Mr. Glenn S. Sunkett
AF-1727
Kern Valley State Prison
P.O. Box 5102
Delano, Ca. 93216

In Propria Persona

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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| GLENN SUNKETT, (Petitioner/Appellant) vs. MARTIN BITER, (Warden/Respondent). | **District Court case no**. 14-cv-00069-RS<br><br>APPELLANT'S MOTION FOR CERTIFICATE OF APPEALABILITY. |

**To: <u>Motions</u> <u>Panel</u>**

**(Certificate of Appealability)**

## ISSUES ON WHICH CERTIFICATE OF APPEALABILITY IS SOUGHT.

The claims to be raised on appeal, which present substantial constitutional grounds upon which relief might be granted, are as follows:

**(1)** THE DISTRICT COURT WAS NOT PARTIAL IN IT'S REVIEW OF WHETHER THE TRIAL COURT'S DISCRETION PROHIBITING THE DEFENSE FROM INTRODUCING EXPERT EVIDENCE MID-TRIAL WAS SO UNFAIR THAT IT INFRINGED ON MR. SUNKETT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AGAINST THE KEY ELEMENT OF THE PROSECUTION'S CASE.

**(2)** THE DISTRICT COURT WAS NOT PARTIAL IN IT'S REVIEW OF WHETHER THE PUBLIC DEFENDER'S FAILURE TO INVESTIGATE AND TIMELY CALL TO TRIAL EXPERT WITNESS DR. DEBORAH DAVIS, CONSTITUTES INEFFECTIVENESS.

**(3)** THE DISTRICT COURT WAS NOT PARTIAL IN IT'S REVIEW OF WHETHER THE PUBLIC DEFENDER'S COMBINED DEFICIENCIES WERE SO UNFAVORABLE TO THE DEFENSE AND TRIAL OUTCOME THAT IT VIOLATED SUNKETT'S COSTITUTIONAL RIGHT TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL.

## TABLE OF CONTENTS

**SUPPORTING DOCUMENTS**



**TABLE OF AUTHORITIES**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GLENN SUNKETT. )<br>Petitioner/Appellant, )<br>vs. )<br>)<br>MARTIN BITER, )<br>Warden/ Respondent. )<br>_____ ) | DISTRICT COURT case No. C-14-00069 RS<br><br>APPLICATION FOR CERTIFICATE OF APPEALABILITY. |

Petitioner, GLENN SUNKETT files this application for a certificate of appealability pursuant to the provisions of Rules 4 and 22(b) of the Federal Rules of Appellate Procedure and pursuant to Ninth Circuit Rule 22-1. In support of this application, Sunkett shows:

I.

Petitioner is a state prisoner who filed an application for a writ of habeas corpus in the District Court for the Northern District of California on June 2, 2015.

II.

On December 6, 2016, the District Court entered a judgment denying the writ of habeas corpus with prejudice and adding that "A certificate of appealability will not issue," "Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals."

III.

On December 16, 2016, Sunkett filed a timely Notice of Appeal to the Northern District Court from the judgment of dismissal on three matters stated below.

IV.

On December 30, 2016, Sunkett filed a timely motion for reconsideration to the District Court, which the court has not responded to.

V.

Sunkett applied for a 30 day extension of time on December 29, 2016, in this Ninth Circut court. This court granted Sunkett's request on January 9, 2017, and gave him a due date of February 13, 2017. Now, pursuant to Rule 22, subd. (b) of the Federal Rules of Appellate Procedure and pursuant to Ninth Circuit Rule 22-1, Sunkett hereby submits his application for a certificate of appealability in this Court on February 10, 2017.

VI.

Issuance of a certificate of appealability is a jurisdictional prerequisite to appeal. See *Rios v. Garcia*, 390 F.3d 1082 (9th Cir. 2004); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003). If the district court denies a certificate of appealability, the proper recourse is for the petitioner to apply to the Court of Appeals for a certificate of appealability. Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts; Fed. R. App. P. 22(b).

For all the reasons stated below, Mr. Sunkett has made the requisite "substantial showing" that the denial of his claims is debatable among jurists and thus should be granted the right to appeal his substantive issues.

WHEREFORE, Petitioner prays that this Court issue a certificate of appealability, granting him leave to appeal the District Court's judgment.

Dated: January 30, 2017

By: _____

Mr. GLENN SUNKETT

In Propria Persona

## LEGAL STANDARD FOR ISSUANCE OF COA.

The Antiterrorism and Effective Death Penalty Act ("AEDPA")provides that, in order to take an appeal from a final order denying habeas corpus, a Certificate of Appealability must be obtained from a circuit justice or from the district court judge. 28 USC § 2253 ["Appeal"], subd. (c)(1). Application must be made in the first instance to the district judge. Rule 22(b), FRAP. In order to obtain a COA, the petitioner must make a "substantial showing of the denial of a constitutional right." 28 USC § 2253(c)(2).

As explained by the Ninth Circuit in *Jennings v. Woodford,* 290 F. 3d 1006 (9th Cir. 2002), the substantial showing standard required for a COA is "relatively low." The Supreme Court recognized in *Slack v. McDaniel* that the "substantial showing" standard for a COA is relatively low ... *Slack*, 529 U.S. at 483, 120 S.Ct. 1595. This standard, articulated in *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), permits appeal where petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further." *Jennings*, supra, at 1011 [emphasis added].

However, the standard for gaining permission to appeal does not equate with the standard for obtaining a writ of habeas corpus. A petitioner need not show he will prevail on the merits. Moreover, all doubts whether a petitioner has met the substantial showing standard will be resolved in petitioner's favor. *Ibid.* at 1025; See also *Valerio v. Crawford*, 306 F.3d 742, 767 (9th Cir. 2002).

In *Miller-El v. Cockrell*, the U.S. Supreme Court clarified the standards for issuance of a COA:

> [A] prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right."
>
> A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Id*. at 327. (Citing *Slack*, 529 U.S. at 484). Reduced to its essentials, the test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Id*. at 336 (citing *Slack*, 529 U.S. at 484.) This means that the petitioner does not have to prove that the district court was necessarily "wrong" – just that its resolution of the constitutional claim is "debatable.":

"We do not require petitioner to prove, before issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward. The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id*. at 338 (citing *Slack*, 529 U.S. at 484). Conflicting case law in another jurisdiction is sufficient to show debatability such that petitioner should be allowed full briefing. *Lambert* at 1025-26.

However, the petitioner need not show that he should prevail on the merits. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) [en banc] ["... [O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor."]. Rather, the petitioner is merely required to make the "modest" showing (*Lambright*, supra, at 1025) that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniesl*, 529 U.S. 473, 484 (2000).

In sum, a COA must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; (3) the questions raised are adequate enough to encourage the petitioner to proceed further. If, any one of these three apply, then "[t]he court must resolve doubts about the propriety of a COA in the petitioner's favor." *Jennings*, supra, citing *Lambright*, supra, at 1025.

## STATEMENT OF THE CASE

This case concerns a home invasion robbery that occurred on July 10, 2008.

On April 8, 2009, in the Mendocino County Superior Court of California, Glenn Sunkett, the Petitioner, was charged by information with four counts of first degree robbery of an inhabited dwelling while acting in concert with at least two other people (Pen. Code §§ 211, 212.5, 213 Subd. (a) (1) (A)-counts 1-4); Four counts of kidnapping (§ 207, Subd. (a) count 9); Two counts of making a criminal threat (§ 422-counts 10-11); Four counts of false imprisonment by violence (§ 236-counts 12-15); and one count of possession of a firearm by a felon (§ 12021, subd. (a) count 16). The information alleged, as to counts 1-8, that Petitioner

had personally used a firearm in the commission of the crimes (§ 12022.53, subd. (b)), and as to counts 5-15, that he had been armed with a firearm (§ 12022, subd. (a) (1)).

On June 30, 2009, a Jury convicted Petitioner of all charges and found all allegations true (4 CT 793-796, 5RT 1313-1322)

Marsden Motions were heard and denied in the trial court on September 30, 2009, October 23, 2009, January 8, 2010, January 22, 2010, and February 24, 2010. addressing Ineffective Assistance of Counsel claims alleged by Petitioner.

On October 15, 2010, the trial court denied Mr. Sunkett's Motion for a new trial as well as Mr. Sunkett's Habeas Petition. He was sentenced to 63 years in State Prison. On this same date, Mr. Sunkett filed a Notice of Appeal.

On October 25, 2010, Mr. Sunkett filed a Habeas Petition in the First Appellate District Court of Appeals In Propria Persona.

On September 28, 2013, the First Appellate Court affirmed judgment and denied Petitioner's direct appeal filed by appointed appellate counsel Mr. Roger Paul Curnow SB # 103660; as well as Petitioner's Writ of Habeas Corpus Petition filed In Pro Per.

On October 25, 2012, Petitioner filed a Petition for Review in the California Supreme Court.

On January 3, 2013, the California Supreme Court summarily denied Petitioner's Petition for review without giving opinion.

On January 6, 2014, the Petitioner filed a federal writ of habeas corpus in the Northern District Court of California. The court found the petition 'mixed' and GRANTED the Petitioner's motion for a Rhines stay to return to the State Court and exhaust arguments 1, 2, 8, 9, 10, 11, 12, and denied the defendant's motion to dismiss.

On March 25, 2015 the California Supreme Court summarily denied the habeas petition without opinion on the merits.

On July 20, 2015 the District Court dissolved the stay and ordered the Respondent to Answer the federal habeas petition.

On May 1, 2016 Petitioner filed a traverse to Respondent's answer and included 14 supporting exhibits.

On December 6, 2016 the District Court denied Petitioner's federal habeas corpus petition, and entered judgment on the same date. Also, in it's ruling, the District Court denied "sua sponte" a COA in the District Court.

On December 18, 2016 Petitioner filed a timely notice to appeal judgement in the District Court.

On December 30, 2016 Petitioner submitted a motion for reconsideration in the District Court on the grounds that the court was not partial in it's review and based it's ruling on evidence unsupported by the trial record.

