FACTS RELEVANT TO ALL GROUNDS FOR RELIEF

PROCEDURAL HISTORY

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 the Petitioner of all charges and found all allegations true (4 CT 793-796, 5RT 1313-1322)

A series of Marsden Motions were heard on September 30, 2009, October 23, 2009, January 8, 2010, January 22, 2010, February 24, 2010, and March 2, 2010. All of which were coducted to address Ineffective Assistance of Counsel and conflict with Public Defender Lynda Thompson. The trial court denied all Marsden Motions, but granted Petitioner's Ferretta Motion on March 2, 2010.

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, the Petitioner's Writ of Habeas Corpus Petition filed In Pro Per.

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

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

On January 6, 2014, the petitioner filed a federal writ of habeas corpus in the Northern District Court of California. **The defendant moved to dismiss the petition due to the petition being 'mixed'**. The petitioner argued rebuttable presumption and moved to' stay' the petition if the court found it was a 'mixed' petition. The court found that the petition was in fact a 'mixed' petition and concluded that arguments 1, 2, 8, 9, 10, 11, 12 in that petition were not fairly exhausted in the state's highest court. The court denied the defendant's motion to dismiss and the petitioners motion to show rebuttable presumption. The court GRANTED the petitioner's motion for a *Rhines* stay. **The Petitioner now ask this court for relief on the issues the District Court ruled were unexhausted in this state court**.

OVERVIEW

This case involved an invasion robbery of a home whose owner, Michael Bennett, had an illegal marijuana grow on the premises. The intruders were three armed African-American men seeking money and/or "dope". The complaining witnesses included: Bennett, Max Stover, Dusty Miller, and Matthew Graves.

Petitioner was implicated as a perpetrator by records of a G.P.S. tracking device which was owned by him. The device was at or near the location at the time of the incident. Two of the complaining witnesses ultimately identified the Petitioner as one of the intruders.

The Petitioner admitted that he was involved in the marijuana industry solely as a purchaser and distributor and had business relationships in the local area where the incident occurred. He adamantly denies having any prior knowledge of, or any participation in the robbery. He contends that his tracking device was purchased and used to perform its sole purpose, to "track", and that the device was in the possession of the carriers/transporters the night of the incident.

EVIDENCE ADDUCED AT TRIAL

1. BENNETT'S TESTIMONY:

Michael Bennett testified that he owned a 45 acre property in Fort Bragg, California which included a 2,500 square foot house and several outbuildings. (1 RT 71-73) He grew marijuana in the outbuildings and believed he had about 150 plants growing at the time of the incident. (1 RT 86).

On the evening of July 10, 2008, sometime after 10:00pm, Bennett and Max Stover arrived at Bennett's property in Fort Bragg, and parked in the driveway. Bennett had not been at the property in four days and at this time was his only time being at the residence. (1 RT 75-76) As Bennett exited the truck, a Black male grabbed him by his arm. He remembered very little after that because he was struck in the back of the head and fell unconscious. (1 RT 79-81) He was hospitalized for about a month after the incident and had limited use of his left arm for almost four months. (1 RT 82-83) When Bennett was released from the hospital, he stated that all of his marijuana was gone from his home [1] and two pieces of jewelry, a Tanzanite ring and a Gold necklace, were missing from his jewelry box.[2] He went on to state that no other jewelry was missing from the jewelry box. (1 RT 87-88)

Bennett also testified that Stover and Matthew Graves both had access to his home as well as the outbuildings where the marijuana was growing, and "had shown Matty" the grow. All three men could unlock the locks on the home and the outbuildings. (1 RT 75, 91)

2. STOVER'S TESTIMONY:

Stover testified that he and Bennett had in fact been at Bennett's property earlier in the day together. (1 RT 109) They left the home to attend a music event together between the hours of 8:30-9:00 P.M. (1 RT 110) Sometime after 11 or 11:30, they arrived back at Bennett's residence. Stover was driving the

[1] By the time Bennett was released from the hospital, the Mendocino County Sheriff's office had already served and executed a search warrant for his property and had confiscated a total of 888 marijuana plants from the outbuildings which is contrary to Bennett's testimony of 150 plants growing at the time. Also seized, was 3 pounds of processed marijuana from the bedroom or kitchen of the home, 1 pound in the garage and an undisclosed amount found in a separate bedroom. (1 RT 101, 3RT 682, 4RT 827, 4 RT 831) Two 22. Caliber rifles and loaded clips and ammunition for an AR-15 type of Assault Weapon were also found and confiscated. (4 RT 828-830)

[2] Bennett testified that it was a habit of his to continuously check the contents of the jewelry box to "make sure it wasn't disturbed" because he had "some pretty good value in there". (1 RT 92) Yet he did not realize that these two particular items were missing until three to four months after the incident. (1 RT 93) Bennett stated he kept a collection of Opals, Tanzanite, and Diamonds in the jewelry box, (1 RT 87) yet no other jewels were missing. Stover testified, contrary to Bennett's testimony, that Bennett showed him the jewelry box at the home earlier that day. Immediately after the incident, Stover found the jewelry box in the bedroom and noticed a Tanzanite ring and Opal ring was missing room the box. Again Stover claims to have known about the specific contents of the jewelry box because he was shown items form the box earlier that day by Bennett. After he took note of the missing items, he put all of the other jewelry back in the box. Ironically, none of the other valuable jewelry including the Diamonds, and other Tanzanite and Opals were taken.

truck the two of them were riding in. (1 RT 111-112) When Stover exited the truck, he saw a gun in his face. (1 RT 113) He thought he saw two or three men, but because it was dark he could not see who was pointing a gun at him. He was then handcuffed. Minutes later he was led into the home by one of the men. (1 RT 115-116) Once inside, he saw Matthew Graves and Dusty Miller seated on one of the couches in the living room. (1 RT 118) With them, was a man at least six feet tall. Stover could not see the man clearly because of the light emitting from the television, but believed this man was wearing a full mask, (1 RT 139) A second man escorted Stover into the house and he thought a third man had entered the room behind him. Stover was told to sit on the couch with Graves and Miller. (1 RT 121) Minutes later, two of the men went back outside and returned with Bennett who at some point during the incident had his hands tied with zip ties. (1 RT 120-121) While on the couch, Stover noticed Graves' and Millers' hands tied behind their backs with zip ties. The men began asking questions about money on the property. Stover denied having any knowledge of any money and failed to provide any information into their questions. (1 RT 121-122) At one point during the questioning, a Black man who Stover described as being about five feet eight inches to five feet eleven inches tall, medium build, a beard or unshaven facial hair, wearing a baseball cap and no mask, held a small lighter style torch three feet away from him and told him and Graves that they would burn their "balls" if they didn't tell what they knew. (1 RT 125) This man was also wearing brownish camouflage pants, black boots, a grey and black hooded sweater, gloves, and holding a silver revolver. (1 RT 135) The third man was stockier and wore a half mask similar to a skiing neoprene cover. His pants, boots and ball cap was similar to his accomplice. He was also holding a semi-automatic handgun. (1 RT 138) At some point, the men led Stover, Graves and Miller into a smaller room[3] in the house. (1 RT 145) Eventually, Bennett was brought into this room and the men began pouring water over his head and face trying to wake him, but he remained incoherent. (1 RT 148) The men continued to ask about money and at some point took $200

[3] This room was estimated by detectives to be approximately 25 feet from the living room.

from Stover's pocket. (1 RT 150) Just before the men departed the home, they bound the ankles of Miller, Graves and Stover and locked the door of the room they were held in. After, the house remained quiet for an extended period of time, Graves and Miller freed themselves from the zip ties and tape and kicked out a vent covering or piece of plywood and made their way out of the hole in the wall. (1 RT 154-155) They then went around the home, entered back inside and let Stover out of the room. Miller used pruning shears to cut the chains between Stover's cuffs. (1 RT 157) At this time, they attempted to clean up Bennett but he was still bleeding from his head and still incoherent. About 30 minutes later, Bennett was taken to a hospital by Graves, Bennett's girlfriend Kathy, and Miller. (1 RT 158) Stover stayed behind to clean up the house alone. (1 RT 158) No police were called because the complaining witnesses did not want the police to find the marijuana on the property.

3. MILLER AND GRAVES' TESTIMONY:

Both Miller and Graves testified to what happened during the incident in similar terms but with some key variations in terms of identification of the suspects.

On the evening of July 10, 2008, Miller and Graves were having dinner together at Bennett's home. Sometime between the hour of 10-11 PM, they were in the kitchen cleaning up when a very tall, Black man entered the home holding a gun. He was wearing an unzipped hooded sweatshirt or jacket, ball cap, gloves, black boots, and camouflage pants. His hair was closely shaven and he did not have any facial hair at all. (2 RT 210-211, 405) He was a "very dark skinned" man who resembled "Barry Bonds". (2 RT 473). They described him as being anywhere between six feet to six feet three inches[4], and weighing 230 pounds. (2 RT 210, 345) He told them that he was there for a "bust" and that they

[4] The Petitioner is 6 foot two inches tall. The height of suspect #1 was now being crafted around the Petitioner's height by these witnesses at trial. Days after the incident, Graves stated this suspect was five foot eleven (interview #1 of Graves p.12) Miller state he was six foot (interview #2 of Miller p. 14-15)

would not be harmed if they followed instruction. He also told them to get on the ground and they both did so. (2 RT 212, 344)

The man who came in with Stover was approximately five-eleven, overweight, weighing about 200 pounds, and wore clothing similar to the first man (2 RT 213-214, 349). He wore a camouflage mask that covered the lower half of his face, had slanted eyes, appeared jittery, wore white gloves, and held a silver revolver to Stover's back. Miller, Graves and Stover were eventually led into the living room.[5] The first man stayed there with them and the second man exited the room; although, Miller testified that the Second man never left. (2 RT 218)

A third man then entered the home/living room dragging a semi-conscious Bennett by his arms. Miller believed this man to be five-six or less, wearing a camouflage mask and hat (2 RT 219-220). Graves saw this man as being six-three to six-seven in height, weighing about 260 pounds, and was not wearing neither a hat nor a camo mask (2 RT 353-354, 418). He was also described as being clean shaven and wore attire similar to the other two men.

The men told the group that they were "sent form New York to eliminate Mr. Bennett" and asked for the location of money and "dope" (2 RT 222-223, 355-356). At this time, Miller said the third man placed a stool in front of the three of them and made the threat to use the torch on Graves and Stover. Graves testified that it was the second man who was seated on the stool who threatened to use the torch

[5] There was a lot of conflicting testimony at this point. Miller testified that when the first man entered the kitchen, she and Graves were led into the living room by the suspect and told to kneel on the floor in front of the couch. As they were kneeling and waiting a second man escorted Stover into the living room and told him to kneel next to them. A third man then brought in Bennett. (2 RT 213-218). Graves testified that he and Miller were instructed by the first man to kneel on the kitchen floor. A second man then brought Stover into the home. All three were then led into the living room and told to take a seat on the couch. The second man then left the room and went outside. The second and third man then entered the home together with Bennett (2 RT 346-354)

on him and Stover (2 RT 225, 357). Then, with the assistance of Graves (2 RT 359, 361-362), Miller[6] and Graves' hands were tied behind their backs with zip ties (2 RT 227-228). Bennett's hands were bound with some form of electrical cord which was also found inside the home along with zip ties.

After approximately 20 minutes, the men moved Graves, Miller and Stover into a smaller room in the Bennett residence that was used for drying, processing, and/or storing marijuana and had them sit on a platform inside of the room (2 RT 233-235, 363). Bennett was brought in last (2 RT 237-238, 364). The men began pouring water over Bennett's head with a cup in effort to wake him but was unsuccessful (2 RT 238, 367). At some point before their departure, the men taped Stover, Graves and Miller's feet with tape also found in the home (2 RT 240-241, 369). The men told them that they would return in 20 minutes and locked the door behind them (2 RT 241, 369). The men did not return after this point.

After 10-15 minutes passed, Graves was able to free himself and Miller from the tape and zip ties (2RT 242, 371). Miller pulled a fan from the wall and was able to jump through the hole left in the wall. She and Graves both after exiting went around and back through the house to let Stover out of the room (2 RT 243, 372-373). According to Graves, there was no working phone in the residence so he drove to Bennett's girlfriend Kathy's home nearby, called Bennett's son Jared, and returned back to Bennett's property (2RT 375-376). Kathy and Jared eventually arrived and after about 30 minutes, they decided to take Bennett to the hospital. Miller later saw that her phone was missing from her purse. Graves found his phone broken in the kitchen and $300 was missing form his wallet. They did not call the police because there was marijuana in various locations on the property.

[6] Prior to Ms. Miller being zip tied, she was allowed to leave the inside of the residence to take Bennett's dog outside. She went out alone but she did not attempt to escape because she felt that the clothing she had on was not "good for running". She returned back inside the home on her own. (2 RT 229-230)

ADDITIONAL FACTUAL ASSERTIONS REGARDING THE INCIDENT

Detectives attempted to interview Miller a day after the incident but she was reluctant to speak with them (4 RT 816). Days later, she described three suspects to the police.

Graves' attorney, Keith Fulder, then contacted the Sheriff's Office on behalf of Graves. He told them that Graves gave him a flashlight that Graves believed may have been used by the intruders. A meeting was then set up by Fulder with Sergeant Greg Van Patten to interview Graves and Miller about the incident (3 RT 724). The meeting was held at Fulder's office and Graves and Miller drove together and arrived together at his office (3 RT 725). On the ride over to the office together, Miller testified that she and Graves took the opportunity to talk about the incident and the escape portion of their story and "told that story a couple times." (2 RT 296). She also stated that they talked specifically about the identification of "the first man." (2 RT 296). Upon their arrival, they each gave the Detective separate detailed statements regarding the incident including three suspects descriptions.[7] This particular portion of both interviews were audio recorded by Van Patten (3 RT 730).

Sometime during or after Miller and Graves' interviews at Fulder's office, Van Patten showed each of them a series of photographic line-ups (3 RT 731, 740). Detective Van Patten chose not to audio record or video record this portion of both interviews. Attorney Keith Fulder was not present during the showing of these photo lines-ups to his clients. Also, despite Van Patten's testimony that this portion of

[7] From the beginning, according to the discovery, Miller, Graves and Stover's individual descriptions of the three suspects were conflicting. But what was importantly consistent though, was Graves' and Miller's physical description of suspect number one who's role the Petitioner was believed to have played. These descriptions were given less than a week after the incident took place at a time that the facts of the incident and suspect descriptions were fresher in the memories of the witnesses.

both interviews was conducted at the Sheriff's station, he was the only officer present during this identification process.

Mr. Sunkett's picture was displayed on the first series of photos. Graves identified Mr. Sunkett as being one of the intruders and did not identify any other suspects in the remainder of the photos.[8] At trial, Graves identified him as the first suspect who entered the home and added that he was able to identify him by his "negroid features", "standard squared, isocephalic skull", and that there wasn't "anything caucasoid" about him (2 RT 393).

When Miller was shown the same photo lineup, she identified several of the photos as "possibly", "maybe", or "could be" any one of the three suspects. The Appellants photo was one of the photos marked "possibly"; yet, she was unable to designate any photos marked to a specific suspect and/or their role in the incident.

