insufficient to establish guilt beyond a reasonable doubt)). Proof beyond a reasonable doubt must be shown for every fact necessary to constitute each crime which Sunkett was charged. (See *In re Worship,* 397 U.S. 358 (1970); and *Herrera v. Collins,* 506 U.S. 390 (1993). A conviction based on evidence that fails to meet the *Worship standard* is an independent constitutional violation which this court may review.

2). The prosecution evidence in this case was more than sufficient to support the verdicts. (See Respondent's Answer at pp. 48-49).

Rebuttal:

As demonstrated in Petitioner's habeas and as stated above, proof beyond a reasonable doubt for every fact necessary to constitute Sunkett's guilt was not established here. At trial, Sunkett was able to scientifically prove that he was never in possession or in the vicinity of the tracking device found at the crime scene, and prove that he did not fit the description of the suspect described by two of the three victims. The Respondent does not believe the GPS evidence specifically, helps prove Sunkett's innocence because the prosecutor never argued that the tracking device had been in Sunkett's *continual* possession throughout the days before and after the robbery. However, *continual possession* gives the presumption that at some point throughout the days surrounding this crime, the GPS tracking device was in Sunkett's possession. And as Sunkett and the GPS records reflect, there is absolutely no evidence of this.

Prejudice:

Sunkett was found guilt of all charges beyond a reasonable doubt, although there is sufficient and very reliable evidence to show that it's highly doubtful that Sunkett was at the location of the crime and a suspect involved. This claim was not raised on Petitioner's direct appeal. However, Petitioner did raise this argument to the California Supreme Court who inturn issued the Petitioner a 'postcard' denial of this claim. The state court failed to apply a standard, case law, or any other showing that it reached its result on materially indistinguishable facts and supporting case law. Thus, the state courts ruling was not decided by clearly established federal law. The California Supreme Court failed to decide whether the jury in this case reasonably reached their verdicts by the proof existing in every fact necessary to constitute guilt beyond a reasonable doubt of each crime charged to the Petitioner. This court now must

decide whether any rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt. (See *Jackson v. Virginia,* 433 U.S. 307, 318-319, 99 S.Ct. 2789, 61 L. Ed. 2d 560, 573, (1979).

Final Statement.

Sunkett's letters to Public Defender Thompson are the best preservation of the circumstances leading up to trial, during trial, and post trial (EXHIBIT F, 166-216). The information found in these letters were proven to be received by Thompson, and the information was never disputed by Thompson. Thompson's file of investigation as well as her entire case file shows two things for certain: (1) Thompson never responded to any of the information provided to her in Sunkett's letters, and (2) Thompson conducted almost no investigation in this case pertinent to establishing a meritorious defense (EXHIBIT G, p. 217-244; *and* EXHIBIT N, p. 266-356). The minimal investigation that had been conducted, these files will show, that Thompson did not begin necessary investigation until 3 weeks before the start of trial. Her failure to communicate with Sunkett and conduct the necessary investigation was practically the main reason Sunkett was found guilty in this case. As the jury stated in it's interview with the defense after trial, the main two reasons they came back with verdicts of guilt was (1) the identification evidence, and (2) the late arrival of the defense alibi witnesses (EXHIBIT E, p. 164-165).

Thompson failed to effectively challenge the eyewitness testimony and present a reasonable defense against it, and Thompson failed to investigate and call to trial the defense alibi witnesses in a timely manner despite having the witnesses information approximately 6 months before the start of trial. The remaining Exhibits in this case support every allegation the Petitioner makes herein, and Sunkett begs this court to give these documents of evidence careful consideration.

Conclusion.

The Petitioner prays that this court order an evidentiary hearing on Petitioner's ineffective assistance and due process claims and, thereafter, grant the petition for writ of habeas corpus. Thank you for your time and consideration.

Dated: April 29, 2016.

Respectfully submitted,

Mr. Glenn S. Sunkett (Petitioner)

(In Pro Per)

VERIFICATION

State of California

County of Kern

____

I, GLENN SUNKETT, DECLARE UNDER PENALTY OF PURJURY THAT I AM THE PETITIONER IN THE ABOVE ENTITLED ACTION. I HAVE READ THE FORGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY KNOWLEDGE EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION AND BELIEF AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 29th DAY OF APRIL, 2016 AT KERN VALLEY STATE PRISON, DELANO, CALIFORNIA 93216.

x.__________________________________ (declarant/petitioner)

SIGNATURE.

PROOF OF SERVICE BY MAIL

I, GLENN SUNKETT, AM A RESIDENT OF KERN VALLEY STATE PRISON, IN THE COUNTY OF KERN, STATE OF CALIFORNIA. I AM OVER EIGHTEEN (18) YEARS OF AGE AND AM/AM NOT A PARTY OF THE ABOVE ENTITLED ACTION. MY STATE PRISON ADRESS IS P.O. BOX 5102, DELANO, CA. 93216.

ON APRIL 29, 2016 I SERVED THE ATTACHED PETITIONER'S TRAVERSE TO ANSWER BY PLACING A TRUE COPY THEROF ENCLOSED IN A SEALED ENVELOPE IN THE U.S. MAIL COLLECTION SYSTEM ADDRESSED AS FOLLOWS:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

445 GOLDEN GATE AVE., SUITE

SAN FRANCISCO, CA. 94102.

I DECLARE UNDER PENALTY OF PURJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FORGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION WAS EXECUTED ON APRIL 29, 2016 IN DELANO, CALIFORNIA.

x.______________________________________ (declarant/petitioner)

SIGNATURE.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28