Now, on this date of February 10, 2017, Petitioner timely files his COA inside the due date of February 13, 2017, extended to him by this Ninth Circuit court. Petitioner hereby asks this Appeals Court to review and ultimately grant his request for COA from the District Court judgement.

## STATEMENT OF FACTS

### A. Overview Trial/Appeal Facts.

With the exception of GPS evidence the previous reviewing courts consider in this case, Petitioner believes the District Court accurately excerpted the general facts of this case as recited by the Court of Appeal on direct review. However, quite a few additional facts were omitted. (See District Court Order, p. 1-9). First, in regard to the GPS evidence, both state and federal courts continue to consider evidence that does not exist. There is absolutely no evidence on or off the record that will show the GPS tracking device left the scene of the crime, and was tracked back to Sunkett's office/apartment 3 hours later, as the Appellate and District Court states in their rulings. This is an error that originated in the Appellate Court Opinion. The Appellate court offered no trial reference as to where this information came from. (See Appellate Court Opinion at p. 22). Yet, the state Supreme Court and federal District Court adopted this fictitious claim as fact, and continue to use this inaccurate evidence as a major reason for denying Petitioner relief. Petitioner has made several attempts to correct the courts by providing the GPS coordinates

entered by the People at trial. (See Fed. Habeas, EXHIBIT J, p.180-81). However, none of the reviewing courts have made any mention of their review of this evidence. Thus, their rulings stand uncorrected.

This evidence is important because had the tracking device left the crime scene and ended the night at Sunkett's residence, it could imply that Sunkett was in possession of the device and at the scene of the crime. The GPS coordinates could then corroborate the eyewitness identification, and strongly infer Petitioner is guilty, just as the state appeals courts and federal district court have implied in their rulings. **But this is not true**, and there is no evidence what-so-ever that can support their conclusions. Petitioner now hereby provides this Ninth Circuit Court the GPS coordinates from this case for review. (See herein EXHIBIT A, p. 66-69 )

Also, in it's Order, the District Court omitted several key facts found in the trial record such as: (1) the variety of complicating eyewitness factors the witnesses experienced during and after the crime, (2) the identifications provided by these witnesses conflicted with eachothers, (3) eyewitness Dusty Miller claimed to have seen the face of only one suspect, but marked the mugshots of several African American men of all shapes, sizes, and complexions as possibly being that one suspect she saw, (4) the witnesses were subjected to improperly conducted identification procedures as defined in P.C. 683.3 and 686.3, and in the CEB section 22.15.(5) the trial court itself found Miller's identification procedure to be "highly suggestive," (6) five other witnesses testified and described Petitioner differently than the victims had on the day of the crime, (7) significant portions of Petitioner's alibi were corroborated by scientific and computer generated evidence introduced by the prosecution, (8) Public Defender's own

investigator advised her to call a cross-race identification expert for trial, (9) Public Defender did not make herself available to conduct pretrial interviews with Petitioner until approximately 30 days before trial, and (10) the Public Defender testified and admitted to many of the allegations Petitioner alleges against her.

These omitted facts by the District court will be discussed in greater detail as they specifically apply to the arguments below.

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## ARGUMENTS SUPPORTING ISSUANCE OF THE COA

### I. WHETHER THE DISTRICT COURT DENIED PETITIONER THE RIGHT TO PUT ON A DEFENSE BY PROHIBITING EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION.

The District Court did not provide Petitioner a partial review on this issue when it failed to address nearly all of the trial court records, exhibits on habeas, scientific facts, and federal case law provided it on habeas supporting Petitioner's claim. Also, this issue specifically addresses (1) complicating eyewitness factors the eyewitnesses were subjected to that are widely known to cause a witness to misidentify a defendant, and (2) how this information, when

removed from a trial, lessens the jury 's abiliity to evaluate the identification evidence fairly. The District court simply ignored the core of Petitioner's argument. It failed to even acknowledge the presence of these factors in this case, and decide if expert testimony would have been needed to explain these issues to a jury. In fairness, the Court must determine whether factors such as erroneous, tainted and suggestive identification procedures, inaccuracies in the witnesses descriptions, fear, stress, weapons-focus, and poor lighting were topics that were relevant and complicated enough to warrant expert testimony, and if so, could that testimony have helped or hurt the jury understand what sort of impact these factors can have on human memory and perception.

Even more, aside from overlooking the main issues in Petitioner's argument, the District Court used fictitious GPS evidence as reason for denying Petitioner relief on this claim. As shown above, the GPS coordinates in this case do not support the District court' s statement of facts (See Exhibit A, p 66-69; also see trial Exhibits 42 A, B, and C). For these very reasons, any reasonable jurist could conclude that (1) the District Court's opinion was formed unfairly and without proper review of all facts, evidence, and case law brought before it, and (2) it's reasoning for denying Petitioner relief is unsupported by the evidence and federal law.

Thus far, none of the reviewing courts have acknowledged these complicating factors and abundant case studies that demonstrate the harmful effect they have on a witness's memory and perception, and a defendant’s trial. Being that witness identification was the central issue in this case, the reviewing courts should have atleast considered whether the presence of these factors, whether individually or cumulatively, could challenge the reliability of the identifications. These courts should have also considered and applied the guidelines controlling 'eyewitness

identification procedures and protocol' outlined in P.C. sections 804, 683.3, and 686.3, and the guidelines outlined in the CEB section 22.15. Cases such as *People v. Nation, Manson v. Brathwaite,* and *People v. Vu,* thoroughly discusses how specific factors can raise reliability issues in the identification of a defendant. Principles expressed in cases such as McDonald define and establish a fundamental defense in an ID driven case. In order to effectively get these principals across to a jury, the only viable option for a defendant to have any chance of taking on the ID's in court is to introduce expert testimony. The complicating factors and the underlying science controlling them is outside the realm of lay understanding and must require expert testimony to properly educate the jury on this complex information.

Because of Miller and Graves' in-court identifications, the only viable defense was mistaken identification. The trial court denied Petitioner the opportunity to use readily available expert testimony to make a reasonable showing that the identifications and their processes are unreliable and wrong. The introduction of this expert evidence was reasonable because the facts show (1) Graves' was subjected to an erroneous and tainted pretrial identification procedure (3RT 727-29, 4RT 859, 863, 7RT 1576), (2) Graves based his in court identification of Sunkett on generalized African-American features he believed Sunkett shared (2RT 393), (3) Miller's in-court identification was came after she was subjected to a highly suggestive and widely condemned pretrial identification procedure of which the trial court ultimately agreed was "highly suggestive" (7RT 1756), (4) both witnesses experienced stress fear, weapons focus, and poor lighting during the time of the crime (4RT 1084-89), (5) their original descriptions of suspect number one conflicted with each others, as well as Max Stover's (See discovery), (6) four other witnesses descriptions of Sunkett on the day of the crime were identical to Sunkett's

actual description and conflicted with Graves and Miller's descriptions (3RT 562, 599-601), (7) Miller claimed to have seen the face of only one suspect but marked several African-American suspects of all shapes, sizes and shades as possibly being that one suspect (See Discovery; also see 3RT 735-37), (8) after being kept under the spell of a suggestive identification procedure for 3 months heading into trial, Miller arrived at trial and was mysteriously able to identify Petitioner as well as evidence she was shown by email that she previously was unable to identify and had since been eliminated as items used in the crime (2RT 210-11, 250-22, 255, 306-311, 314), and (9) all other forensic and technological evidence in this case supported Petitioner's alibi (See fed. habeas Argument I, at p. 24).

## **Applicable Law**.

Petitioner understands that state and federal courts have broad discretion in excluding evidence from trials. (see *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). This discretion is not limited to expert evidence. *People v. McDonald* (1984) Although a trial court's decision whether to admit expert testimony is discretionary, an effective exercise of discretion requires accurate knowledge. (see *People v. Snow* (2003) 30 Cal. 4th 43, 70). Also, a court's discretion is limited by a defendant's constitutional right to due process and "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 319, 324 (2006). Petitioner was denied the opportunity to present the only evidence that could explain fallicies in eyewitness identification which are not going to be appearent to a lay jury, and demonstrate how identifications get tainted by police practices. (see *People v. McDonald*, supra, 37 Cal. 3d 351).

There are several procedural safeguards that exist to protect against the misidentification of suspects, such as the double-blind administration of photographic lineups. But many of these safeguards were not followed in Petitioner's case. As the field progresses, courts are learning just how vital photographic lineup safeguards are to fair prosecutions. Eyewitness misidentification is widely acknowledged as the "greatest cause of wrongful convictions." (*State v. Henderson* (2011) 208 N.J. 208, 231 (*Henderson*).) In *Henderson*, the New Jersey Supreme Court conducted an extensive survey of scientific studies of eyewitness identifications and memory. The court initiated and largely adopted a Special Master's report that evaluated "scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." (*Id.* at pp. 217-218.)

There are several "estimator variables" or factors peculiar to the circumstances of the crime that can affect the reliability of witness identifications. (*Henderson*, supra, 208 N.J. at pp. 261-273.) These types of factors have long been taken into consideration in California courts and include such things as the witness's degree of stress, the ability of the witness to observe the suspect, and the problems involved in cross-racial identifications. (*Ibid.*, see also CALCRIM No. 315 [factors a jury can consider when evaluating eyewitness testimony].). But more importantly, when it comes to due process considerations, there are "system variables," which can also greatly affect the reliability of eyewitness identifications. These are factors that are entirely within the control of law enforcement, such as how lineups are constructed and how identification procedures are conducted. (*Henderson*, supra, 208 N.J. at pp. 248-261.) The manner in which a photo lineup is constructed can affect the reliability of a witness' identification. (See *People v.*

*Johnson* (2010) 183 Cal.App.4th 253, 272; *People v. Cook* (2007) 40 Cal.4th 1334, 1355). The court in Henderson summarized several guidelines that law enforcement generally follow in order to construct a fair lineup. (*Id*. at pp. 251-262; fillers, look-a-likes, ect..) Law enforcement in Petitioner's case violated all of the modern basic principles noted above that exist to ensure the reliability of eyewitness identifications. These systemic violations, which occurred from the outset of detective Van Pattens investigation, were so "impermissibly suggestive" that, when judged in the totality of the surrounding circumstances, there was a very substantial likelihood of a tainted misidentification at trial and ultimately a violation of Petitioner's due process rights. The lack of double-blind or blind administration alone can render the identification unreliable. If the administrator of the lineup is familiar with the suspect, the location of the suspect's photo in the lineup can be communicated to the witnesses either "consciously or subconsciously." An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is." (*Id.* at p. 249.) Also, other factors that law enforcement must protect against but failed to do in this case are giving witnesses confirmatory feedback, and successive views of one person. Only an expert could have helped the defense explain everything detective Van Patten did wrong in procuring a reliable identification.