On March 31, 2009, Van Patten emailed Mr. Sunkett's booking photo, name, and arrest information to Miller. Van Patten stated that he had done this because he wanted Miller to view items taken from his office to see if any of them looked familiar (3 RT 744). In that correspondence, she told Van Patten that she was still unsure if the Mr. Sunkett was the right guy based on the previous photo she was shown of the Petitioner. She also wanted to know if her first time seeing a more recent image of him would be on the witness stand. At this point, Van Patten emailed the Mr. Sunkett's booking photo, name and arrest information. Van Patten attached an admonishment to the photograph advising Miller to not be influenced by the photograph and encouraging her to rely on her memory of the incident. She

[8] According to the offense report (Discovery p. 52) Graves never made the I.D. of the Petitioner as being a specific suspect and never gave any indication of what role the Petitioner allegedly played.

still did not identify the Petitioner but did state that some of the items taken from his office looked "familiar".

Van Patten attempted to send the same photos to Graves' email around this same time, but Graves never responded. Approximately one week before trial, Van Patten met with Graves and showed him the photographs in person. Graves thought a flashlight, boots, gun, butane lighter, and the pattern on the camouflage pants-not the fabric-looked similar to those used or worn by the suspects during the incident.

On the evening of July 11, 2008, after the Mendocino County Sheriff's Office received confidential information about a possible home invasion robbery north of Fort Bragg, Sergeant Van Patten and other Sheriff Deputy's executed a search warrant for Bennett's residence. In searching the property, law enforcement found large marijuana growing operations in three separate locations on the grounds, three large bags of processed marijuana, an extension cord, a broken cellular phone, a roll of duct tape, a container of plastic zip ties, and a pair of severed handcuffs (3 RT 675-680, 716-723).

On September 11, 2008, Mendocino County Sheriff's Deputies and the Oakland Police Department executed arrest and search warrants at Petitioner's Oakland office. The Mr. Sunkett was arrested and Aziza Washington, a woman present in the apartment, was detained. When Washington asked an Oakland Police Officer if she could go and get her purse form the bedroom, the officer personally retrieved the purse and found a black semi-automatic handgun inside (1 CT 198, 203-204).

In a second room, which appeared to be used as an office, Deputies found a pair of camouflage patterned sweat pants, two pair of black steel-toe boots, a flashlight and spotlight, a pair of blue and

white gloves, a brown lighter, and pruning shears. In the attic they found a pair of black tactical pants inside of an old box. A backpack inside the living room contained two small bags of marijuana, a small roll of tape and three universal handcuff keys.

As to the gun found in the purse of Aziza Washington, Washington testified that she and the Petitioner were asleep in the bedroom of Petitioner's office the morning the police arrived. Her purse was on the floor on the right side of the bed on which she slept (4 RT 791-793). The sudden arrival of the police awoke them both. She testified that Mr. Sunkett got out of the bed and let the police inside. He was arrested there at the door. Shortly after that, she asked the Oakland officer if she could retrieve her belongings and the gun was then found in her purse. She testified further that she did not own or possess a gun at that time; nor, did she see a gun that day or put one in her purse.[9] She testified that she did not see the Petitioner with a gun; nor, did she see him put one in her purse (4 RT 793-795). She had no idea how the gun got inside of her purse, but claimed she saw a black gun at the Petitioner's apartment about one month earlier, but could not identify it as being the same one taken from her purse (4 RT 808).

The Petitioner rented hotel/motel rooms in his own name on various occasions in the spring and summer of 2008 in Fort Bragg. On July 9th to 10th, Petitioner rented a room at the Beachcomber Motel (3 RT 592). Gabriela Salazar, a clerk at the Beachcomber, remembered a dispute she and the Petitioner had during checkout. She recalls seeing three males during checkout but did not remember anything about their appearance (3 RT 596). She recalled that the Petitioner looked like the driver's license he provided the hotel and had a mustache at the time of checkout. She also added, that the Petitioner looked the same at the time of checkout as he did right there in the court room (3 RT 599, 601). Later

[9] Upon being detained, Ms. Washington gave interviews with the Detectives. Although, she stated that she had no knowledge of the gun found in her purse, she stated that she was not sure if her prints would be found on the gun (4 RT 805).

that afternoon the Petitioner rented another room at the Ocean View Lodge (3 RT 551). Edith Silva, the clerk who checked the Petitioner into the hotel, stated that the picture of the person on the I.D. provided to the hotel was the same person she checked in (3 RT 553). After he rented a room for one night he returned back to his vehicle and left the premises (3 RT 553-554, 560). The Appellant was wearing black and red attire and wore shiny "bling-bling" jewelry (3 RT 557). Silva never saw the Petitioner enter or exit the hotel room at any time nor did he check out the following day (3 RT 560-561).

Records from Hertz Corporation showed that the Petitioner rented a Lincoln Navigator in his own name on July 9th to July 11th 2008 (3 RT 581-584).

Petitioner owned a portable covert track "tracking" device in 2008. GPS records showed that the tracking device had tracked travel from the Bay area to Fort Bragg on five separate occasions. On July 9, 2008, records showed travel from Berkeley, California to Fort Bragg. Subsequently, on July 10, after the device moved around to several locations in Fort Bragg throughout the day, it was on Bennett's property from 11:11p.m. to 1:20a.m. on July 11. The device then moved to the Bay area and stopped transmitting information on the 880 Freeway the morning of July 11 (3 RT 756-768).

Records from Bank of America and an army surplus store in Oakland showed the Petitioner's debit purchase of three neoprene masks and a pair of camouflage pants from the store on July 9, 2008 (3 RT 617, 769).

DEFENSE EVIDENCE

1. MR. SUNKETT'S TESTIMONY

On June 25, 2009, the Petitioner testified in his own defense. He explained to the court that the premises at 837 Kennedy in Oakland was his main business office and location of his arrest (4 RT 986-988). He had several businesses in operation at this time including a recording/publishing company, a personalized perfume and cologne company, and a tow truck company (4 RT 988-989). He also was a member of Local 261- The Laborer's Union in San Francisco CA.- since March of 2007, and had been working various construction jobs fairly consistently since that time (4 RT 990). He made approximately $5,000 every month from his work and business combination (4 RT 990).

The Petitioner acknowledged and identified various items and clothing taken from his office by police at the time of his arrest. He explained that the black steel toe boots taken from him were used and necessary for his daily construction and towing work (4 RT 992-993). A pair of camo sweat pants, work gloves, and duct tape were also a part of his work attire and accessories. (4 RT 993-994).[10]

Outside of his construction job and three businesses, Mr. Sunkett admitted to buying and selling marijuana. He explained that the shears taken from his office were used for several different purposes including a work related tool and the cleaning up buds of marijuana if needed before sale (4 RT 995). He

[10] Local 261 Union workers are mandated to supply their own tools and gear for work so it was common and necessary for the Petitioner to be in possession of these items.

did not believe that the particular shears shown at trial were used to cut marijuana. The two small scales found in the office were postal scales and were never used to weigh marijuana. (4 RT 995-996).[11]

The Petitioner also stated that between the months of July of 2008 and September of 2008, he owned and operated anywhere between three to six cellular phones, and approximately three laptop computers for business related purposes (4 RT 997-999). He explained how he had numerous personal and business issued credit and debit cards that he designated for specific spending areas (4 RT 1001-1004). Petitioner also owned an email account at Yahoo addressed to daddyrich25@yahoo.com (4 RT 1004-1005).

Mr. Sunkett first visited Fort Bragg in December, 2007 to meet with someone who he knew to be involved in a marijuana growing operation and distributed the product. They formed a business relationship around the sale of marijuana the following year. When he would drive there, he would always use rental cars instead of the cars he owned in order to preserve their resale value (4 RT 1009-1010). On his trips to Fort Bragg he would stay at the motels there. The Petitioner first began buying small amounts of marijuana from the grower before moving forward in making bigger purchases. Once these larger purchases came into effect, acting on the advice of others, the Petitioner began using "runners" to transport the marijuana and bought a tracking device to track the traveling route and protect the security of his purchase (4 RT 1018-1021). Donald Broussard or "D" was hired by the Petitioner to facilitate the transportation of these purchases. Broussard used a team of men and women to help him move the marijuana from one location to the requested designation. (4 RT 1022). The marijuana would be placed in hand crafted duffle bags designed to conceal the stench of its contents and the tracking device would be concealed in a non-detectable compartment inside one of the bags (4 RT 1025-1027).

[11] These scales were used at trial by Prosecutors to insinuate that the petitioner used these scales for illegal activity.

The Petitioner recounted his activities on and around the day of this incident. In the first week of July, the Petitioner arranged a purchase of 30 pounds of marijuana for $75,000 in cash. The date of this transaction was set for July 7th. Prior to this, on July 4th, the Petitioner was contacted by a friend who was attending a holiday Bar-B-Que. He and another man invited the Petitioner and a guest to a group paintball event scheduled for the evening of July 9th. They informed the Petitioner that they had twelve free entry passes and were looking for others to participate. The Petitioner accepted the invitation. He then inquired as to what attire would be needed and was told that old or disposable clothing and some form of face covering or mask would be appropriate. In the afternoon of July 9th, the day of the event, the Petitioner purchased three masks with his bank debit card. One was a fluorescent orange color, while the other two had smiling joker faces printed on the face of the mask. The Petitioner also purchased a small pair of pants sized for a female friend he'd invited to go with him (4 RT 1032-1033). But shortly afterward, the transaction was rescheduled for the following day, July 10th (4 RT 1030). The Petitioner then had to cancel his appearance for the paintball event and immediately began preparing for his trip to Fort Bragg (4 RT 1035).

That night, the Petitioner picked up Jamila Thomas from her home around 9:45 P.M. They travelled to Fort Bragg together and arrived there approximately at midnight (4 RT 1034-1035). Upon their arrival, the Petitioner rented a room at the Beachcomber Motel (4 RT 1035)[12]. This room had one bed and a Jacuzzi and the Petitioner used his California driver's license and debit card for check-in. Around 11:30 the following morning, the Petitioner went to a local McDonalds to meet his supplier. There, he bought food and gave the $75,000 to the supplier. From there, he went to a Longs Drug Store and purchased some allergy medication, then returned back to the hotel (4 RT 1040, 1065-1066).[13] He checked out of the hotel and he and Thomas went to Denny's Restaurant. At some point while there, the

[12] This comported with Prosecution evidence
[13] This comported with Prosecution evidence

Petitioner spoke with the supplier by phone and was told that their meeting would be delayed. The Petitioner's runners/transporters arrived at this pre-arranged location at approximately 12:30-1:00P.M. and he informed them of the delay (4 RT 1040-1041). The runners were three black males between the ages of 18-37 years old. Mr. Sunkett knew these men as 'D', Shorty and D'Waun (4 RT 1042-1043).[14] As they all waited, everyone became agitated at having to wait so long. At approximately 4:00P.M., the Petitioner rented a hotel room so that the runners may continue to wait for the Pick-up there (4 RT 1040, 1042).

The room Mr. Sunkett rented for the runners to wait in was at the Oceanview. He rented the room under his own name and used his debit card for payment. After renting the room, he returned back to his vehicle, spent approximately five minutes issuing instructions, then left the premises of the hotel; never returning. (4 RT 1044). [15] Petitioner and Thomas headed back to the Bay area but stopped at the beach first and enjoyed some minor sightseeing along the way. About an hour before they were set to arrive back into the Bay area, the Petitioner received a phone call from his uncle, Guy Sunkett, who was in need of a ride after his car had overheated and broke down. The Petitioner eventually picked his uncle up at a gas station off of Hegenberger and took him to a friend's house in West Oakland. The Uncle went into the house and came out about five minutes later telling the Petitioner that it was ok for him to leave and that he had it from there (4 RT 1045-1046). Petitioner and Thomas then headed back to her home, getting there about 1 A.M. There, the Petitioner checked his e-mail account and accessed his covert track account which enabled him to track the status of the goods being transported. The next day he picked up the goods and subsequently had them moved around again to Sacramento and Los

[14] "D" or Donald Broussard was described as being Dark-Complected; Shorty is anywhere between 5'6" to 5'8" and anywhere between 170 to 190 pounds; D'Waun is about 5'10" and on the heavy side about 230 pounds (4 RT 1043-1044).

[15] This comported with Prosecution evidence. Petitioner stated that when he and Thomas left Fort Bragg the tracking device was in the bag(s) he provided to "D" and his runners with for transporting the product (4 RT 1044, 1066).

Angeles. The Petitioner made other trips to Fort Bragg after this incident occurred in the months of August and September of 2008. He was arrested on September 11, 2008 (4 RT 1046-1049).

Upon his arrest, Petitioner testified that he never touched, saw, or was aware of a gun in his office (4 RT 1050-1051). When interviewed by Van Patten at the Oakland Police Station, the Petitioner admitted that he did not tell the Detective the full truth about his business dealings in Fort Bragg for fear of prosecution on charges unrelated to the incident in question (4 RT 1051-1052).

2. **GUY SUNKETT TESTIMONY:**

Guy Sunkett stated that he is Petitioner's Uncle. He recounted how on July 10, 2008, he borrowed a 1973 Chevy to go to a night club in Oakland. On his way there, the car overheated and broke down near a Shell gas station (4 RT 903-904). He borrowed a stranger's cell phone and got assistance. He called the Petitioner approximately between the hours of 10:30 to 11:00 P.M. and he waited over an hour for the Petitioner to pick him up (4 RT 904, 905, 908). He stated that the Petitioner looked the same as he always did; with beard, mustache and hair on his head (4 RT 905). He never relayed this information to any law enforcement agency because he never knew what the Petitioner was incarcerated for until he was contacted by Defense Investigator Kidd a couple of weeks prior to trial. That was the first time he talked to anyone about that night and/or was asked about it (4 RT 906-907).

3. JAMILA THOMAS TESTIMONY:

Jamila Thomas testified that she had known Petitioner for a little over two years. She traveled with him to Fort Bragg on July 9, 2008. He picked her up from her home in Richmond between 9:00 to 9:30 and was driving a rented black Lincoln Navigator (4 RT 914). Petitioner told her that this was a business trip they were taking to Fort Bragg. They arrived there later that evening between the hours of

11:30P.M and 12:15 A.M. Upon their arrival, the Petitioner checked them in to a hotel as she waited in the vehicle (4 RT 915). That night, the Petitioner was dressed very casually in a t-shirt and jeans. He wore jewelry, which was usual for him, and had his usual mustache and beard. She stated that she had never seen him without either. She went on to say that Petitioner had four cell phones that night and was frequently using them throughout the trip. He also bought a laptop along with him (4 RT 916-917).

Thomas woke up the next morning, July 10, between 9:00 to 10:00 A.M. Petitioner left the room around 11:00 A.M., telling her that he would be right back (4 RT 917). He returned about 30 to 45 minutes later. Shortly, after, they left the hotel and went to Denny's (4 RT 918). Thomas went inside, got food, and brought it back to the car. Between 12:30 to 1:00 P.M. a dark colored car pulled in and parked across the parking lot from where they were. There were three African American men in the car and from that point on, the Petitioner went back and forth between the two vehicles. He spent most of the time with the other car (4 RT 919).

Thomas noticed that the Petitioner was getting frustrated and appeared irritable. At one point, she saw him take his wallet out from underneath the passenger seat where she was sitting, remove a credit card and walk back to the other car. Petitioner handed the card to the driver of that car (4 RT 920).

They eventually left the parking lot between 4:00 to 4:30 P.M. They followed the other car to a hotel about 5 minutes away. The Petitioner went into the hotel alone and was inside for about 10 minutes. When he came out, he walked over to the other car, which was parked away from their car. He handed the driver of that car something, but Thomas did not see what it was. The Petitioner and

Thomas then traveled to a beach area about 40 minutes away and spent the rest of the day there (4 RT 921-923).