In review, the trial court, state appellate courts, and district court did not evaluate whether the complicating factors experienced by the witness, during and after the crime, contributed to the identifications made by the witness, or suggest that the witness suffered no psychological defects from these factors. Also, the courts did not suggest that the introduction of such evidence would invade the province of the jury, confuse the jury, imply that eyewitness identification testimony is not scientific enough to be admissible, or that this information was

inside the realm of lay understanding. The courts also gave no suggestion as to any other alternative the defense had to get the principals expressed in *McDonald* across to a jury without using an expert. The trial court's decision to exclude Dr. Davis' testimony was prejudicial to the defense because it was based more on lateness, rather than whether or not the expert's testimony was significant to the jury's understanding the facts (5 RT 1089-1090)

In *People v. McDonald* (1984) 37 Cal. 3d 351, 365-369, the California Supreme Court acknowledged that scholarly research has uncovered a set of psychological principals concerning eyewitness identifications and that the information was a proper subject for expert testimony. The Supreme Court observed that the body of information available on psychological factors bearing on eyewitness identification was "'sufficiently beyond common experience' and that in appropriate cases, expert opinion could at least "assist the trier of fact'" (Id. At p. 369, fn. Omitted.) The court also held that, in appropriate cases, exclusion of expert testimony concerning eyewitness identification would constitute error (Id. At p. 377). The court stressed that, "[w]hen an eyewitness identification of the Defendant is a key element of the Prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the Defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (also see *Ake v. Oklahoma*, 470 U.S. 68, 82-83, 105 S.Ct. 1087, 1096, 84 L. Ed 2d 53, 66 (1985).

Since this court's decision, expert testimony on factors affecting the reliability of eyewitness identifications IS ADMISSABLE in cases, where "eyewitness identification of the Defendant is a key element of the Prosecution's case." (Id. At p. 377; see also, *People v. Harlan*

(1990) 222 Cal. App. 3d 439, 453, (where the court indicates that this is the "preferred approach.")). Courts in other jurisdictions have also recognized that eyewitness expert testimony should be admissible because the body of information available on eyewitness identification is sufficiently beyond common experience and can assist the trier of fact (*People v. Mendoza* 4 p. 3d 265 (Cal. 2000). See also *State v. Dubray*, 77 p. 3d 247, 255 (Mont. 2003); *United States v. Stevens*, 935 F. 2d 1380, 1401 (3rd Cir. 1991); *United States v. Smithers*, 212 F. 3d 306 (6th Cir. 2000); *United States v. Moore*, 786 F. 2d 1308, 1313 (5th Cir. 1986). As well, a criminal Defendant "has the right to present a defense, which includes both his version of the facts and the testimony of witnesses."(*People v. McCowen* (1986) 182 Cal. App. 3d 1, 13 citing Washington v. Texas (1967) 388 U.S. 14, 19 ["This right Is a fundamental element of due process of law"]). In McDonald, the California Supreme Court held that the trial court had prejudicially abused it's discretion by entirely excluding expert testimony on the psychological factors affecting the accuracy of eyewitness identification. The court reasoned that this was a matter beyond common experience, and expert testimony on the subject could assist the trier of fact. (*People v. McDonald*, supra at p. 369), (see also *People v. Vu* (1991) 227 Cal. App. 3d 810, 814 [error to exclude expert testimony on how factors such as stress may have affected the Defendant's eyewitness perceptions].).

Expert testimony is the <u>only</u> legal safe guard that is effective in sensitizing jurors to complicating eyewitness factors. Hence, expert testimony should be presumptively admissible in regard to any factor that affects the reliability of eyewitness identification if the proponent of the evidence establishes relevancy and proper qualification of the witness. Courts should not prevent

experts from explaining the underlying science or applying that science to the identification and identification procedures employed in a given case.

However, in *People v. Sanders* (1995) 11 Cal. 4th 475 the court held the exclusion of expert testimony because (1) the eyewitness had been cross-examined concerning the accuracy and reliability of their identifications; (2) Defense Counsel during closing argument emphasized the various factors that tended to undermine the accuracy and reliability of the identifications; (3) the identifications were corroborated; (4) the Defendant offered no alibi (Id. At p. 510).

In *People v. Jones* (2003) 30 Cal. 4th 1084, the court similarly upheld the exclusion of expert testimony because there was other evidence that substantially corroborated the eyewitness identification (Id. At p. 1112). In particular, five witnesses corroborated the eyewitness identification. The court acknowledged that all five witnesses were impeachable due to bias and their prior inconsistent statements; and noted that three of them were also accomplices to the crime, whose testimony itself needed to be corroborated (Ibid).

But in the instant case, unlike in either *Sanders* or *Jones*, the Petitioner did provide an alibi through his own testimony and moreover, described how the crime must have occurred by another's agency. GPS records, hotel records, bank records, email records, latent print analysis, two prosecution witnesses and three defense witnesses corroborated his alibi and/or physical appearance, and the defendant was unknown to all people involved.

Since trial Counsel Thompson did not engage expert witness Dr. Davis at the beginning of trial, the trial court's ruling ensured that the jury would NEVER hear scientific evidence supporting the defense. Petitioner's only hope for acquittal now was that the jury not believe Miller and/or Graves. Yet, as case studies brought before the trial court had shown, juries tend to

believe witness identification where there is no expert evidence presented to explain how the identifications could have been made in error. This is critical to a juries evaluation of the identification evidence because this same science demonstrates that what jurors commonly believe about identification is actually not true, and what they think is significant about a witness' identification is not important at all. For example, the certainty expressed in a witness's identification in court, which jurors heavily rely on, actually is of no importance at all since the certainty comes from having the defendant sitting there. These same case studies also go on to explain how and why juries almost always fail to consider complicating eyewitness factors that are known to cause misidentification.

The trial court's ruling effectively denied Petitioner a reasonable opportunity to explain these principles to the jury, leaving them without means to properly evaluate the accuracy of the identifications of Miller and Graves. If their identifications were not reliable, it means that Petitioner was wrongfully convicted. Only expert testimony could have informed the jury of the psychological dynamics of the identification and it's processes experienced by the witnesses. This jury had to make it's decision without the benefit of the necessary expertise and historical research covering these factors. If presented, any reasonable jurist could find that such science could make a juror reasonably doubt the reliability of the eyewitness identifications.

To that, prejudice occurs from the erroneous exclusion of expert testimony only if it is reasonably probable that a Defendant would have obtained a more favorable result had the error not occurred (*People v. Sanders*, Supra, 11 Cal. App. 4th 1248, 1266). Here, it cannot be said that this error was harmless and had no affect on the Petitioner's right to present a defense because the only evidence the Petitioner could present that could properly explain fallicies in

eyewitness identification that are outside the realm of lay understanding was prohibited. The need and significance of this evidence was illuminated when defense investigator Mr. William Kidd interviewed a juror immediately after trial and the juror stated that the identification evidence was the key in their decision to vote guilty. (see *Chapman v. California* (1967) 386 U.S. 18, 24, *Conde v. Henry* (9th circ. 1999) 198 F. 3d 734, 740-741). Because the court excluded this expert evidence, Petitioner was unable to put together a plausible defense against the identification evidence and make the case of mistaken identification.

## **Elements of Prima Facie Case.**

The District Court unreasonably determined the facts under 18 U.S.C. § 2254(d)(2) when it denied this claim after Petitioner set forth a prima facie case for relief. (See District Court's Order at p. 10-13 ). Petitioner made a reasonable showing that the trial court's descretion to prohibit eyewitness expert testimony infringed on his constitutional right to present a defense against the central issue of this case. Petitioner submitted Dr. Deborah Davis' cirriculum vitae, her signed declaration, court records, case law, and other documentary evidence to support this claim. Assuming the declaration to be true (see *Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1402 n.12 (2011), nothing more was required for a prima facie case).

> "Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects the court's determination that 'the claims made in th[e] petition do not state a prima facie case entitling petitioner to relief."

*Pinholster*, 131 S.Ct. at 1402 n 12 (quoting *In re Clark*, 5 Cal.4th 750, 770 (1993). The California Supreme Court summarily denied this claim and did not grant Petitioner's request for an evidentiary hearing, and the District Court failed to correct the error.

Had the District Court determined that the California Supreme Court's denial of this claim was unreasonable, the court would have been obligated to conduct a *de novo* review to determine whether the trial court's discretion to prohibit eyewitness expert testimony was unfair. (*See Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004) ("When we determine that the state-court fact-finding is unreasonable, ... we have an obligation to set those findings aside and, if necessary, make new findings.") *see also Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842 (2007)(declining to apply AEDPA deference when state court made unreasonable determination of law under 28 U.S.C. § 2254(d)(1)).

Had the district court found, as it should have, that the California Supreme Court's summary denial of this claim to be objectively unreasonable and not entitled to AEDPA deference, the court would have determined to conduct an evidentiary hearing. See *Pinholster*, 131 S.Ct. at 1399-1400 (indicating that, while "evidentiary hearing may be proper where § 2254(d) does not preclude habeas relief); *Richter*, 131 S.Ct. at 785-786 (where petitioner satisfies § 2254(d), claim may be relitigated in federal court); *Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9thCir. 2011)(where state court decision not entitled to AEDPA deference, even after *Pinholster* it was still proper for district court to hold evidentiary); *see also Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005)(evidentiary "hearing is required if: '(1) [the defendant] has alleged facts that, if

proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts'")(quoting *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004)).

It is fair to state that a reasonable jurists could agree that there was no reasonable basis for the California Supreme Court to summarily deny this claim by finding petitioner failed to make a prima facie case. *See Pinholster*, 131 S.Ct. at 1402 ("where there has been a summary denial, petitioner satisfies § 2254 by showing 'there was no reasonable basis' for the California Supreme Court's decision")(quoting *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 784 (2011).

Eyewitness expert testimony was the only evidence available to the defense that could properly explain fallibility in eyewitness identification to the jury, and how eyewitness identification gets tainted from suggestive police practices. Petitioner offers the following facts to support a prima facie case that introducing cross-race identification expert testimony was a reasonable request, vital to the defense, yet, unfairly prohibited by the trial court:

- Witness Matthew Graves identified Petitioner in a non-blind pretrial photo procedure, then again at trial as being a perpetrator in this crime. However, according to the CEB section 12.15 and penal code section 683.3 and 686.3, the pretrial identification procedure law enforcement conducted on Graves was unlawful and flawed. The result, at trial, Graves gave a disturbingly broad and generalized explanation as to how he was able to make such a positive identification of Petitioner. Graves stated he identified Sunkett in court by "Negriod features" he believed Sunkett exhibited, "there's no--anything caucasoid" about him. He added that he recognized Sunkett by his "standard squared,

isocephalic skull shape." (2 RT 393). There is nothing personal or distinctive in Graves' identification of Petitioner. Graves also testified to experiencing fear and weapons focus. (2RT 357).

- Dusty Miller was given the same non-blind pretrial photo lineup as Graves. Then, 5 days before the start of trial, counsel Lynda Thompson received late discovery from the District Attorney's office. Prosecution witness Dusty Miller, who had not yet identified Petitioner as a perpetrator, had been sent an email from lead Detective Gregory Van Patten containing two SINGULAR booking photos of the Petitioner, his name, pictures of suggestive evidence seized from his office, and a statement informing Miller that Petitioner was the individual arrested and held to answer to all charges in this case. (See trial Exhibits LL, MM, NN, OO, PP.) Miller possessed and was held under the spell of Sunkett's singular photos, the pictures of evidence seized, and his arrest information for three months leading into trial. At trial, Miller was suddenly able to provide the court with a positive identification of Sunkett based on his "demeanor." (2RT 252). Miller also testified to experiencing fear and weapons focus. (2RT 212).

- Deborah Davis is a professor of psychology at the University of Nevada in Reno, Nevada, and is accepted as an expert witness in courtrooms across America (See Exhibit A-in federal writ of habeas corpus, pgs. 147-: Dr. Davis' Declaration). Dr. Davis was present at trial and provided the court with her 180 page curriculum vitae, expressing her extensive knowledge and expertise on complicating factors eyewitnesses experience

during and after crimes t widely known to cause false identifications of defendants (see EXHIBIT B attached to fed. hebeas, p 108-135; Dr. Deborah Davis' curriculum vitae). Her field of studies and expertise in factors relevant to this case are suggestive identification, cross-race identification, tainted and erroneously conducted identification procedures, and conflicting descriptions of defendants, as well as poor lighting, stress, fear, and weapons focus experienced by the eyewitness at the time of the crime.

- Mid trial on June 29, 2009, in light of these identifications being the key element of the people's case, trial counsel Lynda Thompson attempted to introduce eyewitness expert Dr. Davis by way of a 402 hearing to properly educate the jury on specific complicating factors experienced by these witnesses widely known to greatly diminish the reliability of an eyewitness's memory and perception. Outside the presence of the jury, Thompson addressed the trial court stating:

"I believe that the case of PEOPLE V. MCDONALD at 37 Cal. 3d 351, specifically at 361 through 372, provides the reasoning behind the court exercising it's discretion to consider this, because the information that would be provided by this expert is outside the realm of lay understanding.

I think it is imperative in light of the fact that there is cross-racial I.D., that some of the misconceptions about eyewitness identification be illuminated by the doctor based upon scientific study. And I think it's imperative, now that I have finally been able to get this person even here, that we be allowed to do this."

(5 RT 1084-1085, 1088-1089)

- After hearing argument from both sides on the matter, the court noted that the identification evidence was not new to counsel, the jury was told that the trial would last approximately two weeks, CALCRIM 315 would be given to the jury, and if defense's request was granted then a continuance would be granted to the People to locate counter evidence. In ruling, the court stated:

"Given the lateness of the hour and weighing the potential probative value of that evidence versus the evidence that has been presented, relevancy, et cetera, at this point I find that it's late and I'm not going to permit it."

(5 RT 1090)

- However, after trial in seperate ruling, the trial court found that the identification procedure law enforcement used on Dusty Miller was "indeed suggestive," but failed to find it prejudicial. (7RT 1756).

A cross-race identification expert's testimony was the only evidence the defense could introduce that could explain (a) the impact complicating factors have on a witnesses memory and perception, (b) why Graves' in-court identification of Petitioner based on his standard "negroid features," and Miller's identification based on Petitioner's "demeanor are unreliable, and (c)

explain how their identifications were likely influenced by the non-blind, tainted and suggestive identification procedure employed upon them by detective Gregg VanPatten. The District Court's decision to prohibit this evidence was uninformed, and it failed to consider that the body of information available on eyewitness identification is sufficiently beyond common experience, and this expert's testimony would have assisted the trier of fact to fairly evaluate the identification evidence.

## **Rebuttal to the District Court**

The District Court simply adopted the Appellate Court Opinion that the Trial Court's denial of eyewitness expert testimony was reasonable because:

**1).** The decision to allow expert testimony lies within the discretion of the trial court (see Appellate Court Opinion at p. 20; and District Court Order at p. 12).

Petitioner's Rebuttal:

As stated above, Petitioner agrees that the decision to allow expert testimony lies within the discretion of the trial court (*People v. McDonald*, 37Cal. 3d 351, 377 (1984)). But the Petitioner contends that an effective exercise of discretion 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). There is no evidence to support that the trial

court educated itself to these issues before prohibiting the Petitioner from introducing this evidence to support the defense.

Additionally, all rulings by the trial court, state appellate courts, and the federal district court fails to mention (a) the many complicating factors found in this case widely known to be key contributors to false identifications of defendants, (b) how and/or if these factors are relevant in this case, (c) if this information could have assisted the trier of fact, (d) whether the eyewitness did or did not experience any psychological factors prior to providing the identification, (e) whether there was anything suggestive or wrong about the identification process conducted by law enforcement, (f) whether the expert's testimony would invade the province of the jury, (g) whether the expert evidence would have confused the jury, and (h) whether the court believed that eyewitness expert evidence is not scientific enough to be admissible.

For these reasons, the trial court's discretion to prohibit expert Dr. Davis' testimony was unreasonable. The trial court did not have full knowledge and understanding of the facts pertaining to this issue when it failed to read the science provided it in Dr. Davis' curriculum vitae before excluding this expert's testimony on account it was "late."

**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 District Court Order at p. 10-11).

Petitioner's Rebuttal:

The court's finding is debatable and demonstrates exactly why expert testimony was extremely vital to Petitioner's defense.

First, it's been scientifically proven long ago that the 'certainty' expressed in a witnesses identification has very little to no validity in cases where stress, fear, weapons focus, and a suggestive and/or flawed identification process precludes the identification of a defendant of a different race than the witness. Had the trial and appellate courts reviewed Dr. Davis' curriculum vitae, they would have found that, based on professional studies, instructing a jury to consider such a 'certainty' factor under these circumstances is extremely prejudicial to a defendant, especially without having expert evidence to educate the jury on it's historical fallibility. (see EXHIBIT C, in fed. habeas, 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 erred in finding that "..Graves expressed absolutely no doubt about his identification of Sunkett as the first intruder." There is absolutely no pretrial record in discovery or otherwise showing Graves identified Petitioner as the first intruder at the photo confrontation; only as one of the three intruders. What specific suspect and the role Graves stated Petitioner played did not come about until one year later at trial. So this does not corroberate any "certainty."

Third, Miller stated "based on his appearance, his demeanor, it's him." This 'certainty' expressed by Miller is just as concerning because her identification was based on the "demeanor" of a quietly seated defendant, and not by any distinctive physical characteristic a positive identification would normally warrant. Demeanor is defined as "behavior towards others;

outward manner." In a courtroom, comparing an unknown defendant's demeanor to another's for identification purposes would at least require some form of personal in-court interaction with that defendant before the comparer could be "certain" in it's identification.

**3).** Other corroborating evidence such as the GPS, gave the identifications independent reliability (see Appellate Court Opinion at p. 21-22; and District Court Order at p. 11).

Petitioner's Rebuttal:

Again, there is absolutely no evidence that will show the GPS 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." (See trial Exhibits 42 A, B, and C). This is a blatant error in facts first introduced to the record by the Appellate Court who then offered no trial record to establish where this information came from. Yet, every reviewing court since has adopted and used this error as a key reason to deny Petitioner relief. The court's analysis is wrong therefore the GPS can not be deemed 'substantially' corroborating evidence based on this fact. (see EXHIBIT A p. 75-78) (also see Petitioner's federal habeas EXHIBIT J, at p. 180-181; GPS COORDINATES, starting and stopping points).

Second, Sunkett has always admitted that he traveled to Fort Bragg regularly as a purchaser of large quantities of marijuana, and claimed all hotel rentals purchased there. He also never denied that he was there in the city on the date the crime occurred. But his merely being in the 'city' of which the crime occurred is not "substantially" corroborating evidence.

Third, none of the items seized from Sunkett's apartment were directly linked to the crime or positively identified by the witnesses. Although, several items were described by witnesses as being similar in some form, some of the items were not identified at all. Also, the gun seized from Petitioner's office was taken from another detained person's possession and could not be directly linked to Petitioner. As well, none of these items, such as tape, black tactical pants, and flashlights can be said to be "substantially corroborating" without any of them being positively identified by the witnesses or found to be directly linked to the crime by law enforcement. (See Graph of Evidence inside Petitioner's federal traverse at pgs. 14-20). For example, witnesses testified that the tape used in this case originated from, and was found at the crime scene (5RT 1266). Yet, the reviewing courts continue to use the tape found at Petitioner's office as a "substantially" corroborating piece of evidence to support the identifications.