The two of them started traveling back to the Bay area around 9:00 to 9:30 P.M. The Petitioner was on his cell phone throughout the drive back. Approximately between 11:45 and 12:30 that night, they picked up Petitioner's Uncle at a gas station and dropped him off at his friend's house. After, Petitioner and Thomas returned to her home in Richmond arriving around 1:00 A.M. Thomas fell asleep about 2:00 A.M. and saw Petitioner use his computer just before then (4 RT 923-925).

Thomas stated that on the day that the Petitioner met with the three men in the car, the Petitioner wore black pants, a red t-shirt, and jewelry (4 RT 965-966). Thomas also added that she and Public Defender Lynda Thompson had never met or had a conversation over the phone prior to her testimony (4 RT 913).

4. <u>DEFENSE INVESTIGATOR WILLIAM KIDD'S TESTIMONY:</u>

William Kidd is the Chief Investigator for the Public Defender's Office. He contacted Guy Sunkett and Jamila Thomas a few weeks before this trial began and made a written report outlining their statements (4 RT 974, 976). He purchased a pair of handcuffs from G.I. Joe's. He was able to open this random set of handcuffs using the keys that were found in the search of Petitioner's office (4 RT 980-981).

PETITIONER'S ARGUMENT

I. ALL OF THE TECHNOLOGICAL, SCIENTIFIC AND/OR COMPUTER GENERATED EVIDENCE PRESENTED TO THE JURY BY THE PROSECUTION SUPPORTED THE PETITIONER'S ALIBI AND INNOCENCE AND THE JURY ERRED IN THEIR VERDICTS OF GUILT BEYOND A REASONABLE DOUBT.[16]

At trial, the People presented the jury with the Petitioner's GPS tracking device records, bank records, and e-mail records. The Defense presented an expert in latent print analysis. It was the theory of the People that from July 9th, 2008, through July 11th, 2008, Mr. Sunkett was in possession of his GPS tracking device which was found to be at the scene of the crime and he was responsible for making all of the transactions and/or purchases on his credit and debit cards. They believed he accessed his email account during these dates and that a firearm found in another person's possession unrelated to this case was possibly the weapon used to commit this crime.

The Defense was that at NO time during Mr. Sunkett's trip to and from Fort Bragg on these dates was he ever in possession or shared the same location as the tracking device, and evidence presented supported this fact. Also, the Mr. Sunkett never disputed any of the transactions made on his credit and

[16] All technological, scientific, and computer generated records mentioned herein were investigated, introduced and entered into evidence by the People at Petitioner's trial. (With the exception of Defense fingerprint evidence).

debit cards and has always claimed all purchases made to be his own. He stated that he indeed accessed his email account during the time in question and that he did not own, possess, or have knowledge of a guns' existence which was found in possession of another person.

First, to make this argument effectively, one must be educated on the science, function and purpose of the GPS tracking device owned by the Petitioner and discussed throughout this case and appeal. The CT-200 mini tracker is a self-contained real-time tracking device that reports the devices exact location, speed of the device's motion, and park time. The device is linked to the Worldwide Reference Network (WWRN) which sees all the satellites in the GPS constellation all the time. It provides the CT-200 with the capability to draw data from up to 14 satellites on multiple continents by delivering satellite orbit data directly to the device.

A service provider, such as Covert Track, transmits this information in real-time, in this case every 5 seconds, to the users laptop or cellphone. Once the user is logged into his/her Covert Track account, via email, the user can now watch live movement and the location of the device in 5 second updates from anywhere in the world.

The CT-200 IS NOT a navigation device and DOES NOT instruct, give requested directions, or pinpoint requested locations to the user. The device's purpose is to allow the user to covertly monitor the movement and location of the device from a separate location other than the user by way of a laptop or cellphone.

The Petitioner testified that he used this device to track the delivery of marijuana he would purchase from the Fort Bragg area. He state that the GPS device was in the possession of transporters or

"runners" during July 9th, 2008 through July 11, 2008. Proof that he was never in possession of the tracking device during these dates was supported by specific and very reliable facts and evidence entered into record by both the Prosecution and Defense.

FACT 1: The 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. [17] 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 shows a continuous drive on highway 101 past the city of Cloverdale with no stoppage time at all in this city.

FACT 2: The 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 as the Petitioner's vehicle.

But records from the tracking device shows the device at a separate location at this time. The device concluded its travel that night at the Beach House Inn located at 188 Pudding Creek Road in Fort Bragg.[18] The device remained parked here for 13 hours, 21 minutes and 22 seconds.

[17] When traveling from the Bay area heading North on Highway 101, Cloverdale is a city you MUST pass by in order to get to Fort Bragg.
[18] A narrative based on this GPS location was reported and entered by Deputy Joseph D. Comer. Comer contacted the Beach House Inn and requested a list of all the people who checked in or stayed there on July 10, 2008. No person by the name of Glenn Sunkett or any similar matches or configurations of the name stayed there or checked in on this day.

FACT 3: On July 20, the following morning, the 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. Records from Petitioner's Bank of America account shows that the Petitioner made a transaction here for $17.00.

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

FACT 4: The Petitioner then testified that once he left McDonalds, he drove to a nearby Long's Drug Store and made a purchase. Bank records from the Petitioner's Bank of America account reflects a purchase made by him at this store for $74.61.

Records for the tracking device does not show any travel at all to this location.

FACT 5: The 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).

Again, records from the tacking device does not show travel to this location at this time, nor at any other time.

FACT 6: The Petitioner and Thomas then 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 Appellant was driving and logged it on the Folio/receipt as being the Petitioner's vehicle. 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.

FACT 7: Records taken from the Petitioner's Yahoo account shows that the Petitioner signed into his covert track account on three occasions; checking the status of the tracking device very close in time to the occurrence of the crime, 8:08 P.M., 8:09 P.M. , 9:34 P.M. This gives the very strong presumption that the Petitioner was in a separate location as the tracking device and was obviously logging into his Covert Track account to gain knowledge of the devices whereabouts and/or course of travel.

FACT 8: 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, and lift cards taken from the crime scene. Miss Senteney testified that the Petitioner was eliminated as having been a contributor to any of the finger prints found.

In summary, the People did not present ANY technological, scientific or computer generated evidence to support their claim that the Petitioner, during the days of July 9th, 2008 through July 11, 2008, possessed and/or shared the same location as the GPS tracking device, making him a perpetrator in this crime. Also, contrary to what the Prosecutor fabricated to the jury in her closing argument, there

is NO GPS RECORD or any other evidence showing that the tracking device left the crime scene and stopped at the Petitioner's home/office three hours later. (5RT 1262-1263). The prosecutor's use of a fictitious map of the GPS 's travel and telling the jury that the GPS device ended it's run at the Petitioner's home/ office on the night of the crime was a complete and deliberate fabrication. This false and misleading statement was introduced for the sole purpose of distorting the facts with the intent of confusing and misleading the jury. This fabrication and prejudicial error filtered into the first Appellate District Court's ruling and the court used this fabrication and error as a factor in their decision to deny the Petitioner's appeal (court's ruling p.22). Had the appellate court reviewed the records of evidence presented to the trial court relating to this issue, the court would have found that this statement introduced by the prosecutor and this error which was supported and perpetuated by the Attorney General on appeal, was false and prejudicial and may have quite possibly tainted the jury in deliberation. And the Appellate Court themselves wouldn't have then erred when they considered this false statement in their ruling. The belief that the Petitioner's GPS device- which was in the vicinity of the crime scene- ended up at the petitioner's home/office would be considered strong enough evidence to sway a jury to convict. Therefore, this false statement was prejudicial to the petitioner and the trial was not fair.

Jackson v. Virginia 443 U.S. 307 (1979) holds that due process mandates reversal of a conviction if, viewing the evidence in the light most favorable to the prosecution , no rational fact finder could have found the defendant guilty beyond a reasonable doubt. In this case it is clear that all of the specific records of evidence and expertise presented by the prosecution supports the Defense and corroborates with the Petitioner's and other Defense and Prosecution witnesses' testimony. The facts show that the Petitioner was never in possession of the tracking device in the days leading up to the crime and the hours of the crime as per the prosecution's theory. Also, none of these records of evidence places the petitioner at or near the crime. When considering the source and reliability of such evidence,

and that such strong and convincing evidence did in fact conflict mightily with the Prosecution's theory of events, it must be said that reasonable doubt was certainly injected into these proceedings. The jury failed in their duty to properly weigh and consider all of this very reliable evidence presented to them and thus erred in their findings that the Petitioner was guilty beyond a reasonable doubt. This court now needs to secure the Petitioner's constitutional rights to a fair trial and in the interest of Justice, overturn these convictions and grant him a new trial.

II. THE EYEWITNESS IDENTIFICATION EVIDENCE AND IDENTIFICATION PROCESS USED AGAINST THE PETITIONER AT TRIAL WAS FLAWED, TAINTED, CONTRADICTIVE AND UNTRUSTOWRTHY, YET THIS EVIDENCE CARRIED GREAT WEIGHT IN THE JURORS DECISIONS TO PRODUCE VERDICTS OF GUILT.

The identification of the Petitioner and the process eliciting the identification(s) was greatly flawed and prejudicial yet the identification(s) was the central issue in this case. Upon the conclusion of trial, lead investigator, William Kidd, interviewed one of the Jurors in this case. Yet however flawed, tainted, contradictive and untrustworthy the Defense argued these identifications and the process that produced them were, the Juror stated that the **identification evidence** presented by the Prosecution was "**big**" in the Jury's evaluation of the case (7 RT 1618, 1621). This is important because the petitioner contends that the identification process was conducted in error and produced two false identifications that were prejudicial at trial.

Mr. Justice Frankfurter once said, "What is the worth of identification testimony even when uncontradicted? The identification of strangers is unproverbially untrustworthy." In United States vs. Wade, Mr. Justice Brennen noted, "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification".

Although eyewitness identification is highly fallible, it still carries great weight with Jurors. In fact, one study-cutler, et al, 1990, found that witness confidence is about the only aspect of an identification that Jurors consider. This is disturbing being that eyewitness research has repeatedly found that identification is a relative, not an absolute judgment and that the correlation between eyewitness confidence and accuracy is very low.

There are some instances though where identification is more likely accurate. For example, if the suspect is someone previously known to the victims, then high accuracy is more probable. However, when it comes to strangers, especially when cross race identification is a factor, identifications are frequently in error.[19] Eyewitness confidence provides only modest assurance that the identification is correct.

In the instant case, law enforcement officers interviewed two of the complaining witnesses in this case five days after the crime was committed. Dusty Miller and Matthew Graves gave individual descriptions of the suspects. Not only were these descriptions inconsistent with each other's, but none of the descriptions given were a positive match to the Petitioner's actual description.

[19] One study (wells, et al 1998) examined the first 40 cases where DNA exonerated wrongfully convicted people. In 90% of these cases, mistaken identification played a major role. In one particular case, 5 separate witness identified the Defendant. Huff (1987) studied 500 wrongful convictions and concluded that mistaken eyewitness identification occurred in over 60% of them.

For example, Dusty Miller believed suspect number 1[20] was the tallest of the three suspects at approximately 6 foot to 6 foot 1 inches tall. She believed he was approximately 27 years of age. She states that his facial hair was "all shaven", and the hair on his head was cut "close to the scalp". She added that this suspect was "very black" and dark skinned. She told investigators that the other two suspects were both under 5 foot 9 inches tall. (Transcript of interview #2 of Ms. Miller on 07/16/08, p. 14-15, 29-31).

Matthew Graves saw things differently. He believed that suspect number 3 was the tallest of the three suspects at 6 foot 6 inches tall, weighing 280 pounds. Graves believed suspect number 1 was 5 foot 11 inches with a beefy build. He stated that this suspect weighed approximately 230 pounds. Graves told investigators that suspect number 1 "looked like Barry Bonds,"[21] and "looked like he used steroids". He also believed, as did Miller that this suspect was clean shaven. (Transcript of interview #1 of Mr. Graves on 7/16/08, p.12, 25-26, 28).

As previously stated, the description given by both Miller and Graves of the first suspect is far from matching that of the Petitioner's. According to the Petitioner's California driver's license, booking information taken at the Mendocino county jail at the time of his arrest, prior arrest information and intake information into the California State Prison system and federal system, the Petitioner's adult height has always been recorded at 6 foot 2 inches, and his adult weight has always been recorded between 185 to 195 pounds. The Petitioner was 37 years of age at the time this incident occurred. His driver's license picture, which was included in the photo array comprised of 60 other African American males, shows the Petitioner as being more of a light-brown complected African American. Quite

[20] Through investigation, it was believed that suspect number 1 was possibly the Petitioner.
[21] Barry Bonds is a retired African American Major League Baseball player who is a citizen of the United States. Mr. Bonds face is closely associated to the sport of baseball to this day and he is highly recognized by many Americans.

obviously not a "very dark" or "dark-skinned" man as Ms. Miler described. He is shown in this picture having both a mustache and beard, and has at least an inch of hair on his head. Also, upon independent examination, outside of sharing the same Ethnicity, the Petitioner and Barry Bonds do not share any of the same physical features. Their head shape and size, as well as, their facial structure are totally opposite and can be easily distinguished by the average person if/when compared. Where Bonds is dark skinned, the Petitioner is much lighter. Where Bonds is big and beefy in his build, the Petitioner is tall and lanky. Bonds is mostly identified with having a clean shaven face. The Petitioner has NEVER been photographed in such a manner as an adult.

Prosecution witnesses Edith Silva and Gabriella Salazar both physically witnessed the Petitioner on July 9th, 2008 and July 10th, 2008, and had the opportunity to view the picture and physical information on his driver's license. At trial, both witnesses identified the Petitioner as being the same person who checked in and out of their motels on these dates and was the same person on the driver's license picture provided for check-in (3 RT 562, 599). Ms. Salazar went on to state that the Petitioner looked the same way there in trial that he did on the day he checked out of her motel.[22](3 RT 601). Neither witness stated that the Petitioner was "clean shaven" on this day or that his hair was cut close to the scalp. Nor, did they say that the Petitioner seemed darker skinned at that time than he did in trial or on his driver's license picture. They also did not suggest that the Petitioner appeared bigger or beefier than he did at trial or in his picture. It was firmly established that on these dates, Mr. Sunkett physically appeared in person as he did on his driver's license picture as well as right there in trial, and neither witness expressed difficulty identifying the man in person from the driver's license picture. Furthermore, Defense witnesses, Guy Sunkett and Jamila Thomas, also had the opportunity to physically

[22] It should be noted that the Petitioner wore a mustache, beard, and about an inch high of hair on his head at trial. Ms. Silva stated that the Petitioner's hair was LONGER on the day she encountered him than how he had it cut in trial (3 RT 601). Defense witness, Guy Sunkett, also testified that the Petitioner's hair was longer on the day he encountered the Petitioner (7/10/08) than what it was there at trial. (4 RT 905). Both witnesses testimony conflicts with victim testimony that suspect #1 had hair cut close to the scalp and that he was clean shaven.

view the Petitioner on these dates and/or day of the incident. Both of these witnesses also confirmed that the Petitioner wore a mustache, beard and hair on his head on this day(s). (4 RT 905, 916). They both also added that neither of them has ever seen him clean shaven. There was never any proof presented by the Prosecution, despite the Petitioner's prior arrest history, booking photos, and other records related, that the Petitioner was ever photographed or seen clean shaven, had his hair cut close to the scalp, was beefy built or overweight, or was "very dark" or dark skinned.

Sadly, errors made like these by victims attempting to identify suspects of a crime are heightened when the process in which the identification was produced was tainted, flawed and/or conducted improperly by law enforcement.

In this case, according to the National Institute of Justice and current California legislation on eyewitness identification and police line-ups, the procedures conducted by the lead detective, Lt. Greg Van Patten, and the Mendocino County Sherriff's Department are greatly flawed and significantly raised the probability of misidentification by both Dusty Miller and Matthew Graves.