**4).** Petitioner's alibi was weak, and his defense witnesses testimony was late and unreliable (see Appellate Court Opinion at p. 22-23; and District Court Order at p. 11).

Petitioner's Rebuttal:

The District Court's opinion is unfair because (a) Petitioner's alibi was corroborated by forensic and technological evidence introduced by the prosecution, (b) aside from the identification, the prosecution did not show that Petitioner's alibi conflicted with this evidence, and (c) Petitioner made a prima facia case on habeas proving that the late appearance of Petitioner's two primary defense witnesses was the fault of his trial counsel's own negligence and trial preparation. (See fed. habeas at p. 138-149). This is important because the jury found that

these two alibi witnesses were not credible given their late appearances. (see EXHIBIT E on federal habeas, p. 164-165; Jurors' post-trial interview with the defense).

The Appellate Court opinion was that Sunkett's testimony was "riddled with unlikely coincidences and inconsistencies," Yet it offered no further commentary or provided an example drawn from the record to show how it came to such a conclusion. Especially being the trial record offers very reliable evidence in GPS, hotel, bank, and email records that supports Sunkett's alibi. (See trial Exhibits 42 A, B, and C-GPS records; Exhibits 44, and 47-hotel records; Exhibits 50, 51, 52-bank records; and Exhibits KK, and EE-Yahoo email records).

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

Petitioner's Rebuttal:

As previously stated, the late introduction of eyewitness expert Dr. Davis was trial counsel error, and beyond Petitioner's own control. Yet aside from that, although late, the trial court still had an obligation to carefully consider whether the information the expert would cover lies outside the realm of lay understanding, and if the expert's testimony could assist the jury in properly evaluating the facts.

However, if the court finds that the trial court used proper discretion in rejecting this evidence due to it being "late," then the court must seriously consider whether trial counsel was ineffective for the late introduction.

**6).** 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).

Petitioner's Rebuttal:

Trial counsel's closing argument was not sufficient in challenging both Graves' and Miller's identifications. In closing, trial counsel Thompson attempted to make the defense of mistaken identity based on psychological factors known to cause misidentification. Thompson is a lay cross examiner untrained in the field of eyewitness identification. Without testimony from a scientific expert to explain the connection between complicating factors and mistaken identification, juries tend to perceive that eyewitness testimony must be correct. Without this available information coming from an expert along with it's supporting case studies, counsel's tactical defense of mistaken identification is merely her own opinion. The exclusion of this expert's testimony lessened the credibility of the defense. In closing, counsel did not show nor prove that the defense presented was valid and had legal, psychological, and scientific support.

**7).** 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).

Petitioner Rebuttal:

CALCRIM 315 which instructs juror's to consider an eyewitness's certainty, is outdated and highly prejudicial. As the research demonstrates in Exhibit C at p. 186 attached to fed.

traverse 136-159, there is overwhelming science that proves that the 'certainty' expressed in an eyewitness's identification of a defendant has very little to no validity in cases where complicating factors preceed a witness's identification of a defendant. Although counsel failed to object to this instruction, 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 (a) the certainty expressed in a witness's identification, and (b) identifications made by witnesses of a different race as the defendant.

**8).** The exclusion of the identification expert was harmless error; and Petitioner has not shown prejudice. (see Appellate Court Opinion at p. 24-25; and District Court Order at p. 12).

Petitioner Rebuttal:

The defense in this case was mistaken identification. The jury was never educated to, nor given the opportunity to consider any of the scientific evidence showing how factors found in Petitioner's case are widely known to cause mistaken identification. The trial record reflects Miller and Graves were overcome with fear, stress, weapons focus, and poor lighting during the crime, and were subjected to erroneous, tainted, and suggestive identification processes afterward. At trial, both gave a rather generalized and highly questionable in-court identification of the Petitioner. An eyewitness identification expert is the only credible evidence that could have helped the defense explain to the jury how the factors listed above birthed these false identifications. The court's exclusion of this expert was prejudicial because it removed the only legal and scientific evidence Petitioner could have possibly presented to support his case how

mistaken identification occurred in this case. Without it, the defense had no substance. As a result, the jury's decision to vote guilty was largely based on the identification evidence. (see Traverse, EXHIBIT E, p 164-165; juror interview). However if this court finds the trial court's discretion to exclude this evidence due to lateness was proper, then this court must determine whether the "late" introduction of this evidence was trial counsel error.

## II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN: (A) FAILING TO INVESTIGATE, TIMELY RETAIN, AND CALL AN EYEWITNESS EXPERT; (B) FAILING TO COMPETENTLY ESTABLISH AN ALIBI; AND (C) FAILING TO PRESENT READILY AVAILABLE EXCULPATORY EVIDENCE.

The District Court's review of the issues on habeas was not partial because the court failed to consider any of the relevant exhibits, trial records, case law, and trial counsel's own admissions supporting Petitioner's claim that counsel was ineffective. The District Court's denial was issued without proper review of all facts and evidence brought before it, and it's conclusion is unsupported by trial evidence and federal law. Also, the district court erred in failing to find that the California state appellate courts unreasonably determined the law under 18 U.S.C. § 2254(d)(1) by denying Petitioner's claim that trial counsel was constitutionally ineffective for failing to investigate and timely call to trial eyewitness expert Dr. Deborah Davis, failing to

competently establish an alibi, and failing to present exculpatory evidence, for the following reasons:

(1). It has been held constitutionally ineffective assistance of counsel under *Strickland* to not adequately investigate and/or argue defenses where it is "reasonably probable" that but for counsel's errors, the balance would have tilted in favor of the defendant (*Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987); *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993); *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001); *Miller v. Anderson*, 255 F.3d 455 (7th cir. 2001).

As a tactical choice, Public defender Lynda Thompson put on a scientifically driven defense of mistaken identity being that Graves pre-trial identification was the central issue of this case. Thompson was aware of this identification immediately upon her appointment of this case. Any reasonable defense attorney would agree that the most viable defense would be to prove that the witness ID is unreliable. Therefore, from the beginning, 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 *Arias*, 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."].)

(2). The trial court ordered Thompson to turn over her entire case file and investigative notes to the court upon her relief from this case on March 3, 2010. The entire file was then turned over to Sunkett's new appointed attorney Mr. David Eyster, who's office then made a matrix of her files (see trav. Exhibit G p. 217-244, Matrix of files and declaration for Custodian of records). Thompson's own notes show that she practically started work on this case one month before the

start of trial (see traverse, Exhibit N p. 266-356, Thompson's complete file of investigative notes; also see federal habeas, Exhibits A-G, pgs. 148-175, Affidavits signed by witnesses contacted by phone in this case; and Exhibit I p. 178-179, Aziza Washington phone interview). Petitioner's pretrial letters found in these files are proof of two things, (a) that Thompson did not make herself available to interview Petitioner until one month before the start of trial, and (b) that she failed to contact various alibi witnesses Petitioner provided her with 6 months prior to that (See trav., Exhibit F p. 166-216, Sunkett's letters to Thompson). Jail visitation logs, personal emails between Thompson and Kidd, and the lack of any phone record or any mail correspondence from Thompson to Petitioner also supports this claim (Exhibit H p. 245-247, jail visting records; Exhibits L-M pgs. 262-265, e-mails between Thompson and Kidd). Thompson's own investigative notes also show that she ignored all of Petitioner's letters and phone calls throughout the entire pretrial process. (see EXHIBIT G, p. 217-244; Complete Matrix of all Documents found in Thompson's case file, and Declarations signed by the law office employees that constructed it). Even more, Thompson admitted to not reading any of Sunkett's many letters nor documenting any of his phone calls made to her office. (7 RT 1644-45, 1649-50). All evidence supports Thompson did not fulfill her obligation to confer with Sunkett without undue delay and as often as necessary to elicit all matters of defense prior to trial (*Coles v. Peyton* (4th Cir. 1968) 389 F. 2d 224, 226).

Additionally, trial counsel Thompson had an ethical obligation and professional duty to investigate all possible defenses of fact and law favorable to Petitioner's defense. Only then can Thompson make sound tactical decisions on his behalf. Her failure to interview and call to trial available material witness Alan Gordon whose testimony was admissible results in the

withdrawal of a crucial element of defense. The need to investigate and call to trial favorable witnesses for Petitioner was extremely necessary if counsel was to present the most effective defense at trial. (*Baylor v. Estelle* (9th Cir. 1996) 94 F. 3d 1321; see also *Sanders v. Ratelle* (9th Cir. 1994) 212 F. 3d 1446).

(3). It normally constitutes error when counsel fails to present available exculpatory evidence expressing a possibility of a defendant's innocence. (*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]. Thompson failed to introduce an audio recording and a coded letter given to her by the District Attorney's office produced by possible suspects in this crime expressing Sunkett's innocence (7RT 1671-74).

If given a partial review, all records will show that Thompson was given the names and contact information pretrial of available witnesses required to establish Petitioner's alibi and defense, and had evidence in her possession from the beginning of her appointment that she never investigated and brought to trial that supported Petitioner's innocence.

## **Applicable Law.**

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].

However, 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 absolutely no evidence in the record, including Thompson's own testimony and case files, that will show that Thompson conducted any investigation into her tactical defense that psychologically complicating eyewitness factors influenced the witnesses to falsely identify Petitioner. Any finding made otherwise is fundamentally flawed because the court would then be ignoring the main principal here, that an attorney's strategy is only as reasonable as it's investigation. No investigation, no strategy. Also, the court cannot find that calling the expert for the defense would have undermined anything that Thompson was doing or attempting to do to effectively defend Petitioner, because she was already attempting to present a defense based on scientific facts. It would be unfair to simply characterize a decision made by trial counsel as a "trial strategy" or a "tactic" merely to validate counsel's performance. Although, federal law does state, a "trial strategy" or "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."].

Further, Thompson's case file and investigative notes are the best evidence of Thompson's deficient performance cumulatively. There are no significant pretrial records found in these files that could show that Thompson did anything more than just show up for court appearances. There are hardly any pretrial notes that can show that Thompson conducted a sufficient investigation into Petitioner's defense. The absence of investigation is key here because Thompson had an ample amount of time to interview witnesses, investigate their stories, and attempt to obtain corroborating evidence supporting their testimony, but she simply neglected to

do so. She also had an opportunity to provide the jury with exculpatory evidence demonstrating Petitioner's innocence, but she admitted to failing to investigate that as well (7RT 1674-75). Thompson's unavailability to the Petitioner pretrial, contributed to her lackluster investigation. These deficiencies combined removed a great deal of substance and facts from the defense. The court must acknowledge that Thompson's investigation itself must be reasonable before she can make "tactical decisions" based on that investigation. (*Wiggins v. Smith,* 539 U.S. 510, 523-24 (2003).

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 made." 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).

**Elements of Prima Facie Case.**

The District Court erred in failing to find that the California Supreme Court unreasonably determined the facts under 18 U.S.C. § 2254(d)(2) when it summarily denied Petitioner's state habeas petition after he set forth a prima facie case for relief. Petitioner made a reasonable showing that (a) trial counsel was in ineffective for failing to investigate and timely call to trial expert testimony, (b) trial counsel failed to competently establish Petitioner's alibi, and (c) trial counsel failed to investigate and present readily available exculpatory evidence. Petitioner offers the following facts to support this claim:

## **(A)** Deficient Performance.

- Trial counsel Thompson provided testimony at Petitioner's motion for a new trial hearing and was questioned by defense attorney Mr. David Eyster. Thompson admitted that she was aware of Graves' identification since the beginning of her appointment. (7RT 1639). Thompson stated that she knew early on that the witnesses had "discrepancies in their physical descriptions that did not match Mr. Sunkett." (7RT 1639). She stated that she "knew there was always an issue of cross-racial" identification, and that the identification process which birthed the identification was tainted" and "suggestive".

(7RT 1640, 1662). Thompson told the court that she was "well aware" of experts and case studies that could explain to a jury how various complicating factors she observed in this case are found to be "highly prejudicial to a defendant in an identification case." (7RT 1641,1662-66). Thompson also explained how 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 1645-46). Thompson was then asked whether she at least filed any motion to suppress or common law motion to attack the taint or influence she believed the identification process and these psychological factors would have on the identification, Thompson stated "I did not file a motion to suppress, whether statutory or non-statutory motion." (7RT 1663-64).

- Eyster asked Thompson had she herself conducted any investigation or ordered her investigator to investigate any of this information she'd just described to the court, whether "on her own" or with help from an expert, Thompson admitted that she "did not." (7RT 1641, 1645, 1655), (see *Wiggins v. Smith*, 539 U.S. 510, 527-528 (2002)).

- Six months before trial started, Petitioner made a formal request to Thompson on January 29, 2009, to investigate and retain a cross-race identification expert for trial to help attack the discrepancies in the witnesses identifications, the tainted identification processes Miller and Graves were subjected to, and cross-race identification issues. Thompson admitted to receiving this letter on February 2, 2009. (7RT 1644-45) (also see

Traverse, Exhibit F, p. 171-172; Sunkett's January 29, 2009 hand-written letter to Thompson). Thompson then admitted that she did not read this letter. (7RT 1644-45).

- Around this same time, Thompson's own lead investigator Mr. William Kidd testified that after reviewing discovery, he also contacted Thompson and "talked to the attorney about.." contacting an eyewitness expert for trial. (7RT 1612-13).
- Thompson ignored Sunkett's request and her own investigator's advice and admitted that she conducted absolutely no investigation into the matter until nearly the end of trial. (7RT 1645).

- Late in trial, as the defense was presenting it's case, Thompson attempted to introduce cross-race eyewitness identification expert Dr. Deborah Davis by way of a 402 hearing to address what she believed were psychological factors present in this case that impact cross-race identifications. (5RT 1084-89). Thompson stated she believed this evidence was "imperative" to the jury being "illuminated" about the misconceptions of eyewitness identification evidence "based upon scientific study." (5RT 1088).

- The trial court denied the introduction of this expert's testimony because it was "late." (5RT 1090).

- After both sides rested, the trial court gave the jury cautionary instruction on these psychological factors. (5RT 1214-15).

- In closing, the prosecution also expressed that the jury consider "a number of eyewitness factors the court gave.." them to consider. (5RT 1254-56).

- In closing, Thompson attempted to make the defense that psychological "factors" such as discrepencies in witness descriptions (5RT 1266-68), "stressors" (1268), weapons focus (1268), and tainted, and suggestive identification procedures used by law enforcement (1271-80), were the cause of Miller and Graves falsly identifying Petitioner.

- The District Court found that Thompson "freely explored" these factors in her closing argument with "great attention to the issue." (See District Court Order p. 16).

- Additionally, Thompson failed to investigate and interview critical alibi witness Alan Gordon. Thompson was informed Gordon was in possession of three neoprene masks and their receipt of purchase. These were the mask originally purchased by Petitioner that the prosecution repeatedly claimed may have been the masks used by the suspects.

Approximately 30 days before trial, Gordon was contacted by investigator Kidd via voicemail and told that he would be needed as a witness In this case (See Fed. Habeas EXHIBIT B p. 154-57; Gordon's affidavit). Thompson added Gordon's name to the defense witnesses list and timely submitted it to the court (see Fed Habeas EXHIBIT C p. 158-59; Witness list). Without ever speaking to Thompson, Gordon did as instructed and arrived at the courthouse in possession of the 3 neoprene masks and their receipt of purchase. Both Thompson and Kidd

admitted to knowing Gordon was present at the courthouse, and that they failed to meet with and interview him, and take possession of this evidence (7RT 1608, 1688-89).

Interviewimg Gordon was extremely relevant to establishing Petitioner's alibi because the receipt of purchase, the actual presence of the masks, and Gordon's testimony is the only evidence that could prove that these were the actual masks purchased by Petitioner, they were not camouflaged as the masks described by the witnesses, and that Gordon had always been in possession of these masks since the day of purchase for use in a paintball event he'd invited Petitioner to.

- At the very start of trial, the prosecution provided Thompson an audio recording sent to their office of two people discussing Sunkett's non-involvement in this crime. Prior to that, Sunkett's first attorney Richard Petersen provided Thompson a coded letter allegedly written by a possible suspect in this case which also expressed Sunkett's innocence. Without at least attempting to investigate this evidence first, Thompson concluded that she knew of no way to authentic these items so she didn't introduce it (7RT 1674-75). However, at the time, Sunkett suggested hiring a voice analysist, or audio forensic expert, or cryptography experts to authenticate the evidence (Sealed RT p. 1436; 7RT 1673-74). Thompson told the court that she did not know what a voice analysist was or how it could be helpful to the defense so she didn't investigate it. (Sealed RT 1436; 7RT 1673-74).

## **(B).** Prejudice**.**

The heart of the prosecution's case were the witnesses in-court identification of Petitioner. Without that, the remainder of the prosecution's evidence was circumstantial and fairly weak. In regard to the evidence seized from Petitioner's home/office, the prosecutor herself stated "..it's convincing. But is it enough to convict? Absolutely not." (5RT 1258). As well, in regard to the GPS evidence, the prosecutor stated " Now the GPS is interesting, but it is not conclusive." (5RT 1300). In this case, the prosecution relied heavily on eyewitness identification and basically acknowledged that the remaining evidence could not stand alone and get a conviction. She told the jury that the other evidence she brought forth was "convincing" and some "inconclusive," "[b]ut put it together with the eyewitness testimony" "and you see how the pieces of the puzzle are coming together." (5RT 1258-59).

However, on the other hand, a large portion of the most reliable evidence the prosecution introduced actually supported Petitioner's alibi. Hotel records, and Petitioner's bank/credit card statements all support that Petitioner never shared the same location as the GPS evidence over the entire three day span surrounding the crime (see trial Exhibits 42 A, B, and C-GPS records; Exhibits 44, and 47-hotel records; and Exhibits 50, 51, 52-bank records). Petitioner's email records linked to the GPS device show Petitioner checking the location of the tracking device on three seperate occasions shortly before the crime occurred (See trial Exhibits KK, and EE). And fingerprint analysis did not show Petitioner was at the crime scene, nor show that Petitioner possessed or owned the firearm seized from another person detained upon at the time of his

arrest (3RT 698). This technological and forensic evidence when evaluated with witness testimony specifically demonstrates:

- Petitioner and Thomas both testified that they drove from Richmond to Fort Bragg on the evening of July 9, 2008. Records from Petitioner's Wells Fargo Business Account shows that the Petitioner made a transaction of $58.49 at a Chevron gas station in the city of Cloverdale on July 9, 2008. Also, on this same evening, bank records show a separate transaction made by the Petitioner for $7.08 using his Bank of America debit card at this same gas station.

  Yet, records taken from the tracking device on July 9, 2008 during these same times show the device took a continuous drive on highway 101 past the city of Cloverdale with no stoppage time at all in this city. (See Exhibit A, p. 66-69).

- Petitioner and Thomas testified that they arrived in the city of Fort Bragg just after midnight on this same evening and rented a motel room for the night. Records gathered from the Beachcomber motel show that the Petitioner rented a room for TWO GUESTS and used his business debit card and driver's license for payment and check-in verification. A 2008 Lincoln Navigator was logged onto this reciept as the vehicle Petitioner arrived in and was parked in the hotel parking lot.

  However, records from the tracking device show the device parked at a totally

separate location in the city at this same exact time. The device concluded its travel that night at the Beach House Inn located at 188 Pudding Creek Road in Fort Bragg. The device remained parked at this location for 13 hours, 21 minutes and 22 seconds.

- On July 20, early the following morning, Petitioner and Thomas testified that the Petitioner left Thomas behind in the motel room. The Petitioner stated that he drove to a McDonald's restaurant in Fort Bragg and purchased food. Records from Petitioner's Bank of America account shows that the Petitioner made a transaction at this McDonald's location for $17.00.

  Records taken from the tracking device does not show, at any point, that the device traveled to or near this location on this date, or any other date.

- Petitioner then testified that once he left McDonalds, he drove to a nearby Long's Drug Store in the same city and made another purchase. Bank records from the Petitioner's Bank of America account reflects a purchase Petitioner made at this store for $74.61. Records from the tracking device does not show any travel whatsover to this location.