First, the lead investigator, Van Patten, solely conducted all interviews of the witnesses in this case. He documented all descriptions of the 3 suspects, arranged the 10 six packs, and conducted the entire identification process alone, without video recording and without any other law enforcement officer present at no point in these procedures. While conducting the identification process, Van Patten failed to follow the guidelines enacted to prevent eyewitnesses from misidentifying suspects.

To make matters worse, Ms. Dusty Miller's identification was preceded before trial by a procedure where Detective Van Patten, the chief investigator, sent her an email containing two booking

photographs of the Petitioner that included a message that he was the person who had been arrested and held to stand trial in this case. His name was also given to her. At this same time in a seperate email, Van Patten sent Miller photographs containing images of items seized from the Petitioner's office that included one pair of camouflage sweat pants, two flashlights, two pair of black boots, one pair of gardening gloves, one Brown BBQ style lighter, the black hand gun seized from Aziza Washington's purse, one black t-shirt, one pair of black tactical pants, and a black jacket with white stitching (2 RT 250-252, 255, 306-311, 314; 3 RT 744-747). Prior to receiving these emails Miller had evinced great difficulty and uncertainty with pretrial identification.[23] Only after receiving these emails and remaining in possession of the Petitioner's photograph and other prejudicial information for THREE MONTHS, was she able to suddenly show up at trial and positively identify him.

Penal Code Section 683.3 and 686.3 states that when law enforcement officers in the State of California shows witnesses to a crime a photo lineup of a suspect(s), they should follow the following procedures:[24]

1. Prior to conducting the identification procedure, and as close in time to the incident as possible, have the eyewitness complete a standardized form describing the perpetrator.

By failing to do this, Van Patten did not preserve the witnesses' earliest memory of the perpetrator; therefore, failed to assure the reliability of the eyewitness identification made at a later date.

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[23] Miller testified that the camouflage pants worn by the suspects weren't "the proper army pants" but were more like "sweat pants" (2 RT 215). At no other time prior to trial had Miller made such a distinction before. Yet, both Graves and Stover testified that these camo pants were not a "sweat pant" type of material, but more identical to what the Military uses (1 RT 126, 2RT 344) Moreover, Graves who testified to having Military experience was more specific in stating that the camouflage style sweatpants seized from the Petitioner's office WERE NOT the pants worn by the suspects. Graves stated that the pants worn by the suspects "were Military style BDU's like the Police or Military officials would use during training operations" (2 RT 346-347) This is important because as the Petitioner makes his argument throughout this Writ, it is necessary to show that Miller was highly influenced by the suggestive identification procedure used by the Detective in the Pretrial stages. This procedure tainted Miller's memory of the actual events that took place the night of the incident and caused her to shape her testimony around the evidence shown to her prior to trial and not solely on her true memory of the incident.

[24] Other procedures included in P.C. Section 683.3 that pertained more to in-person line ups or procedures that are not highly significant to this argument, were excluded for relevance.

2. Have the Investigator conducting the identification procedure be a person who is not aware of which person in the identification procedure is suspected as the perpetrator.

By failing to substitute himself with a fellow officer unfamiliar with the suspects included in the identification process, it is likely that lead detective Van Patten inadvertently, if not intentionally, influenced the eyewitness to misidentify the Petitioner.

3. Present photos used in an identification procedure sequentially, and not simultaneously.

By Van Patten presenting the photos simultaneously, he caused the witnesses to make relative judgments by their comparing all lineup members to each other to determine which one most closely resembles his/her memory of the culprit.

4. If the eyewitness identifies a person he/she believes to be the perpetrator, then all of the following apply:
    a. The investigator immediately inquires as to the accuracy of the witnesses' identification.
    b. No information concerning the identified person shall be given to the witness(s) prior to obtaining the witnesses' statement of confidence.

There is no evidence on record in which Van Patten took any measures to insure the accuracy and reliability of Matthew Graves's identification of Mr. Sunkett, or the alleged role he could have played in this crime at the time of this identification. In regards to Dusty Miller, Van Patten sent Miller an email that included the Mr. Sunkett's singular booking photo, his name, arrest and court information, and

pictures of evidence seized from his office, PRIOR TO HER MAKING THE IDENTIFICATION OF THE APPELLANT AT TRIAL.

5. Have a written record of the identification procedure be made that includes the following:
    a. A signed statement of the witnesses' own words regarding the certainty and accuracy of the identification.
    b. A video recording of the lineup

Matthew Graves never provided, or was instructed to make a written or recorded statement in regards to the certainty and accuracy of his identification and the role in which the Petitioner allegedly played in this crime. This was critical when evaluating and preserving Graves' earliest memory very close in time to the incident and would have increased the certainty of the identification and the role played by the identified suspect. Also, the showing of the photo lineups was NOT video recorded and was done privately in the sole presence of Van Patten, Graves and Miller. Video recording the lineup process, which was conducted at the Mendocino County Sheriff's office, would have preserved the integrity of the lineup, and would have recorded the manner, demeanor, and certainty in which the witness made the identification. All of these procedures are supported by the criminal law procedure and practice (CEB) §22.15 (b) also.

Whether Graves was influenced in some way by Detective Van Patten to finger the Petitioner's photo in the photo array, or whether he believed he needed to cooperate with the detective and make this identification to avoid being prosecuted himself for being found in possession of 888 marijuana plants,

growing equipment and several pounds of processed marijuana,[25] it's likely something unnatural took place in that interview room that prompted Graves to identify the Petitioner by photo as one of the perpetrators in this crime. It's already been proven that the description given by both Graves and Miller of suspect number one 5 days after the incident was not that of the Petitioner pictured in his driver's license photo. Both had major discrepancies in their identification of this particular suspect and neither of them was able to correctly identify at least one of Mr. Sunkett's true physical features/characteristics prior to being shown the Petitioner's photo by Detective Van Patten. From the very second Van Patten himself produced Mr. Sunkett's photo and showed it to both Graves and Miller, he tainted both of these witnesses as well as the identification process itself by his not following the most important procedures for conducting eyewitness identifications and lineups outlined in Penal Code Section 683.3 and 686.3. These procedures were specifically designed to protect the integrity of the process and accuracy of the identification. By failing to follow these guidelines, Detective Van Patten produced flawed and highly untrustworthy identifications of Mr. Sunkett that were used against him at his trial.

It should be taken into account what our courts have said about the dangers inherent in unduly suggestive pretrial identification procedures. An identification which is tainted by an unnecessarily suggestive identification procedure is vindictive of a Defendant's right to due process under the Fourteenth Amendment to the United States Constitution (see *Stovall v. Denno* (1967) 388, U.S. 293, 301-302; *Manson v. Bratwaite,* Supra, 432, U.S. 98, 106). "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned". (*Stovall v. Denno, S*upra, 388 U.S. at p. 302). Indeed, it has been stated regarding a situation where the witness was shown only a defendant: "It is hard to imagine a situation more clearly conveying the

[25] Despite Graves adamant denial about having knowledge about the marijuana grow on Bennett's premises (even after Bennett himself stated that Graves had access to the locks and keys that guarded the marijuana), Graves' own girlfriend and invited guest testified that the decision to not call the police was "a democratic one". (2 RT 246). The decision was based on the belief that the marijuana on the property could land them more time in jail than the offenders would get for the crime (2 RT 247)

suggestion to the witness that the one presented is believed guilty by the police." *United States v. Wade* (1967) 388 U.S. 218, 234). This condemnation extends to showing witnesses photographs of only one person, the defendant. (See *Simmons v. United States* (1968) 390 U.S. 377, 383-384.)

The court in Simmons described this problem as follows:

> "It must be recognized that improper employment of the photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only a picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of mis identification is also heightened if the police indicate to the witness that they have other evidence that one of persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person

actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." (Ibid., emphasis added, footnotes ommitted)

The trial court itself, AFTER hearing all of the facts, regarded the process Van Patten used to produce these identifications as being "highly suggestive" (7 RT 1756). In saying that, the trial court acknowledged unfairness to the Petitioner in this trial proceeding but failed to provide relief. Therefore, the Petitioner is entitled to a new trial that is both fair and partial which is his constitutional right to have. At this time, this issue can be properly litigated in limine and if needed, again at the close of the Prosecution's case. If by chance, the trial court rules against the Defense Motion to Suppress in Limine, expert testimony would be used to properly educate the jury on the fallibility and unreliability of identifications made by witness that were elicited under the for mentioned circumstances and other contributing factors such as cross race identification, stress, weapon focus, etc… Due to the unfairness and prejudice of these identifications as well as the identification procedure's own fallibility, the Petitioner must be awarded a new trial.

III. TRIAL COUNSEL'S FAILURE TO MAKE A PRETRIAL MOTION PURSUANT TO 995 OR MOVE PURSUANT TO PENAL CODE SECTION 1118.1 AT THE CLOSE OF THE PROSECUTION'S CASE BASED ON THE INSUFFICIENCY OF EVIDENCE TO SUPPORT KIDNAPPING DENIED THE PETITIONER EFFECTIVE ASSISTANCE OF COUNSEL.

LAWS GOVERNING P.C. 207(a) KIDNAPPING:

Penal Code Section 207, subdivision (a) provides:

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

The elements of kidnapping are: "(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; AND (3) the movement of the person was for a substantial distance." (People v. Jones (2003) 108 Cal. App. 4th 455, 462; People v. Bell (2009) 179 Cal. App. 4th 428, 435.) The movement must be forced upon the victims, the victims must protest this movement, AND the distance of this movement must be MORE than slight or trivial and/or out of the country, state, county, or into another part of the same county. These elements must be proven in order to convict beyond a reasonable doubt.

In People V. Martinez (1999) 20 Cal. 4th, the California Supreme Court held that a jury may consider "such factors as whether that movement increased the risk of harm about that which existed prior to the asportation, decreased the likelihood of detection and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes (Id. At p. 237. Fn. Omitted.). Although the jury is allowed to take into account considerations in addition to actual distance, the Supreme Court cautioned that "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (Ibid).

Cases decided since Martinez have held that quite short distance suffice for kidnapping when the movement substantially changes "the context of the environment." (People v. Diaz (2000) 78 Cal. App.

4th 243, 247). The Diaz court upheld a kidnapping conviction based on a distance of approximately 150 to 300 feet because the victim was moved from a visible street location to a completely dark portion of an adjacent park where the chance of detection were minimized (Id. At p. 248).

Even distances of just several feet have sufficed to meet the asportation requirement for kidnapping. In People v. Shadden (2001) 93 Cal. App. 4th 164, A Defendant's aggravated kidnapping conviction was affirmed even though the victim was moved only nine feet before the Defendant began to assault her. This short movement sufficed for kidnapping because the victim was moved from the front of a video store to a backroom with the door closed. (Id. At p. 167). Because the backroom was out of public view, the risk of harm to the victim was increased (Id. Pp. 169-170). The court noted the "critical factor" was whether the Defendant secluded or confined "the victim (Id. At p. 170) Similarly, the court of appeal affirmed a kidnapping conviction in a case in which the Defendant cause the victims to move about 10 feet from a public area to a small back room with no windows and a solid door (People V. Corcoran (2006) 143 Cal. App. 4th 272, 279). The Corcoran court explained that even this short distance substantially increased the danger to the victims due to the back rooms lack of visibility (Id. At p. 280).

Applying the Martinez "Totality of the circumstances" test in the instant case, it's clear that the simple kidnapping convictions cannot be sustained. First, this incident occurred inside the 2,500 square foot home of Michael Bennett located on a 45 acre parcel at 27425 North Highway 1 in Fort Bragg California. The property has the house, a garage, a big shop, and other small outbuildings located on it (1 RT 71). The house in large part was secluded, surrounded by trees and far removed from public visibility. The driveway of the home is approximately 150 feet from the highway. (1 RT 74) And as all victims testified to, the incident took place approximately between 10-11 pm, and it was very dark on

the property. Given these facts, it must be said that this is private property, not a public place or a place meant to be observed by the public.

Secondly, the four simple kidnapping convictions stemmed from the four victims being moved from the living room into a smaller room of the house. None of the victims testified that the intruders threatened them with harm or death in order to facilitate this movement. Nor, did any of the victims testify that they objected to or put up a fight against this movement. In fact, the victims spoke very matter-of-factly about the movement from one room to another; as if it were an afterthought or vague memory. Stover addressed this movement during his testimony. He was asked how did the victims get from the living room to the "spare room" and Stover replied:

"They walked us there."

Q. "Did they direct you there?"

A. "They must have, yes. But, I mean, its so hard to remember these fine details."

(1 RT 145).

Dusty Miller was also asked about this movement during her testimony. When she was asked how they were moved from the living room to the smaller room, she stated:

"They told us that they were going to move us and ushered us in front of them the same way that they ushered us into the living room."

Q. "Did someone in particular tell you that they were going to move you?"

A. "Yeah, the tall first man."

Q. "Did he tell you why he was going to move you?"

A. "No."

Q. " He just said, 'I'm going to move you into this other room'?"

A. "Yeah."

(2 RT 235)

Graves was asked about this movement as well. After the victims were restrained in the living room, he was asked "What happened next?" Graves replied "Then they had us all rise and they walked us into another room." (2 RT 363)

None of the victims protested against this movement and/or expressed a greater fear of the movement from the living room to the "spare room" at no point during their testimony. Nor, did any of them express a heightened sense of fear or inescapability once they were seated inside the spare room. The intruders did not inflict physical force, threaten to inflict physical force or harm, beat any of them until they could no longer resist, and/or drag a resisting victim to the "spare room". Nor, were they made to be used to insure the intruders escape. The movement from one room to another was nothing more than incidental to the commission of the robbery.

Third, the moving of the victims was approximately 24 feet, (1 RT 147), and was made inside of the same house. Moving the victims from the living room was not done to decrease the likelihood of detection because the home was on private property, secluded by high vegetation, and at least 150 feet from the nearest road, Highway 1. There is no evidence on record showing that the living room of the home was in view of public visibility. Hence, there is no evidence that was ever brought forth that could show that the moving of the victims was made to decrease detection.

Next, the movement did not increase the harm above that which existed prior to the asportation because there was no significant change in the context of the environment. The victim's hands were already secured behind their backs BEFORE they were moved from the living room to the spare room. And the door to this room remained open, but guarded by one of the intruders until the intruders made their departure.[26] When in the living room, the victims were seated on the couch with their hands bound, being continuously watched by all 3 intruders. When moved to the "spare room", they were placed under the same conditions, seated, bound, and guarded. Only now, one intruder guarded them. The spare room had a fan mounted in a hole cut into the wall that they eventually made their escape through shortly after the intruders departed (2 RT 242-243, 372). There is no evidence supporting the movement increased the harm to all four victims.

Fourth, the intruders made it clear quickly after they made entry into the house that their motive was robbery to which they were already in the commission of prior to moving the victims into the spare room (2 RT 234). That being, no further crimes were committed that the moving of the victims may have enhanced the intruder's opportunities to commit.