- Petitioner and Thomas both testified that the Petitioner returned to the Beachcomber, retrieved Thomas, and checked out of the hotel shortly after. Prosecution witness and Beachcomber employee, Gabriella Salazarr, identified the Petitioner by his driver's license and in open court as being the same man she checked out of the hotel (3RT 599).

Once again, records from the tracking device does not show travel to this location at this time, or any other time.

- Petitioner and Thomas both testified that they drove from a local Denny's Restaurant to the Ocean View Motel later that afternoon. Motel records and the Petitioner's bank records show that the Petitioner rented a room here and used his Bank of America debit card and driver's license for check-in. Prosecution witness and Ocean View employee Edith Silva, identified the Petitioner by his driver's license as being the same man she checked into the hotel. She saw the Lincoln Navigator the Petitioner was driving and logged it on the Folio/receipt as being the vehicle Petitioner arrived in and parked in her parking lot. Edith Silva, the Petitioner, and Thomas all testified that after the Petitioner checked into the hotel, he returned to the vehicle, left the premises, and never returned or was seen at the motel again (3 RT 553-554, 560-561, 921-923, 1044).

Records from the tracking device never recorded any travel or park time at or near this location.

- Records taken from Petitioner's Yahoo email account shows that Petitioner signed into his covert track account on three seperate occasions; very close in time to the occurrence of the crime at 8:08 P.M., 8:09 P.M., and 9:34 P.M. This gives the very strong presumption that the Petitioner was (a) in a separate location as the tracking device, and (b) was logging into his Covert Track account to gain knowledge of the tracking device's location and/or course of travel.

- Linda Senteney was presented at trial as an expert witness in the area of latent print analysis. Miss Senteney conducted a thorough examination on the handgun found in Aziza Washington's purse. She also did an examination of the magazine inside the gun, the 15 rounds taken from the magazine. Miss Senteney also examined and conducted tests on the lift cards taken from the crime scene. Miss Senteney testified that Petitioner was eliminated as having been a contributor to any of the finger prints found on any of these items of evidence. (3RT 698).

Also, the descriptions given of Petitioner by other prosecution and defense witnesses support Petitioner's alibi, and conflicts mightily with Graves and Miller's own conflicting descriptions of Petitioner. The trial record reflects:

- Prosecution witness Gabriella Salazar testified that she interacted with Petitioner on the day of the crime and stated that he looked exactly like his driver's license photo and

wore a mustache, beard, and hair on his head at the time she checked him out of her hotel. (3RT 562).

- Prosecution witness Edith Silva testified that she interacted with Petitioner on the day of the crime and described him as having a mustache, beard, and hair on his head, and added that Petitioner looked the same way in court as he did on the day the crime occurred with the exception that his hair was longer at the time she saw him. (3RT 599-601).

- Defense witness Jamila Thomas testified that on the day the crime occurred Petitioner wore a mustache, beard, and hair on his head. She added that she'd never seen him without facial hair or hair on his head, and added he looked similar in court as he did on the day of the crime. (4RT 916, 933).

- Guy Sunkett testified that on the day the crime occured Petitioner wore a mustache, beard, and hair on his head, and that he looked the same in trial as he did on that day. (4RT 904-05).

- Mathew Graves originally described suspect number one as 5'll, beefy build, approximately 230 lbs., "clean shaven," "looked like Barry Bonds," and "looked like he used steroids." Graves stated suspect number one was not the tallest of the tallest suspect. He stated the tallest suspect was number three at 6'6 tall, and weighing approximately

280 lbs. (see Graves pretrial interview #1, at p. 12, 25-26, 28). At trial, Graves identified Petitioner in court stating "The subject number one exhibits negroid features," "There's nothing caucasoid," "He has a standard icocephalic skull shape." (2RT 393).

- Dusty Miller originally described suspect number one as 6'1, approximately 27 years old, clean shaven, hair cut close to the scalp, and very dark-skinned. (See, Miller's pretrial interview #2 at p. 14-15, 29-31). Miller told investigators that she'd seen the face of suspect number one. However, at the pretrial photo lineup, Miller marked pictures of several African-American men of all different ages, sizes, and skin complexions. (See trial Exhibits 18, 56, and 'C', Miller's six pack photo array). Approximately nine months later, in an attempt to get an identification, law enforcement emailed Miller the Petitioner's singular booking photographs, his name, and arrest information, and provided her with pictures of evidence seized from Petitioner's office. (See Exhibit 57- Petitioner's booking photo; Exhibit LL-emails between Miller and Van Patten; and Exhibits MM, NN, OO, and PP-photos of evidence). Miller kept these pictures of the Petitioner and the items seized from his office in her possession for 3 months prior to Petitioner's trial date. Miller then appeared at trial and positively identified Petitioner stating that based on "his demeanor, it's him." (2RT 252).

- Max Stover, testified that suspect number one wore a mask during the incident and he did not see his face. (1RT 139).

Simply, Thompson failed in her one most important duty in this case; competently investigate and establish a viable defense against the eyewitness identification evidence. Had Thompson timely investigated and called to trial Dr. Davis as an expert to help support the science explaining eyewitness factors she stated were responsible for the witnesses misidentifying Petitioner, the jury would have been given valid facts to consider upon it's evaluation of the identification evidence. These facts would have validated the defense and made the possibility of mistaken identification appear more likely because the trial record and the evidence in this case shows (a) three victims in this case gave very conflicting descriptions of suspect number one, (b) two other prosecution witnesses and two defense witnesses accurately described Petitioner's actual appearance on the day the crime occurred, (c) the eyewitnesses were subjected to tainted and suggestive identification procedures, (d) separation between Petitioner and the tracking device was clearly established, (e) hotel, credit card, and email records supports Petitioner's alibi, (f) two defense witnesses corroborated Petitioner's alibi, and (g) none of the items seized from Petitioner's office was found to be directly linked to this crime.

Just as the prosecutor told the jury in closing, the people's case could not be proven beyond a reasonable doubt without the eyewitness identification evidence. Had Thompson used an expert to combat this evidence, presented the jury with the readily available exculpatory evidence that demonstrated Petitioner's innocence, brought in Gordon to show that the masks purchased by Petitioner were not the same masks the witnesses described, and the facts listed above were properly explained to the jury, the defense of mistaken identification would have been reasonably probable. Based on these facts and evidence, the jury could not have found Petitioner

guilty beyond a reasonable doubt. Thompson's errors weakened the defense and left the jury with very little to consider in determining whether misidentification was a possibility in this case.

## **Rebuttal to the District Court.**

The District court basically adopted the Appellate Court Opinion that trial counsel Thompson was not ineffective in failing to investigate and timely call to trial expert evidence, and provided four reasons supporting it's opinion:

**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, but yet attempted to do so late "to appease" Mr. Sunkett. (see Appellate Opinion at p. 26; and District Court's Order at p. 14).

Petitioner's Rebuttal:

As stated above, whether or not Thompson believed eyewitness testimony was helpful to the defense, she still had a duty to investigate it. (see *Duncan v. Ornoski).* Also, Thompson did not state that this particular expert testimony would be disregarded by the jury, but any expert witnesses testimony in general used in her trials. (7RT 1640). However, had the District Court reviewed multiple trial transcripts and exhibits prior to the Motion for New Trial hearing that

were referenced in Petitioner's habeas petition, it would have found that the testimony provided by Thompson at this hearing was either perjured, or Thompson intentionally mislead the trial court, Dr. Davis, and Petitioner throughout the entire trial process. As far as Thompson's experience, Thompson stated that based on "trials I have done with expert witnesses, juries have a tendency of disregarding that evidence." (7RT 1640) Yet, at this same hearing, she herself admitted to only having one prior experience using an identification expert, and that she represented only one other African American at trial during her entire 12 year career in Mendocino County. (7RT 1686-88).

Petitioner raised this issue to the court on several occasions prior to the Motion for New Trial, so there is an abundant record of conflict between Petitioner and Thompson. Thompson was given several opportunities on record to express to the Petitioner and the trial court that she did not agree with her investigator's recommendation and Petitioners request to introduce a cross-race identification expert's testimony at trial and whether she believed it was relevant or not to the defense. Also, after reviewing Thompson's own case and investigative files, personal notes between she and lead investigator William Kidd, trial transcripts (request for 402 hearing), and transcripts of several Marsden hearings, Thompson gave absolutely no indication that she believed, at any point, that the eyewitness expert was useless and unnecessary. All records show:

a). In the middle of trial, Thompson requested a 402 hearing to introduce expert testimony relative to cross-race identification and psychological factors that impact identification. Thompson stated that 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)

As Thompson stated herself, "In light of Miller's I.D. of my client..," she believed this expert testimony was relevant to the eyewitness identification and to the psychological factors found in this case. Based on this statement, it was her own lack of foresight that warranted her failure in bringing to trial the expert's testimony timely. Not, that she believed it was unnecessary.

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). Kidd never told the court that Thompson told him that such an expert would be useless, or the expenditure of funds to retain this expert would be unreasonable.

c). Petitioner filed two separate Marsden motions and one Farretta motion claiming Thompson failed to conduct pretrial investigation and retain the expert in a timely manner. Only at the January 8, 2010 Marsden Hearing held in the trial court, did Thompson respond to this claim stating:

"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)

Again, Thompson is telling both the court and the Petitioner that she believed the introduction of the expert's testimony was appropriate and that it was reasonable to attack the identification in that manner.

d). The trial court ordered Thompson to turn over her entire case file which included her investigative records and all of Sunkett's hand-written letters received by her office. In one letter in particular, dated January 29, 2009, Sunkett requested that Thompson investigate and bring to trial a cross-race identification expert (see Traverse, Exhibit F, p. 171-172; Sunkett's letter). There is no evidence found in Thompson's testimony or in any of her own records, that she responded to Sunkett's request and told him that this expert would not be helpful or relevant. Nor is there any record that she would only move to do so to appease him. (see Traverse, EXHIBIT N, p. 266-356; Thompson's entire investigative file).

As shown, Thompson was given several platforms to make her case that she did not investigate and call to trial this expert because she believed doing so was unnecessary and unreasonable, and she only attempted to do so to appease the Petitioner. However, such a statement came approximately 15 months after trial, after Sunkett filed a complaint against her to the California Bar Association, and attacked her competence and effective assistance at the motion for new trial hearing.

Next, also during Petitioner's motion for a new trial hearing, Thompson stated that due to her prior unsuccessful attempts using expert witnesses, she thought that this the jury would also disregard this eyewitness expert testimony evidence. (7RT 1640) The District Court gave little consideration to the fact that Thompson used only one eyewitness identification expert in her entire 12 year career, and only defended one other African American defendant (a woman) in

that span (7RT 1640, 1682-1684, 1686). One eyewitness expert and one other African American client in 12 years far from qualifies Thompson as having sufficient experience and knowledge on this scientific evidence as to completely fail to investigate the evidence and call to trial an expert to explain it.

As a result, her lack of knowledge and experience on this issue resulted in Thompson making a highly unreasonable and uninformed decision that left the defense of mistaken identification incomplete and less credible because the defense was not corroborated or supported by scientific or legal facts that was actually available to the Petitioner. As a consequence, once the defense rested, the jurors' hands were tied because they were given absolutely nothing substantial that would give them reason to doubt the reliability of the identifications.

**2).** 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; and District Court Order at p. 14).

Petitioner's Rebuttal:

The District Court was not partial in it's review whether the method adopted by the public defender to attack the identification issue and whether to use an expert to do so were "tactical

decisions which the court will not second-guess." First, Thompson admitted that she conducted absolutely no investigation into the subject/science of eyewitness identification and the complicating factors she herself stated were present in this case (7RT 1641, 1645, 1655). This extreme negligence and incompetence was overlooked by the reviewing courts even after Thompson admitted that she knew from the very beginning that eyewitness identification was the main issue of this case. (7 RT 1639).

Investigative methodology is the most important consideration when evaluating the accuracy of the identification. However, all reviewing court rulings on this issue are contrary to the state and federal law they themselves site and rely upon. 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)).

The Court is out-right ignoring that Thompson, by her own admission, conducted no investigation at all into psycologically complicating eyewitness factors, identification expert testimony, and whether it could have helped make a meritorious defense of mistaken identification. *Wiggins* states, "In assessing the reasonableness of an attorney's investigation, however, 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 pretrial investigation was unreasonable because there was none. Thompson's "tactical decision" to attack the identification was as reasonable as the investigation of which her decision stems. Therefore, the state courts and District Court rulings on this matter are unsupported by it's own case law cited, and Petitioner was denied relief unfairly.

**3).** 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 District Court Order at p. 14).

Petitioner's Rebuttal:

First, neither witness identified Sunkett by anything distinct or personally unique about his face or body. Therefore, the "certainty" expressed by both Graves and Miller at trial does not automatically make these identifications "strong" and "corroborating" evidence. Second, the GPS evidence the courts continue to rely on to corroborate the identifications does not exist. 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, (b) there is no GPS evidence what-so-ever that shows the tracking device returned to Sunkett's residence some three hours after the crime as the courts claim, and (c) all forensic evidence and 5 other witnesses testimonies supported Petitioner's alibi. (See Fed. Traverse, Graph of Evidence p. 9-20).

The State Appellate Court did not offer a trial record to indicate how it determined the GPS's ending transmission. (See Appellate Opinion at p 26). Thus, Petitioner can only assume that the court may have attached itself to fabricated statements made by the prosecutor in closing argument which were never supported by any trial evidence. (5RT 1261, 1263). The State court and the District Court may have adopted these statements as FACT, which if true, could have suggested Petitioner's guilt. But on habeas, Petitioner provided the state and federal courts the GPS coordinates from the trial record as an exhibit to prove their conclusions are entirely false. (see Exhibit J, p. 180-181; GPS Coordinates; beginning and ending transmissions) Still, both courts obviously failed to review this evidence and continued to use this fiction as a key point in denying Petitioner relief.

**4).** Sunkett failed to show prejudice under the second prong of Strickland. (see Appellate Opinion at p. 26; and District Court Order at p. 14).

Petitioner's Rebuttal and show of Prejudice:

Thompson, a lay cross-examiner, attempted to present a defense of mistaken identification based on scientific facts, case studies, and professional theories, without bringing in an expert to properly explain this scientific information to a lay jury. Once she 'tactically' decided to do that, the defense turned from being factually and legally supported, to merely being Thompson's own opinion. The defense is now no longer a meritorious one. The District court perpetuated Thompson's error when it stated that counsel "freely explored the issue in her closing. With such great attention to the issue, foregoing to call an expert witness cannot be thought deficient." On the contrary, this is the exact reason why failing to call and expert was undoubtedly deficient and prejudicial. Thompson spent a significant amount of time exploring this information in her closing argument, but she is not qualified to explain such scientifics to a jury in a court of law. In failing to call an expert, she failed to provide the jury scientific evidence explaining her theory that cross-race identifications are negatively influenced by suggestive and tainted identification procedures employed by law enforcement, and that psychological factors found in this case are widely known to affect human memory and perception which contributes to false identification. Without such expert evidence, juries tend to lean toward eyewitness identification being reliable. (see EXHIBIT B, p. 108-135; Dr. Davis' curriculum vitae).

Had Dr. Davis been called, her testimony would have helped the defense explain (a) how complicating factors can diminish the credibility of an eyewitness's memory and perception, (b)why there were discrepancies in Miller, Stover, and Graves' descriptions of suspect #1, (b) why they described him as two different suspects, (c) why Miller only seen the face of one suspect, but selected several African-American suspects of all different sizes, shades, and conflicting features at her photo confrontation, (d) why both Miller and Graves non-blind photo

confrontation was tainted and conducted in error, (e) why Graves identified Sunkett in court by standard "Negroid" features he believed Sunkett exhibited, (f) the harmful impact the suggestive identification procedure had on Miller, (g) why Miller mysteriously began identifying items seized from Sunkett's office that had no connection to the crime, (h) why Miller's in court identification of a quietly seated defendant, by his "demeanor," is unreliable.

The exclusion of expert testimony here was prejudicial because jury consisted of lay people, not expected to be knowledgeable or versed in scientific studies that demonstrate fallibility in eyewitness identifications. For that reason, the jury could not fairly consider whether the defense of mistaken identification was a viable option in this case without first being educated to scientific facts demonstrated by an expert that gave Petitioner's defense greater credibility. Thompson's error resulted in the withdraw of a potentially meritorious defense.

**5).** Thompson's alleged cumulative deficiencies did not equate to ineffective assistance of counsel, and Petitioner did not show prejudice from these alleged deficiencies. (See District Court's Order at p. 18-20).

Petitioner's Rebuttal.

The District Court's opinion is wrong, unfair, and totally unsupported by the facts of this case and the laws itself cites.

First, records from Sunkett's case file and Thomson's investigative notes clearly reflect that counsel did next to nothing to find and/or investigate exculpatory evidence to corroborate Petitioner's alibi and/or innocence. Petitioner's pretrial letters to Thompson shows Petitioner actually begging for her assistance as she continued to be absent to him during the pretrial stage. Moreover, all of Thompson's personal notes, jail visitation logs, and personal emails between she and lead investigator Kidd strongly supports this claim. Thompson's pretrial notes show she did very little to help the defense besides simply showing up for court dates.

Thompson's notes also show that she started work on this case approximately 30 days before the start of trial. Thompson left herself practically no time to interview and investigate information provided by Sunkett and his alibi witnesses, and investigate an audio recording and a letter produced by suspects in this case expressing Petitioner's innocence. Thompson gave the jury absolutely nothing substantial or legally and scientifically supporting to show how mistaken identification occurred in this case. Had Thompson sufficiently investigated and ultimately presented this exculpatory evidence, conduct pretrial investigation, and timely call all alibi and expert witnesses for testimony at trial, a much more complete and meritorious defense would have then been offered to the jury. Since she didn't, the jury was then left to only consider Thompson's theory of how mistaken identification occurred in this case.

# IV. CONCLUSION.

The key element of this case is eyewitness identification. Trial counsel Lynda Thompson made a tactical decision to attack this evidence with a wide range of scientific conclusions related to "estimator variables" and "system variables" known to cause a witness to misidentify a defendant. However, Thompson is not a scientist or an expert legally qualified to properly explain such scientific information to a jury. Therefore her closing statement was made less plausible, thus insufficient. Compounding this error, Thompson admitted that she did not conduct any investigation whatsoever into this scientifically based defense, and admitted to failing to timely present an expert's testimony to support such a defense. In fact, Thompson's own notes and testimony show she did not conduct investigation into much of anything else, including evidence demonstrating Petitioner's possible innocence, until 30 days before trial. Even then, that investigation consisted of very little more than 4 phone calls to potential defense witnesses. Petitioner's pretrial letters found in Thompson's notes clearly show Thompson received alibi witnesses contact information, Petitioner's request for an eyewitness expert, and information related to the audio tape and letter implicating Petitioner's innocence approximately 6 months before trial. Due to Thompson's neglect to conduct a reasonable pretrial investigation, almost all evidence that was likely to add any substance to the defense was removed.

Also, because Thompson was "late" introducing expert testimony, the trial court made sure the jury would never hear significant facts that was practically the key to the defense. However, the court's discretion to do so was unreasonable because the trial record reflects the court made it's decision without first educating itself to the scientific evidence provided it by the defense. Therefore it did not fairly consider the pros and cons of this evidence. In general, the

court did not permit this evidence because it was "late", not because this information was irrelevant to the circumstances found in this case.

The previous reviewing courts did not provide Petitioner a partial review of these issues because they simply failed to acknowledge and address the facts, supporting documentation, and case law Petitioner provided validating his claims. The courts also wrongfully denied Petitioner relief due to fictitious GPS evidence unsupported by the trial record.

Because reasonable jurists could find the district court's holding debatable, it is respectfully requested that this court grant a Certificate of Appealability on the issues.

Dated: February 10, 2017

By: _____
Mr. GLENN SUNKETT
In Propria Persona

# EXHIBIT A (GPS Coordinates)