Fifth, there is no evidence that the moving of the victims was intended to fulfill a seperate objective. There was but a single objective to this crime --- obtaining money and/or marijuana from Michael Bennett. The movement of the four victims was incidental to the intended crime of robbery and never

[26] After the intruders entered, the victims were kept in the living room approximately 20 min. (2 RT 233). They were kept in the spare room for approximately 3 hours (2 RT 240). Shortly before the intruders departed the house, they bound the victims legs with duct tape they found somewhere inside the home and relived them of their cell phones. This took place long AFTER the movement from the living room to the spare room and after the victims had already spent a considerable amount of time inside this room.

was there evidence of a different expression and/or more sinister goal other than the mere commission of the original crime.[27]

To clarify, without the existence of a public visibility argument, force or fear directly placed upon the victims for the purpose of facilitating the trivial movement of 24 feet from one room to another, no evidence satisfying the asportation elements, and no evidence to prove the intruders harbored a separate intent at the moving of the victims, it cannot be said that there was never sufficient evidence to support kidnapping as outlined in Penal Code Section 207(a). Force was not used to move the victims, the victims did not protest the movement, and they were not carried out of the country, state, county, or taken to another part of Mendocino County. The movement remained limited to a trivial distance inside the house which was located on private grounds.

And when applying the factors outlined in People V. Martinez, the movement did not increase the risk of harm because the movement did not significantly change the situation. The victims were already in hand restraints and were seated in the living room PRIOR to their being moved to the "spare room," and the robbery was already in progress. After they were moved, they remained in the restraints and were seated on a platform inside the room. The door remained open. They were now guarded by one intruder instead of the three watching over them in the living room.[28] And at no point was it stated that the intruders harmed or threatened to harm, kill, and/or tell them they would die there in the room. Also, the likelihood of detection did not decrease by the movement because the movement was made inside of the home which in itself was secluded from public visibility. And in this movement, the victims were placed in a room that had a fan set inside of a hole in the wall. They were put in a position where they

[27] Just before Miller was bound with zip ties she pleaded with the intruder to not tie her hands. The intruder told her "don't worry. I'm not going to do anything weird to you." (2 RT 230) Also, at her request Miller was allowed to use the restroom without objection. She was escorted to and from by the intruder without incident (2 RT 239).

[28] When being asked about where the intruders focus was at during the 20 min they kept the victims in the ling room, Miller replied "its's on us…" (2 RT 234).

were able to communicate with each other and cooperate in making their escape. They were not placed in great peril and they managed to make their escape within minutes of the intruders departure by kicking the fan out of its setting (2 RT 290-291). And last, the movement did not enhance the intruder's opportunity to commit additional crimes, because one of the intruders remained with them in the living room AND in the spare room.

There is an abundance of case law establishing what factors constitute simple kidnapping. It is clear that force, distance, and intent to decrease detection are the most prevalent. In People v. Arias (2011) 193 Cal App. 4th 1428 the Court of Appeal upheld a trial court's findings that there was sufficient evidence of asportation where the victim was involuntarily moved 15 feet. In that case the Defendant was looking for rival gang members to "blast" with his gun, and came upon the victim and pointed the gun at him. He walked behind the victim for about 15 feet to the victim's apartment door. He then entered the apartment and later left, apparently after checking the rooms for rival gang members (Id. At. P. 1431). In upholding the trial court's denial of the Defendant's Section 1118.1 Motion, the Appellate court ascertained that a reasonable trier of fact could have found simple kidnapping. Applying Martinez, the court reasoned that "[T]he movement of [the victim] increased his risk of harm in that he was moved from a public area to the seclusion of his apartment. Similarly, by scaring [the victim] into moving away from a public place, it was less likely Defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping." (Id. At p. 1435).

The contextual factors found decisive in Arias do not apply in the instant case. Here, the movement of the victims to another room in the house did not facilitate the commission of the crime, was not done with force, and did not increase the risk of harm because they were not taken out of public view. They

were placed in a situation where they could communicate and cooperate with each other to facilitate their escape. Also, it was NOT LESS LIKELY that the intruders would have been detected if they committed additional crimes had they NOT moved the victims from the living room to the "spare" room. The movement was not substantial to support kidnapping and every case cited to this court substantiates that.

Trial counsel Lynda Thompson was appointed on the Petitioner's case on January 13, 2009. All of the case law cited thus far governing P.C. 207(a) existed long before that. She was aware of the circumstances in the case that prompted the kidnapping charges from the very beginning of her appointment. During the Petitioner's motion for a new trial hearing, Thompson was asked:

Q. "Did you review the preliminary hearing transcript that had been undertaken by the Peterson firm?"[29]

A. "I did."

Q. "Did you bring any --- did you anticipate or bring any motion pursuant to 995?"

A. " I did not"

Q. "Did you make any attempt, based on what you read in the transcript, to challenge the asportation aspect of the kidnapping charges?"

A. "I did not file a 995 to attack the Asportation aspect of a 207 (A). I did not."

Q. " You didn't file a 995 at all?"

A. "That's correct." (7 RT 1636)

[29] Lynda Thompson was appointed to the Petitioner at his arraignment. She was removed shortly after the Petitioner hired Richard Peterson as private counsel. Peterson took the Petitioner past the prelim stage then excused himself from the case due to a financial conflict. Thompson reappointed herself to the case and inherited the Petitioner's case file. After the case was dismissed then refiled, she participated in the Petitioner's 2nd preliminary hearing and trial. At no time did she challenge the kidnaps.

At no other point in this proceeding did Thompson address or give any additional statements on why she failed to move the court to dismiss the four kidnapping charges. The only other time Thompson addressed this issue was during the Petitioner's February 24, 2010 Marsden Hearing. When addressing the Petitioner's complaint stating that she was ineffective for failing to move the court to dismiss these charges, Thompson responded:

> "[T]he difficulty I had in this particular case, unlike certain trials when you can argue very strenuously, very contradictory defenses, this is a situation wherein I believed Mr. Sunkett and I believed his alibi witnesses and who not have bode well for either one of us if I had looked the jury in the face and said Mr. Sunkett wasn't there. But if you find that he says he didn't commit the kidnapping ---I believed he wasn't there. I argue that and that's how we went forward."
>
> (Augment RT p. 9-10)

As it appears, Thompson neglects to realize that her duty was to litigate this issue prior to trial, outside the presence of the jury. She failed to protect Mr. Sunkett from being held to answer on charges that were not supported by the law when applying the circumstances of the crime. Thus, she failed to protect Mr. Sunkett's constitutional rights and preserve argument on appeal had the court made an adverse finding against the Defenses' request for dismissal. That said, and when factoring in Thompson's statement she gave in this regard at the Marsden hearing, her decision NOT to move the court to dismiss the four kidnapping charges was an error that was <u>not</u> based on investigation into the circumstances of the crime and law, but solely on her belief that Mr. Sunkett was innocent of these charges to begin with. And because of that, the question of tactical error is eliminated.

A criminal defendant's constitutional right to effective assistance of counsel is guaranteed by the Sixth Amendment of the Federal Constitution, as made applicable to each state by the Fourteenth Amendment (U.S. const., Amend. VI; *Powell v. Alabama,* 287 U.S. 45 (1932); *Culver v. Sullivan,* 446 U.S. 335 (1980)). The State of California specifically guarantees the right to effective assistance of counsel in it's own constitution (Cal. Const., Art 1 § 15). The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in it's conduct and reliable in it's results. [citations] [91]. Construed in light of it's purpose, the right entitles the defendant not to some bare assistance but rather to EFFECTIVE assistance. [Citations] (*People v. Ledesma* (1987) 43 Cal. 3d 171, 215). Effective assistance of counsel is not rendered where counsel fails to act in a manner to be expected of a reasonably competent attorney acting as a diligent, conscientious advocate. (*In Re Cordero* (1988) 46 Cal. 3d 161, 180).

To succeed in this claim, Petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness...under prevailing norms." (*In Re Cordero,* Supra, at p. 180 and *People v. Ledesma,* Supra, at p. 216, both quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688; also see *People v. Seaton* (2001) 26 Cal. 4th 596, 666). Petitioner must also show that counsel's deficient performance prejudiced his defense. That is, Petitioner must show either counsel failed to present or inadequately presented a potential meritorious defense or that it is reasonably probable that a more favorable result would have been obtained had counsel performed adequately (*In Re Cordero* Supra, at p. 180; *People v. Ledesma* Supra, at pp. 217-218; *People v. Fossleman* (1983) 33 Cal. 3d 572, 583-584).

The United States Supreem Cout has long "recognized the '[p]prevailing norms of practice as reflected in American Bar Association (ABA) standards and the like...are guides to determining what is

reasonable..." (*Padilla v. Kentucky* (2010) 559 U.S. ---, ---, 130 S. Ct. 1473, 1482, citing *Strickland*, Supra, 466 U.S. at p. 688; *Bobby B. Van Hook* (2009) 558 U.S. ---, ---, 130 S.Ct. 13, 16; *Florida v.* Nixon (2004) 543 U.S. 175, 191, & Fn. 6; *Wiggins v. Smith (*2003) 593 U.S. 510, 524; *Williams v. Taylor* (2000) 529 U.S. 362, 396). Standard 4-4.1 (a) of the ANNa's standards for Criminal Justice Prosecution Function and Defense Function states:

" Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the Prosecution and law enforcement authorities. The duty to investigate exists regardless of the facts constituting guilt or the accused 's admissions or statements to Defense counsel of facts constituting guilt or the accused 's stated desire to plead guilty." (ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d Ed. 1993), p. 181).

The ABA commentary states that "[f]ailure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel." (Ibid., citing *Strickland,* Supra, 466 U.S. at p. 691). And as noted in *Renoso v. Giubino* (9th Cir. 2006) 462 F. 32 1099, 1113 (citing *Sanders v. Estelle* (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 he/she has not yet obtained the facts upon which such a decision could be made." A Defense attorney is required to explore all meritorious defense before making a tactical choice about what defense, if any, to present (*In Re Cordero* (1988) 46 Cal. 3d 161, 181 n8; see also *Riley v. Payne* (9th Cir. 2003) 352 F. 3d 1313, 1321; *People v. Ledesma* (1987) 43 Cal. 3d 171; *People v. Ledesma*. Supra; *People v. Stratton* (1988) 205 Cal. 3d 87). Tactical choices by

the attorney must be made "after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." (*Strickland*, 466, U.S. at 690) "[C]ounsel can hardly be said to have made a strategic choice when…[H]he has not yet obtained the facts on which such a decision can be made." (*Frierson v. Woodford* (9th Cir. 2006) 463 F. 3d 982, 992, citing *Sanders v. Ratelle* (9th Cir. 1994) 212 F. 3d 1446, 1457).

As stated in *Strickland,* "A defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," (*Strickland,* Supra, 460 U.S. at p. 693). "The benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having a just result." (I'd. at p. 686).

Trial counsel Thompson was given several opportunities to state that her failure to move for the dismissal of the kidnapping charges was a tactical decision and/or what that tactic was. Yet, she never did. In fact, this issue appears to be the most avoided by Thompson. The Petitioner first brought Thompson's error to the courts attention during a January 8, 2010 Marsden proceeding. Mr. Sunkett raised a variety of IAC issues that included argument on Thompson's failure to move for the dismissal of the four kidnappings (sealed RT 1419-1420).[30] Although Thompson managed to address all of the other ineffective assistance of counsel issues raised by Mr. Sunkett, she made absolutely no mention or offered any explanation in her defense in relation to her error to not challenge the kidnapping charges due to the insufficiency of the evidence. The Petitioner raised this issue once again at his second Marsden hearing dated February 24, 2010. As previously referenced, Thompson stated that she did not investigate the law and facts of the kidnaping charges because "I believed he wasn't there. I argued that

[30] Petitioner hired private attorney Jeffery Fletcher for representation solely for the Marsden proceedings conducted on January 8, 2010 and January 22, 2010.

and that's how we went forward." At the Petitioner's motion for a new trial, Thompson simply stated "I did not filed a 995 to attack the asportation aspect of a 207(A). I did not." At no point did Thompson offer this error to be a question of strategy nor did she explain what that strategy could have been.

After investigating and applying case law to this case it must be presumed that any "reasonable lawyer" would have moved for the dismissal of these charges PRIOR to trial or at the closing of the Prosecution's case due to the insufficiency of evidence to support of a P.C. 207(a). Thompson did not. That being, Thompson should have atleast prepared a Defense that would have assisted the jury with understanding the law of 207(a), all of the elements required to support a charge of kidnapping, and explained the lack thereof in this case. Thompson failed to do this as well. By her failing to do so, Thompson left it to the jury to acquit solely on the bases that Mr. Sunkett was not there. Yet, the jury decided that Mr. Sunkett was there and convicted him of all charges. Therefore, Thompson left her client vulnerable to being wrongfully convicted on the kidnapping charges because she did not present a Defense covering the facts and law of Penal Code section 207(A).

First of all, the insufficiency of the evidence to support kidnapping should have been decided by the trial court, a much more knowledgeable arbitrator of law, before the evidence was heard by the jury. A 995 motion should have been brought before the court to argue that the evidence in this case is insufficient and does not fulfill the elements required to charge the Petitioner of kidnapping according to P.C. 207(A). If this motion was denied, Thompson should have moved the court pursuant to 1118.1 at the close of the Prosecution's case- in-Chief to dismiss the four kidnapping charges due to lack of evidence. If another denial was ordered, trial counsel had an obligation to present argument directly targeting the law governing these charges in her closing statement. With several ways to address matters of law in her closing statement and without inferring guilt, Thompson should have shown the

jury that regardless of who they may conclude committed this robbery, four kidnappings according to P.C. 207(a) never occurred in this case.

Had Thompson moved the court by way of a 995 motion or pursuant to P.C. 1118.1, based on the court's ruling in a separate context, it is highly likely that the Defense's request to dismiss the four kidnappings would have been granted. During the Petitioner's sentencing phase, the trial court referenced Re Ponce (65 Cal. 2d 341):

> "The Defendant and two co-defendants held up a café. A confederate took money from victim one at gunpoint, then forced him to move approximately 60 feet from a bar to an office, and 40 feet more from the office to the restroom. Meanwhile, Defendant, at gunpoint, had forced the customers and employees into the restroom and took money from a customer." (7 RT 1763).

This court precluded punishment for both the robbery and the kidnapping. From that, the trial court in the instant case determined that the objective of the conduct involved in this case was robbery and that the kidnapping was incidental to the robbery or simply a means of allowing the intruders to accomplish the robbery (7 RT 1764). This gives a strong possibility that with sufficient argument, the Defenses chances of moving the court to dismiss these charges was great.

At the very least, Mr. Sunkett was entitled to a Defense to these charges due to the abundance of available case law favorable to the defense. Whether Thompson simply ignored these charges, or "strategically" decided not to present a defense to these charges, a conclusion as such cannot be drawn without her first conducting a diligent investigation into all facts and law. Obviously Thompson did not

research the law. When given the opportunity to explain her actions or lack thereof, Thompson NEVER stated that she made the decision to NOT argue for the dismissal of the kidnaps based on her investigation into all the facts and law. Nor, did she explain how her decision to not file a 995 motion or moved pursuant to Penal Code Section 1118.1 was a tactical choice. Therefore, Thompson failed in a manner to be expected of a reasonably competent attorney acting as a diligent advocate and her obligation and duties on this issue were ignored and totally absent to the Defense. Thompson's acts and omissions lead to a deficient performance that failed to protect Mr. Sunkett's constitutional right to due process and a fair trial, and prejudiced him at every stage leading up to the jury's verdict.

Despite the abundance of case law available supporting the Petitioner's claim that the evidence needed to support the kidnapping charges in this case is insufficient, Thompson failed to conduct the investigation necessary to raise this claim. Hence, Thompson failed to move the court and failed to present an argument to the jury, that the evidence warranted the dismissal of all four kidnapping charges against the Petitioner. Thompson's incompetence and error left Mr. Sunkett vulnerable to wrongful conviction and allowed for an additional 40, out of the 63 years the Petitioner was sentenced to, to be added on to the his sentence. Due to the severity of these four charges and harsh consequences these charges carry, Thompsons ignoring and/or failing to argue for the dismissal of these charges CANNOT be seen as harmless error.

It is Mr. Sunkett's constitutional right, guaranteed by the Sixth Amendment of the Federal Constitution, to be represented by effective and competent Defense counsel. It is clear from case law that an appointed attorney, who grossly neglects the preparation or examination needed to present an effective Defense and/or stays ignorant as to the applicable law, the facts, or both, denies the Defendant his right to effective assistance of counsel. Here, unlike what is required to convict a Defendant beyond

a reasonable doubt of Penal Code Section 207(A), the victims were not forced to move from one room to another nor did the victims contest this movement. The movement was not made to take the victims out of public visibility to decrease detection nor were they moved out of the country, state, county or into another part of the same county as required in 207(A). Therefore, in a clear show of incompetence, lack of knowledge of the law, and proper decision making, trial counsel Thompson failed to make a motion seeking the dismissal of the kidnapping charge. If successful, this would have prevented the Petitioner from being tried and ultimately convicted on these four counts of simple kidnapping. Given the substantial case law cited, it is clear that the charges of kidnap should have been at least contested by trial counsel Thompson. Her failure to argue against and move for the dismissal of the four counts was ineffective to an extreme and she also failed to preserve this argument on appeal had the trial court made an adverse ruling against the Defenses request.

REVERSAL OF THE CONVICTION IS REQUIRED.

IV. PUBLIC DEFENDER LYNDA THOMPSON WAS INEFFECTIVE WHEN SHE FAILED TO INVESTIGATE; INTERVIEW AND CALL TO TRIAL A CRITICAL ALIBI WITNESS.[31]

According to witnesses, at least two camouflage style masks were worn by the intruders.[32] Two days before the incident, a purchase of three neoprene masks and a small pair of pants was made by the

[31] Law relating to constitutionally ineffective assistance of counsel has been previously set forth. Petitioner herein refers to those authorities and applies them here.

[32] Max Stover testified that only one mask was worn by the suspect. (1 RT 126) These masks were never retrieved and presented to the jury as evidence by the prosecution.

Petitioner from an Oakland Army surplus store. The Petitioner testified that these items were purchased for use in a paintball event he'd been invited to on July 4th, prior to the incident, and that these items were different than what the victims described as being worn by the intruders. He stated that two of the masks had a "smiley Joker face" printed on them while the third mask was of a "fluorescent" type. He added that the pants were sized for a female friend he himself invited to the event (4 RT 0132-1033).

According to trial counsel Thompson and lead investigator Kidd's' testimony at the Petitioner's motion for new trial hearing, she and Kidd learned of Mr. Sunkett's alibi and was given witnesses names and contact information on May 14, 2009, one month before the start of trial. (7 RT 1600, 1677).[33] At this time, the Petitioner told Thompson and Kidd that a Mr. Alan Gordon was the person who invited him to the paintball event. Upon cancelling his appearance on the day of the event, he gave the items purchased from the surplus store to Mr. Gordon for other guests to use if needed. Mr. Gordon took possession of all three masks, the small pants, the original receipt of purchase, and other non-related items, and all items remained in his possession from that point forward.

Mr. Kidd then subpoenaed Gordon. Kidd testified that he tried to make contact with Gordon by telephone but stated that Gordon never returned his calls or paging (7 RT 1608). Yet, despite having the resources to seek out Mr. Gordon at his home or business address, at no point during the pretrial investigative stage did Kidd travel outside of Mendocino County to conduct any investigation and attempt to interview this witness; or any other witness for that matter (7 RT 1607-1608).

According to a signed affidavit by Mr. Alan Gordon, Kidd left a voicemail on his cell phone stating that he would be called as a witness in this case and would need to be in Ukiah for Mr. Sunkett's trial

[33] The Petitioner asserts that the late timing of this meeting was due to counsels neglect to meet with him. This issue will be discussed in depth in the next argument.

(see EXHIBIT B, pg. 96-99). Gordon contacted the Public Defender's office to announce his participation at trial but no one representing the Public Defender's office returned his calls.[34] No one from the Defense met with him for interview and/or took control of the evidence he had in his possession. Still, Gordon did as he was told by Mr. Kidd and flew in from another state into the San Francisco airport, drove to Ukiah, and went directly to the Public Defender's office for check in. There, with the items in question in his possession, he was told that trial counsel Thompson was not going to see or talk to him. He was then told that he would not be needed as a witness and that he could leave. Both Thompson and Kidd acknowledged Gordon's presence at their office during trial (7 RT 1608, 1688-1689). Yet, without first meeting and conferring with this witness, examining and seizing control of the evidence related to this crime, then making a reasonable determination of its probative value, Thompson instructed her office to send this witness away.

Unfortunately for Mr. Sunkett, Thompson's negligence extended beyond this. At no point prior to trial did Thompson make a personal attempt to speak with Mr. Gordon over the telephone or meet with him in person (7 RT 1654, 1688). Thompson also had the resources to seek and interview Gordon at his home or business address. But like Kidd, she also made no attempt to travel outside of Mendocino County to interview this witness or any other Defense witness in this case (7 RT 1655). Yet, she still added Mr. Gordon on the witness list. (see EXHIBIT C, pg.100-101) Thompson was given a second opportunity to interview this witness in person at her office during the commencement of trial and present him as an alibi witness, and Thompson failed in her duty to do so once again (7 RT 1688-1689).

In these errors, Thompson, as well as her appointed lead investigator Kidd, allowed for the Prosecution to use a copy of the original receipt of purchase at trial and inferred to the jury that the items

[34] Public Defender Thompson and her offices neglect to return phone calls are a consistent pattern of behavior and will be discussed in depth in the next argument.

purchased were purchased for use in commission of this crime. By Thompson's complete failure to investigate and interview a known Defense witness in Alan Gordon before and/or during trial, and take possession and introduce evidence this witness possessed that was directly related to this case, Thompson failed to present an effective Defense against this circumstantial evidence that was repeatedly used to infer guilt throughout the Petitioner's trial.

It is Thompson's obligation as trial counsel to investigate all possible defenses of fact and law favorable to the defense. Only then can counsel make sound tactical decisions on her client's behalf. Failing to interview and call to trial material witness(es) whose testimony was admissible results in the withdrawal of a crucial defense from the case. The need to investigate and call to trial favorable witnesses for a Defendant is not only counsels ethical obligation to protect the Defendant's constitutional rights under the Sixth Amendment, but is extremely necessary if counsel is to present the most effective defense at trial. On behalf of the Defendant it is trial counsels duty to do so. (Baylor V. Estelle (9th Cir. 1996) 94 F. 3d 1321; see also Sanders v. Ratelle (9th Cir. 1994) 212 F. 3d 1446).

In the instant case, Alan Gordon was a known and existing witness for the Defense that Thompson and Kidd both failed to interview for the purpose of presenting this evidence at trial. Gordon was willing to testify to the facts made aware by the Petitioner to the Defense team, and even showed up at the trial to do so. With him, he brought the masks, the pants, the original store receipt, and other corroborating evidence to support his testimony. Further, in terms of timing and the intended use of these items, Gordon's testimony would have corroborated with the Petitioner's alibi. Also, even more importantly, given the descriptions of the masks worn by the intruders, the jury would have had physically tangible proof that the items purchased were definitely NOT the items described by the

victims and were not used in this crime (Alcala V. Woodford (9th Cir. 2003) 334 F. 3d 862 [Failure to call witness who could have established date and time of alibi]).

Being that Thompson or Kidd never interviewed Gordon and investigated the evidence he possessed, it cannot be said that Thompsons's decision to NOT use Gordon was based on tactics. She confirmed her intent to put Mr. Gordon on the stand when she put his name on the Defense witness list. Her failure to interview, prepare, and call to trial this willing and admissible witness is a clear display of incompetence and ineffective representation (People V. Hill (1969) 70 Cal. 2d 678, 688, 689). Here, there is more than a reasonable probability that, if not for counsels negligence and ineffective assistance, evidence would have been presented that would have injected reasonable doubt into the proceedings with regard to all counts against the Petitioner.

With that, the Petitioner's Constitutional rights under the Sixth Amendment were violated and the Petitioner's conviction must be reversed.

V. ADDITIONAL ARGUMENT SUPPORTING TRIAL COUNSEL WAS INEFFECTIVE AND FELL WELL BELOW THE PROFESSIONAL STANDARD IN HER DUTY AND RESPONSIBILITY TO ACT AS A DILIGENT ADVOCATE FOR THE PETITIONER .[35]

1.) Counsel failed to meet and confer with Mr. Sunkett to elicit all matters of defense.

[35] The basic laws relating to constitutionally ineffective assistance of counsel has been previously the Petitioner herein refers to those authorities and applies them here.

The Petitioner addressed this issue to the court in great detail during Marsden Motion Hearings held January 8, 2010 and February 24, 2010. While addressing the court during the January 8th proceeding, the Petitioner stated:

> "Communication was a major factor between me and Ms. Thompson. I've written numerous letters which I have here in this file for your viewing, if you'd like. Numerous letters. And they're all dated prior to my trial, many months before my trial even started. And, you know I voiced my concerns letting Ms. Thompson know that we needed to communicate to present a defense, and there was no communication at all. At all. I got no response back from my letters."
>
> "During this time that I was writing these letters and the months was passing, I was making numerous phone calls. I mean, an abundance of phone calls. Easily over 150 phone calls. Easily. And again, I've --- out of half of those calls resulted in messages and never got a --- a response at all."
>
> "[N]o response at all. Unresponsive for months. Until this day, I have yet to speak to Ms. Thompson on the phone. I don't even know what she sounds like over the phone. Never talked to her, ever. Again, you know, that's a lot of contact. I went out of my way to --- to inform Ms. --- Ms. Thompson that we did need to communicate so that we can present a defense, and there was no communication. Just absolutely none."

> "[D]uring nine months of my incarceration, I've seen her two times and never talked to her outside of the courtroom or nothing except those --- those two occasions. Never. So communication was a big issue."
>
> (sealed reporters transcripts on appeal pg. 1397-1398).

At this hearing, the Petitioner submitted to the court all of his letters written to, received and authenticated by the Public Defender's office as evidence of his claim. He also submitted an authenticated visitation log and request form produced and signed by the Mendocino County Jail correctional staff of the 2 dates he was visited by Public Defender Thompson.[36] The trial court then reviewed all of the documents submitted and entered it into evidence.

Public Defender Lynda Thompson then offered rebuttal to the Petitioner's claims at this hearing. Thompson, who worked for the Mendocino County Public Defender's office for twelve years and was the "number two" attorney in the office at the time she was appointed to represent the Petitioner (7 RT 1623) before being promoted Chief Public Defender weeks before trial, stated that she in fact visited the Petitioner six times prior to trial. However, correctional deputies use alias names when logging her in to the jail. She stated that "about six names" come up when she visits the jail and that they have a hard time determining who she is. (Sealed RT p. 1427). Although she provided the court no proof of these other four visits and there was no preexisting evidence entered supporting her claim, she went on to state that the Petitioner refused to assist her in her investigation, did not offer an alibi and help form a defense, and did not offer names and contact information of defense witness during these visits prior to May 14, 2009. Yet, despite how adamant and firm the Mr. Sunkett was about making over a hundred

[36] During the duration of the Petitioner's stay at the county jail -pre and post trial- the Petitioner was housed in either administrative segregation (which staff stated was due to his race and protection in an all white facility) or in solitary confinement (due to possible escape or suicide concerns after the Petitioner was found guilty on all charges) at all times, the Petitioner's movements outside and inside his cell was carefully regulated and controlled and all visitors were specifically monitored and thoroughly logged prior to visitation.

calls to her office and never once being granted the opportunity to speak with her, she did not deny the validity of this claim and opted not to challenge such a serious accusation made against her. Nor, did she contest this fact when given the opportunity to do so once again at the February 24, 2010 proceeding. The Petitioner expressed to the court that the Public Defender's office's neglect to answer phones and respond to phone messages was "pretty much standard over there."[37] The Petitioner stated "I've been going through this 14 months now. The last time I talked to Ms. Thompson has been eight months ago. How is it that this is effective assistance of counsel when I can't get Ms. Thompson to confer with me?"

> "Eight months ago is the last time I talked to Ms. Thompson. And, again, I never talked to her over the phone, ever."
>
> (Augment reporters transcript on appeal p. 14-15)

Thompson did not comment or dispute Mr. Sunkett's claim that she and the Petitioner had never spoke over the phone, thus, her failing to confer with him in this manner.

Ironically, many months later, during direct examination by Mr. Sunkett's newly appointed counsel Mr. David Eyster at his motion for new trial, if somehow by magic, Thompson remembers talking to Mr. Sunkett by phone. The record reflects:

> Q. Miss Thompson, Mr. Sunkett would also call your office from the jail?

[37] Affidavits signed by Alan Gordon, Jamila Thomas, Guy Sunkett, Brittney Flow, Glenn Sunkett Sr., and Dr. Deborah Davis Ph.D., all made comment directly toward trial counsel and the public defender's offices neglect to answer phones and/or return phone messages, and/or reply promptly to previous and/or arrangements (Dr. Davis) (see exhibits A pg. 89-95, ex. B pg. 96-99, ex. D pg. 102-106, ex. E pg. 107-110, ex. F pg. 110-113, ex. G pg. 114-117.)

A. I --- yes.

Q. During the course of your representation?

A. Correct.

Q. Do you have a recollection of the number of times you accepted those calls and actually spoke to him?

A. There were a few times that I was in the office that we actually had a phone conversation. He left numerous messages. I can't recall how many we actually directly spoke over the phone." (7 RT 1649).

During this line of questioning, Thompson stated that she was responsible for taking all messages left by clients on her voicemail and information left on her voicemail was noted in the client's file. Yet, Mr. Eyster told Thompson that after "Going through your file, I didn't seem to find any of these directions that you talk about where you make note of a telephone conversation." (7 RT 1649-1650). Reason being, at no point in time did Ms. Thompson and Mr. Sunkett ever have a telephone conversation during her entire tenure as trial counsel due to her neglect and unavailability to her client.

What was even more absurd, was despite the truth that she had only visited the Petitioner twice during the months leading up to trial, she was sticking to her story originally made at the Marsden Hearings that the Petitioner was the one who was uncooperative, refusing to talk a defense, and was failing to provide names and contact information of defense witnesses. However, Mr. Sunkett had already submitted to the court evidence gathered as early as pretrial that proved everything Thompson was now saying post-trial was not the truth. In one of the letters written by the Petitioner to Ms.

Thompson previously entered as evidence by the court dated January 29, 2009 and received on February 2, 2009, approximately 6 months prior to the start of trial, the Petitioner stated:[38]

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

In a second letter dated February 3, 2009 and received by the Public Defender's office February 6, 2009, the Petitioner stated:

> "I think it is extremely urgent that we meet and discuss your current status and progress"

> "I have yet to speak with you since you became my attorney. So I have no idea what, if anything has been done on your end."

> "I am requesting a visit from you as soon as possible so that I can be made aware of what's going on."

In a third letter dated March 9, 2009, and received by Thompson on March 11, 2009, Mr. Sunkett can be clearly viewed as begging for Thompson's assistance and cooperation. The Petitioner writes:

[38] All letters referenced from here forth were written by Petitioner to Thompson and were authenticated and entered into evidence by the trial court and included in writ submitted to 1st Petitioner court.

> "Since you've taken on this case I've only met with you once (1). And this seems to be far less than the time needed for a defense attorney to properly prepare and orchestrate a strategy of Defense for his/her client. Especially with a case that consist of charges as serious as these that carry a maximum sentence of life in prison. I am innocent Lynda! And a plea deal is not an option. So this trial is detrimental to how the rest of my life is going to be. Either free or in jail. And I refuse to accept the latter for lack of proper defense. Please Lynda, listen to me. My life is on the line here. And I am being expected to put my faith in a defense attorney who admits being overworked and does not have the time needed to work this case and discuss matters with their client. I've had evidence in my possession for months that has yet to be submitted to the court (as well as evidence being held by one of my witnesses). I don't' have any idea if the things I asked your investigator to investigate has been done. And interviews with witnesses I intend to use have yet to be scheduled. All this makes for a very scary and life threatening situation. Believe me, this is not an attack on your character. I believe you are a very good person and your intentions are not malicious. But try to look at this in the way that I must be seeing this. It's scaring me to death!

As shown, it does not appear as if the Petitioner is the one being uncooperative, unresponsive and failing to provide Thompson with witness' names and contact information. Shortly after this letter, the charges in this case was dismissed then refiled all in the same day. Still, in the pretrial stages leading up to the second trial setting, Thompsons behavior did not change and she remained uncooperative and absent. A couple months later, in a letter dated May 11, 2009 and received by Thompson on May 14, Mr. Sunkett

goes from pleading with Thompson, to anger and frustration aimed at her absence and lack of assistance. The Petitioner wrote:

> "It is now May 11, 09, 27 days before my trial is set to begin, and I have yet to speak with you or meet with you since these charges have been refiled. You have not contacted me about what evidence I want submitted at my trial, what witnesses I want interviewed and subpoenaed, or what my alibi even is in this case. I've contacted your office MORE than a dozen times and left messages on your voicemail as well as with your secretary. My family and my civil attorney has called and left messages for you as well voicing their concerns. But still, there has been not contact what-so-ever by you or your office. You have had this case now since January and this is our second time around approaching a trial date, and I have only met with you ONCE since the first of the year. And it makes me question your urgency, seriousness of this case, and proper preparation needed for a suitable and satisfiable defense.
>
> "These charges pending against me are very serious to say the least. And my life can be taken away in the snap of a finger. So a 27 day defense with charges that carry a life sentence is not acceptable. And I am extremely scared and leery to move forward in this manner. I have no idea what to do since I can't even get you down here to meet with me. I have a bad feeling about all this. I just pray that I am not being sold out. These circumstances are really STRESSING ME OUT!!"

This last letter appears to have been the possible motivator in convincing Ms. Thompson to finally meet with Mr. Sunkett. Thompson testified at the Petitioner's motion for new trial that on May 14th, the day

this letter arrived at her office, was the day she learned of the Petitioner's alibi and was given witnesses names and contact information (7 RT 1647-1648, 1685).

With these letters and other supporting evidence previously entered into record, the Petitioner has clearly made the case that Public Defender Thompson during the pretrial stages in this case, did in fact fail to confer with him for the necessary purpose of eliciting all matters of defense and law. Had this not been the case, a reasonable and competent attorney would have, and should have, brought this issue of conflict before the court and made aware Mr. Sunkett's accusations and concerns as well as expressed what she believed to be the truth of the matter. By her not doing so, she not only failed to protect her clients interest, but her own interest as well and left her and her performance open for scrutiny in the event trial was lost. Being that this was ultimately the circumstance, and the Petitioner learned after the fact about the process and purpose of a Marsden Motion, which he then filed, Thompson was made to answer post-trial to the Petitioner's claim that counsel was deficient in her performance.

During the January 8th Marsden Hearing, Thompson gave an extremely odd and bizarre explanation in regard to the lack of visitation and verification issue raised by the Petitioner. Yet, at no point did she dispute the Petitioner's claim that she never answered or responded to any of the significant amount of phone calls and voicemails made and left for her by the Petitioner. Nor, did she dispute his claim that she failed to respond whether verbally or in writing to the many letters written by the Petitioner and received by her office, and she made no suggestion that she addressed his accusations and concerns stated in these letters with him. Therefore, she conceded to more than half of the things that the Petitioner was accusing her of. Not even at the motion for new trial hearing did she express to the court that she confronted and addressed the accusations and concerns made inside these letters with the Petitioner. It appears that all she attempted to do was concoct statements that had little or no validity

what-so-ever that would possibly protect her reputation and position and mask all of her errors and deficiencies.

It is commonly known and expected that trial counsel has an obligation to confer with their client without undue delay and as often as necessary to elicit all matters of defense (Coles v. Peyton (4th Cir. 1968) 389 F. 2d 224, 226). By counsel Thompson failing to call a critical expert and alibi witnesses, acquiring the petitioners alibi approximately 3 weeks before trial, as well as her failing to prepare and give herself sufficient time to fully investigate the petitioners alibi, trial counsel Thompson has demonstrated neglect and incompetence grossly and blatantly. Public Defender Thompson failed to prove otherwise when given the opportunity to do so on three (3) separate occasions. The Petitioner has made a clear showing that Thompson indeed failed in her duty as competent trial counsel. Provided the evidence presented herein, it cannot be said that counsel's absence and lack of early cooperation as well as her decision to begin forming a defense less than 30 days before trial, did not result in the exclusion of a meritorious and effective defense due in part to her absence to the Petitioner.

PETITIONER'S CONVICTIONS MUST BE OVERTURNED AND A NEW TRIAL UNDER FAIR CIRCUMSTANCES SHOULD BE ORDERED.

2.) Counsel failed to investigate and introduce exculpatory evidence that proved that the Petitioner was not a participant in these crimes.

Trial counsel Thompson had knowledge and access to a recorded conversation between two people; as well as, a threatening letter sent to Mr. Sunkett by a suspect(s) in this crime in which both made

references to the effect that the Petitioner was a non-participant in this crime (see EXHIBIT H, pg. 118-119; letter sent by suspects).

First, when addressing the tape recording, Thompson failed to investigate and introduce this tape as evidence prior to and immediately after it was made available to her. In a letter written to her by the Petitioner dated January 29, 2009, the Petitioner informed her of the possible existence of this tape and gave her the name of Aziza Washington as the person who had possible possession of it. He then gave Thompson Ms. Washington's contact information and requested that she contact her as soon as possible. At Petitioner's motion for a new trial, Thompson admitted her awareness of the tapes existence very early in her appointment on the case (7 RT 1675). Yet, Thompson stated that she never personally made any effort to investigate this information or locate the tapes whereabouts (7 RT 1674). Investigator William Kidd was also privy to this information. Yet, despite his having this information for over four (4) months, Mr. Kidd did not attempt to make contact with Ms. Washington until mid-May of 2009, approximately three weeks before the start of trial. After interviewing Ms. Washington by telephone, no further investigation was conducted by Kidd to either locate the tape itself, the recorder, and/or the person making direct statements about the commission of this crime on the tape (see EXHIBIT I, pg. 120-121); Washington phone interview).

On June 17, 2009, this tape along with a declaration provided by the recorder was sent to and received by the District Attorney's office. The recorder, Ms. Danielle Hamilton, stated that she recorded a partial conversation she had with a man name Dujaun Smith after he began making statements about a crime that he said he and two other individuals committed. He stated that a mutual acquaintance of theirs-the Petitioner-had been arrested for this crime and was pending trial on the related charges. She

stated that she believed what she was told was true but out of fear for her life she wanted no further involvement in this case.

Ms. Hamilton sent the audio recording of her conversation with Dejaun Smith along with her declaration of these events to the District Attorney's office. The receivers immediately declared the recording a hoax of which the Petitioner orchestrated, and they believed the voices on the tape were that of Alan Gordon and Jamila Thomas. The District Attorney's office then passed the tape, Ms. Hamilton's declaration, and a report on their findings to Public Defender Thompson. Thompson then gave the tape to investigator Kidd to play for the Petitioner (7 RT 1673). The Petitioner quickly dismissed these voices as being that of Gordon and Thomas. Public Defender Thompson also agreed that she believed the voices on the tape were not that of these two individuals (Augment RT p. 9). The Petitioner then insisted that Thompson retain experts in the field of voice analyzation and tape recording authentication. He proposed that a voice analysis expert could compare previously recorded conversations taken from jail records between him, Gordon and Thomas and pit them against the voices on the tape. But as simple as this seemed on its face for the Petitioner, Thompson seemed lost on this idea and it's process and failed to investigate and/or interview such experts to help properly educate her and assist in her weighing their probative value.

At Petitioner's Marsden Hearing conducted on January 8, 2010, Thompson stated:

> "As to any voice analysis expert, what was I supposed to compare the voice on this alleged tape to? I --- I don't understand that."

> "I never received any idea of who the person was on the other end of the line. I --- so I did not deal with a voice analysis expert and would not have under these circumstances." (Sealed RT p. 1436).

Thompson failed to grasp the fact that the purpose to introduce this expert was not to identify the persons whose voice was actually on the tape, but that those voices were not that of Gordon or Thomas as was being suggested by the District Attorney. Therefore, she failed to introduce exculpatory evidence to the jury of the Petitioner's innocence due to her own complications and difficulties understanding the logic behind the science. Further failing to at least investigate the science for the purpose of assisting her with making a knowledgeable choice in tactic.

In addition, Thompson was questioned during the Petitioner's motion for new trial hearing about why she did not consult with an expert to verify the tapes authenticity, and her response was simple and baseless. The record reflects:

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

Thompsons failure to investigate these experts and have them perform the necessary test requested by the Petitioner to help introduce critical evidence for the jury to consider that proved the Petitioner was not a participant in this crime, was grossly negligent at the least. This error, due to Thompson's own

admission that she conducted NO investigation into this evidence, cannot be regarded as a choice in tactics (In Re Edwards. (2009) 174 Cal. App. 4th 387, 407).

Second, the Petitioner received a letter from an unknown source while incarcerated in the county jail one month after his arrest. The envelope the letter arrived in had two red dots in each of the four corners on its backside. This was a common code used by incarcerated individuals to inform the receiver that coded information was placed inside the contents of the letter. The dots represented and instructed the receiver to skip to and note every second letter starting from the introductory sentence. When done so, a message would be revealed to the receiver. In this case, the Petitioner decoded this letter and the following message was revealed, "Didn't know GPS was on car, sorry you got blamed, but if you snitch you die." The Petitioner immediately contacted Mr. Richard Peterson, his private attorney at the time, and informed him about the letter and its contents. Petersen came to the jail the next day and picked up the letter and mailing information attached. Approximately one month later, Peterson removed himself from the case due to financial conflict and the letter and mailing information was turned over to Public Defender Thompson upon appointment.

At no time during her taking possession of this letter and senders information, did Thompson attempt to locate and contact the individual whose name and address was attached to this letter. Nor, did she think to have a fingerprint analysis check for possible prints left on the letter and if so, run those prints through the criminal database to identify a possible suspect in this crime. In fact, Thompson ignored this evidence to the point that the Petitioner thought she'd misplaced the letter. At some point, without first conferring with the Petitioner and conducting basic investigation to identify and locate the possible sender, Thompson decided or simply failed to move to introduce this letter to the jury for their consideration.

At Petitioner's Marsden Hearing held on January 8, 2010, Thompson stated:

> "In conjunction with threats and someone else confessing, there was, in fact, a letter that Mr. Sunkett provided me. He personally himself had circled certain letters of words that were contained within that particular letter indicating that they were encrypted. And it was, in fact, a threatening letter. I still have possession of that. It has not been lost. It is still there. I did not believe under the circumstances that it was something I needed to question Mr. Sunkett about. It would be an interpretation of Mr. Sunkett as to what that letter meant. But I do have possession of that. So there was no failure to investigate."
> (Sealed RT 1435-1436)

Thompson addressed this issue again at the Petitioner's February 24, 2010 hearing Thompson stated,

> "I know he's concerned about the encrypted letter that he received; however, that was a subjective interpretation, even though I know letters have code and certain individuals use a certain code when they send letters so it can't be interpreted wrongly by the jail or prison. But I did not believe that letter itself would necessarily be a benefit to Mr. Sunkett because Mr. Sunkett would be the only one who could indicate this is what the code is and that it would be a threat."
> (Augment RT p. 8).

In terms of subjective interpretation, this could be the case had Thompson contacted and interviewed prison or jail officials throughout the county and/or state, experts in this field, or any other credible

person thought to have some form of knowledge and or expertise in this area, and they had ALL told her that they were unfamiliar with this form of code used. But she did not. In regard to her statement that "there was no failure to investigate," the Petitioner contends that it most certainly was. Not only did Thompson not attempt to contact the aforementioned people to validate such a code and/or process, she made no attempt what-so-ever to identify and locate the possible sender. But this wasn't the last of her errors. Thompson failed to introduce another critical piece of evidence she had in her possession to the jury to help assist them in considering the Petitioner's non-participation in this crime.

It is expected of a competent defense attorney that his/her first priority is to zealously represent their client using all resources and evidence available in the process. In this case, Public Defender Thompson obtained two key articles of evidence involving other suspects in this crime which both removed the Petitioner as being a participant. In regard to the recording, it would have easily been shown to the jury that the two people on the tape were not who the Prosecution would have claimed them to be by simply introducing subpoenaed records of a variety of telephone recordings of Mr. Sunkett, Ms. Thomas, and Mr. Gordon conducted while the Petitioner was incarcerated. Scientific voice analysis could have been performed to compare voice samples of these individuals against the two voices on the tape. Also, Thompson should have made a diligent effort to locate and make contact with Ms. Hamilton herself and inquire as to her willingness and need to testify. In addition, Thompson made no effort to contact or visit the person and return address connected to the threatening letter sent to the Petitioner one month after his arrest. If the proper investigation had been conducted, the results of that investigation could have produced witnesses and/or other evidence that would have assisted in the admission of this evidence for the jury to consider.

Such errors undermines one's confidence in the Petitioner's conviction. Counsel's gross misconduct by failing to perform investigation and seek the admission of these two critical articles of evidence carried severe consequences for Mr. Sunkett who, though innocent, was convicted of this crime (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].

Given these facts, more likely than not, the verdict, due to reasonable doubt standards, would NOT have been the same had the Mr. Sunkett received effective representation (Sanders V. Ratelle (9th Cir. 1994) 21 F. 3d 1446).

THE PETITIONER'S CONVICTION MUST BE OVERTURNED

3.) Counsel failed to file the necessary motions to suppress suggestive evidence in Limine and/or otherwise.

The Petitioner owned a vehicle towing company and was a unionized construction worker, Local 261 San Francisco, CA, employed by Shaw Pipeline well before and during the time this crime occurred (4 RT 989-990). Due to his occupations, the Petitioner had work related clothing, footwear, and tools common in both fields of employment. Some of these items seized from this office were similar to items used by the perpetrators of this crime. But these items were either ruled out early on by investigating Detectives as items specifically used in this crime or were not positively identified by the victims during their pretrial viewing stages of these items. Still, these items were introduced by the prosecution and used to infer the Petitioner's guilt in these crimes.

The Petitioner has always contended that various objections should have been tendered, including but not limited to relevance in regard to these items. Public Defender Thompson failed to litigate the admissibility of these items of evidence through in Limine motions and, if necessary, also through pinpoint objections at trial. Failing to object to the introduction of these items at Petitioner's trial assisted the prosecution in providing the jury with unsubstantiated and highly suggestive evidence which likely influenced the jury to believe that the Petitioner was a participant in this crime. The admissibility of the following items should have been litigated prior to or during trial.

A.) <u>One roll of Grey Duct Tape</u>

This tape was a similar shade to the tape used to bound the victims feet. However, it was determined by the investigating detectives that this particular roll of tape was of a different size and grade as the tape used in the incident.

B.) <u>One roll of Black Duct Tape</u>

This tape had absolutely no relevance to the crime but was used by the Prosecution to show jurors that tape of this nature is commonly used to commit crimes of this nature and the Petitioner was in possession of it.

C.) <u>One pair of blue and white gloves</u>

Detectives and all witnesses excluded the involvement of these gloves. But the gloves were used to show that gloves of a similar nature are common tools in committing crimes of this nature and the Petitioner owned a pair.

D.) <u>Red pruning shears</u>

It was claimed that marijuana plants were cut down during the commission of the crime. These shears were never identified or determined that they were used in this crime or for any other illegal use.

E.) Blue Garrity Flashlight

It was stated by one of the witnesses that a flashlight was used by the perpetrators. This item was never identified as being the one used in the crime but the Prosecution used this flashlight to show the jury that the Petitioner owned a flashlight for possible use in crimes of this nature.

F.) Black 3-cell Maglite Flashlight

It was stated by one of the witnesses that a flashlight was used by the perpetrators. This item was never identified as being the one used in the crime. But the Prosecution used this flashlight to show the jury that the Petitioner owned a flashlight for possible use in crimes of this nature.

G.) Woodland camouflage sweatpants

Although the pattern of these pants were similar to those worn by the perpetrators, two of the witnesses testified that the pants worn were actually standard military issued B.D.U's and NOT "sweatpants". This was critical because with their admission, the Prosecutor was able to infer that the Petitioner harbored similar items commonly used in these types of crimes.

H.) 2 Pair of blackboots

The witnesses testified that black boots were worn by the Perpetrators. Yet, after viewing these boots, none of the witnesses identified these boots as the style worn by the perpetrators.

I.) Black tactical pants

Dusty Miller identified these pants as possibly being worn by the perpetrators. This conflicted heavily with her prior statement and trial testimony in which she stated that all three suspects wore camouflaged pants. Investigators dismissed these black pants as being part of this incident. Yet, Prosecutors used these pants to infer the Petitioner possessed clothing used in crimes of this nature.

J.) Black jacket with white stitching

This jacket was not identified by any of the witnesses as being involved in the crime. Yet, the style of this jacket (hooded) was played upon by the Prosecutor as clothing commonly worn in commission of such crimes.

K.) Brown Bar-B-Que lighter

Witnesses testified that a small butane torch was used to threaten the two male witnesses. None of the witnesses identified this common household tool as being the device used in this crime. Although they stated a similar device was used, the description, style, and color varied from the item seized. Yet, the Prosecution used

this evidence to insinuate that the Petitioner possessed an item similar to one used in this incident.

L.) Digital postal scale

This item had no connection to this crime. Yet, despite the Petitioner being a business owner with a common interest in such a device, the Prosecution told the jurors that this device was "possibly" used by the Petitioner for illegal purposes.

M.)Black Taurus 9mm semi-automatic handgun

Witnesses testified that a black gun was used by the perpetrators. This weapon was found in the handbag of another person unrelated to this case at the time of the Petitioner's arrest. This gun had no connection to the Petitioner or his place of business. The Petitioner's fingerprints were not found on the weapon and the person who was found in possession of this weapon never stated that it was the Petitioner's firearm or that he knew of its existence. Furthermore, none of the witnesses identified this weapon as that used by the perpetrators. Due to these circumstances, Thompson should have never allowed such highly suggestive evidence to be seen by the jury without adamant objection. By failing to do so, the Prosecutor introduced this weapon as the possible weapon used by the perpetrators, that being the Petitioner, and inferred the Petitioner's participation in this crime.

It is trial counsel's obligation acting as a diligent advocate on behalf of the Defendant to make considerable effort to file motions that are not only necessary but critical in insuring the Defendant's right to a fair trial and effective legal defense. However, knowing the irrelevancy of the aforementioned

items and knowing that none of these items were identified by the victims as being items used in this crime, Thompson brought no motions what so ever at any time during her appointment of the Petitioner to challenge this evidence and prevent it from being considered by the jury.

During the Petitioner's Motion for new trial hearing, Thompson was questioned in regard to her error. The record reflects:

> Q. Did you bring any --- did you anticipate or bring any motion pursuant to 995?
>
> A. I did not
>
> (7 RT 1636)

Shortly after she was questioned again on this issue. The record reflects:

> Q. Did you bring any motion pursuant to 1538.5 to challenge evidence that had been seized at any location pursuant to search warrant or otherwise?
>
> A. I did not
>
> (7 RT 1636-1637).

Further in this questioning, she was asked again about her lack of filing motions to suppress in this case. The record reflects:

> Q. Did you file --- in this case, did you file any motions in Limine?
>
> A. I don't believe I did.

Thompson was also given the opportunity to address this issue at both of the Petitioner's Marsden Motions and she made no mention or gave no explanation on why she failed to file suppression motions in this case. When given several opportunities to explain her actions at the Motion for New trial hearing she gave no explanation that allowing this evidence to be considered by a jury was a decision she made based on tactic. Unfortunately, that decision was another that hurt the defense and prejudiced Mr. Sunkett.

First, one must understand that the crime in question took place in Mendocino County which has a long history of being a marijuana growing community. Home invasions and robberies are quite common here and are heavily followed in the local media. Just the mere inference of these items to a jury constructed of locals is highly prejudicial to a Defendant; especially one of African-American descent. Thompsons' need to seek the suppression of this evidence-especially under these circumstances-was critical to the Defense. Her failure to move to suppress these items of evidence cannot be reasonably explained as being a knowledgeable and informed choice of tactic. Which is the reason why, when given the opportunity, she failed to provide the record with an explanation of her lack of action and/or tactic.

Thompson's duty as a trial attorney is to actively seek the exclusion of evidence critical to the Prosecution and highly prejudicial to the Defense (In Re Jones (1996) 13 Cal. 4th 522). That did not happen in this case. The fore mentioned items should have been litigated by counsel in limine proceedings which sought to preclude the inclusion of these items as evidence against the Petitioner at trial. At the very least, an objection pursuant to evidence code § 352 should have been made as to each of the fore mentioned items as their respective probative values were outweighed by their prejudicial value and the risk of causing undue confusion in the minds of the jurors. The Petitioner was entitled to

at least an adjudication on these issues so that any adverse ruling as to the Defense evidentiary objections would have been preserved on appeal (Kimmelman V. Morrison (1986) 477 U.S. 365, 91 LED 2d 305, 106 S. Ct. 2574 [counsel ineffective for failing to file a motion to suppress evidence]).

COUNSEL'S FAILURE TO OBJECT TO THESE ITEMS PROVED PREJUDICIAL AND THE PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL. THE CONVICTION MUST BE OVERTURNED

4.) Counsel admitted to not making any formal or informal demands for discovery.

This error resulted in Thompsons' not receiving critical eyewitness identification evidence from the District Attorney's office until approximately one week before trial. This left Thompson unprepared to effectively present a Defense to this evidence (7 RT 1625, 1628-1629, 1660).

5.) Counsel failed to obtain and review all search warrants issued in this case.

This brings into question counsel's knowledge of all facts and legalitiesrelated to this case; as well as her trial preparation prior to entering trial. (7 RT 1630-1635).

6.) Counsel Admitted to not meeting and interviewing any of the Defense witnesses for pretrial preparation.

This was important in easing the witness into a situation that would be hostile and foreign to them. This way, a witness's credibility can be properly evaluated prior to taking the stand so that the witness is not misjudged due to nervousness or adjusting behavior (7 RT 1654-1655).

7.) Counsel admitted to not visiting the crime scene.

It is much more difficult for counsel to present a Defense (especially one of false identification) and prepare for cross-examination when she is unfamiliar with the scene of the crime (7 RT 1656).

8.) Counsel admitted to failing to prepare the Petitioner before taking the stand in his own defense.

This is something trial counsel must do in order to insure the Defendant's articulation and understanding of the questions raised during both direct and cross examination are thoroughly projected and answered credibily (7 RT 1656).

9.) Counsel admitted to not meeting with the Petitioner and going over the discovery, elements of offenses, and jury instructions.

This is important to alert the Petitioner of the accusations and evidence against him; as well as the penalties and process throughout. (7 RT 1656-1657).

10.) Counsels lead investigator admitted to not reviewing or retaining any of the search warrants in this case.

This calls into questions Counsel's knowledge of all facts and legalities; as well as adequate trial preparation heading into trial (7 RT 1584-1585).

11.) Investigator Kidd admitted to not going to the scene of the crime for investigative purposes.

This made it much more difficult for counsel to present a Defense and prepare effective cross examination when she and her investigator are both unfamiliar with the crime scene (7 RT 1586).

12.) Investigator Kidd admitted to not serving any lay witnesses or expert witnesses with subpoenas and conducted no investigative work in this case prior to the first trial setting.

Although counsel announced trial ready, counsel had no witnesses and had not compiled any investigative information to arm herself to effectively present a defense. Therfore Thompson was not prepared to start a trial at that stage. (7 RT 1599, 1603-1604, 1661).

13.) Investigator Kidd admitted to not meeting with and evaluating Defense witnesses prior to calling them to trial.

It is critical for the Defense to meet with lay witnesses prior to putting them on the stand so that their testimony, demeanor, and credibility can be properly evaluated beforehand (7 RT 1605-1606).

14.) Investigator Kidd admitted to not reviewing all of the discovery in this case.

To thoroughly assist in the investigation the investigator must arm himself with all the facts and evidence pertaining to the case. Although Kidd acknowledged that it was his job to do so, and that normally he does, he admitted that the failed to do so in the Petitioner's case (7 RT 1607).

Given careful examination of these errors and admission of error by both Public Defender Thompson and her lead investigator William Kidd, it is impossible for one to conclude that Mr. Sunkett was given a fair and partial jury trial. These errors and admissions lead to the question whether the jury heard all of the facts and the full defense. After reviewing the facts here stated, one will conclude with certainty that the jury did not. Therefore, it is a very strong likelihood that the jury would have been influenced by a more effective defense had the Petitioner been given competent and effective assistance by counsel and all testimony and evidence available at the time been presented.

VI. THE TRIAL COURT MADE MULTIPLE ERRORS WHEN DETERMINING AND CACLUATING THE PETITIONER'S SENTENCE OF 63 YEARS AND APPELLATE ATTORNEY ROGER CURNOW FAILED TO RAISE THESE ISSUES ON APPEAL.

Penal Code Section 654 prohibits multiple punishments for a single act or an indivisible course of conduct. Whether a course of conduct is indivisible depends on the Defendant's intent and objective. Also, 654 prohibits conviction for both a greater and lesser, included offense.

In this case, the court decided that all of the crimes, with the exception of the 12021, were incidental to the objective of robbery. According to the 654 analysis, the court would then sentence under the most serious of the crimes. The court erred when it made count 5, the 207(A), the principal term. It erred further when it determined that the 12021 and 12022's were independent and had a separate objective to the robbery (7 RT 1763-1764).

The Petitioner contends, according to 654, that once the trial court made its determination that robbery was the one common objective to these crimes, its next question was which is the more serious crime, the robbery or the kidnapping. The robbery is a 3/6/9, plus 10 for the enhancement. This gives the robbery a total of 19 years. The kidnapping charge is a 3/5/8, plus 10 for the enhancement, giving it a total of 18 years. It is clear that the robbery is the more serious charge by legislative fiat than the kidnapping. The trial court should have concluded that the robbery was the more serious of the two then turned to the questions of concurrency, consecutive and so forth. Yet, the court came to its conclusion that the kidnapping charge, all of which were considered as separate crimes, was the most serious of the two by COMBINING ALL FOUR kidnapping charges together as an aggregate. Once the court did that, it defeated the purpose of the 654 analysis because the court has to look at each separate crime and determine which of those crimes is applicable to each victim, and which one of those is the most serious offense. Only after the court decides the 654 issue as to each separate victim can it move to consider consecutive sentencing. Therefore, the Petitioner asserts that the court erred when it failed to review the charges singularly to determine which of the charges was the most serious (7 RT 1767). Even the Prosecutor initially believed that choosing a single count was the rule as well (7 RT 1775).

The motivation and intent here was robbery and the kidnapping was an indivisible tool used in the course of the robbery. It was never a separate and distinct motivation because it was used from the start. This was not a kidnapping that turned into a robbery, but a robbery that included, as the court determined, a kidnapping to better effectuate the robbery itself. With that, coupled with the robbery charge totaling 19 years opposed to 18 for the kidnap, the robbery should have been made the principal term.

Also, being that the one objective of these crimes was robbery it cannot be said or proven that the 12021 and 12022's are indivisible motivations. Therefore, they should have been run concurrent. The guns were obviously brought for the purpose of robbery and its all part and parcel. The use of the gun was not used in separate crimes or in different places, but in one course of conduct.

By definition, counts 1, 2, 3 and 4, the robbery's, are the most serious punishment. 654 should have been found against the 207's, 236's and 422's. One of the 12022.53 should have been imposed while the other three should have been stayed.

THE PETITIONER REQUEST FULL REVIEW OF THE SENTENCE IMPOSED, AND ADJUST THE SENTENCE ACCORDING TO THE RULES OF LAW.

VII. THE CUMULATIVE ERRORS AND COMBINED DEFICIENCIES OF COUNSEL WARRANT RELIEF

The cumulative effect of the instances of ineffective trial counsel alleged herein warrants relief. The combined derelictions of counsel allowed highly prejudicial argument and inadmissible evidence before the jury, as to which counsel unreasonably failed to seek to limit, to object to, and to request curative or

limiting instructions. Trial counsel also failed to competently investigate and prepare a Defense, advise Petitioner regarding his available Defense strategies, present available testimony and evidence to support his defense, including expert testimony, and request the proper jury instructions that supported the Defense and object to the ones in conflict. There is a reasonable likelihood that these deficiencies of counsel resulted in prejudice and adversely affected the outcome of the proceedings. It cannot be made fair to the Petitioner to insulate such negligent and incompetent errors made by counsel in the blanket of "strategy calls". Because first, there must be a strategy and at no time, when given the opportunity, did counsel state what that strategy had been when committing such errors. Hence, there is no reasonable strategic excuse for failing to locate and interview witnesses, both expert and lay, who would support the Defense theory of the case and impeach the Prosecution witnesses. The fact that Defense counsel merely cross-examined witnesses requires only a reading of the file. Counsel and her investigator both admitted that investigation was not pursued until approximately three weeks before trial and counsel admitted she filed no motions at all to either suppress evidence or dismiss charges unsupported by the evidence. So the question is, exactly how much of a contribution to this case did counsel give to effectively investigate and present a Defense on Mr. Sunkett's behalf? What was that contribution, if any, and was it enough to ensure the Petitioner was given a fair and impartial trial? The record CLEARLY reflects that trial counsels contribution and diligence in this case; as well as, her availability to her client was so limited and practically non-existent that it deprived Mr. Sunkett of a reliable result at trial and the preservation of arguments for appeal (see Strickland, 466 U.S. at 687, 104 S. Ct at 2064). Also, Appellate counsel's failure to adequately raise issues on reversible error noted here in deprived Mr. Sunkett of his right to relief on appeal. Together, these errors denied Mr. Sunkett due process and a fair trial, and relief would have been reasonably likely on appeal had the omitted or partially raised issues been raised fully.

CONCLUSION

Based on the foregoing argument and authority, Petitioner Glenn Sunkett respectfully requests that this Honorable court grant him an evidentiary hearing with the right to conduct discovery, overturn and vacate all of his convictions and sentences, grant relief in the form of a new trial, and/or any other further relief deemed appropriate by this court. I thank this court for your time and consideration.

Dated this 25 day of October, 2014.

_____
Glenn S. Sunkett
CDC # AF1727