Mr. Glenn S. Sunkett
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In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16-17320

GLENN SUNKETT, (Petitioner/Appellant)	)	**District Court case no**. 14-cv-00069-RS
vs.	)	APPELLANT'S REQUEST FOR ALLOWANCE OF HIS LATE RESPONSE; AND REQUEST FOR RECONSIDERATION.
MARTIN BITER, (Warden/Respondent).	)	

To: Motions Panel

REQUEST FOR THIS COURT TO ALLOW APPELLANT TO RESPOND LATE

Appellant, Glenn Sunkett, is incarcerated at Kern Valley State Prison. As an incarcerated individual, appellant's access to the court is solely limited to U.S mail, and extremely limited telephone communication. He petitioned this court in pro per on February 13, 2017, requesting the court grant a certificate of appealability on a District court ruling. His request for COA was

denied on August 18, 2017. However, appellant only learned of this court's denial when he called the clerk of this court on Monday September 11 to check the status of this case. The court clerk, Mr. Khanh Thai, informed appellant that his COA request had been denied on August 18 and the order was mailed to petitioner's mailing address on the same day. Appellant informed Mr. Thai that he'd never received the order. Mr. Thai then re-mailed the Order to appellant on September 11.

It is now September 14, and Appellant has still not received and physically reviewed the court's order. However, after learning of this court's decision only three days ago, appellant is now submitting this request to file a late response to this court's August 18th decision. Due to circumstances that are not the fault of the court or appellant, and are far beyond the court's and appellant's control, appellant now asks this court to grant this request to respond late because the court's order was lost, misplaced, or destroyed by the delivering parties prior to the appellant being notified of the court's decision by mail. With no other means of notification accessible to the appellant by this court, the appellant could not timely respond to an order he had absolutely no knowledge of. (See Exhibit A, pg. ; appellant received court order September 16, 2017).

REQUEST FOR RECONSIDERATION OF APPELLANT'S COA

This 9th circuit court denied appellant's request for a COA simply stating "Appellant has not made a "substantial showing of a constitutional right."" The court then cited 28 U.S.C. 2253(c)(2); and *Miller-El v. Cockrell,* 357 U.S. 322, 327 (2003) to support its ruling.

However, appellant contends that he was in accordance with the principals set forth within both rules cited by this court, by which he clearly showed the denial of his 4th and 5th Amendment right to due process, a fair trial, and effective assistance of counsel. The appellant summarizes this fact below.

Rules.

28 U.S.C 2253 (c)(2) states that a certificate of appealability may issue "..only if the applicant has made a substantial showing of the denial of a constitutional right."

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) states that "..a petitioner must make such a "substantial showing" under the standard set forth in Slack v. McDaniel, 529 U. S. 473." It adds "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. (*Slack*, supra, at 484). Even more significant, *Slack* states that the "substantial showing" standard for a COA is relatively low ... *Slack*, 529 U.S. at 483, 120 S.Ct. 1595.

Argument.

When applying the principles above to appellant's application, a COA should have issued because:

(1). Appellant showed in his COA that the trial court denied his constitutional right to put on a viable defense when it prohibited expert testimony combating the eyewitness identification which was the central issue of the case. Appellant presented this court with supporting case law, as well as pre, during, and post-trial records supporting this claim (See petitioner's COA, pgs. 11-34). Trial records provided by appellant clearly prove,

(a) eyewitness testimony was the central issue of this case,

(b) the identification was not supported by anything,

(c) various psychological factors such as tainted,

erroneous, and suggestive identification procedures, cross-race

identification, stress, fear, and poor lighting were significant issues

at trial,

(d) the various descriptions given by the witnesses after the crime, and

again at trial, conflicted with eachother's and were at odds with

Appellant's actual description,

(e) the trial court itself stated that one of the two eyewitness identification procedures conducted in this case that elicited the identification of the appellant was "highly suggestive,"

(f) Non-blind identification procedures were conducted in this case and all eyewitness interviews and all other interactions were solely conducted and initiated by lead investigator Det. Gregory Van Patten; the same officer who conducted the identification procedure thought to be "highly suggestive" by the trial court,

(g) evidence presented showed appellant to be in a separate location than the crime scene minutes before the crime occurred, and consistently in a separate location (in the days, hours, and minutes leading up to the crime) than a GPS tracking device linked to Appellant and the crime scene.

Applicable Law.

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

State v. *Henderson* (2011) 208 N.J. 208, 231 demonstrates several procedural safeguards that exist to protect against the misidentification of suspects, such as the double-blind administration of photographic lineups. The lack of double-blind or blind administration alone can render the identification unreliable. If the administrator of the lineup is familiar with the suspect, the location of the suspect's photo in the lineup can be communicated to the witnesses either "consciously or subconsciously." An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is." (*Id*. at p. 249.)

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

(2). Using U.S. law, Petitioner showed that his trial counsel Ms. Lynda Thompson was ineffective when she failed to investigate, timely retain, and call to trial an eyewitness expert, competently establish an alibi, and present readily available exculpatory evidence critical to petitioner's defense (See petitioner's COA pgs. 35-66). By way of pre, during, and post-trial records Petitioner demonstrated:

(a) Trial counsel Thompson provided testimony at Petitioner's motion for a new trial hearing and was questioned by defense attorney Mr. David Eyster. Thompson admitted that she was aware of Graves' identification since the beginning of her appointment and knew early on that the witnesses had "discrepancies in their physical descriptions that did not match Mr. Sunkett." (7RT 1639).

(b) Thompson stated that she "knew there was always an issue of cross-racial" identification, and that the identification process which birthed the identification was tainted" and "suggestive" (7RT 1640, 1662), that she was "well aware" of experts and case studies that could explain to a jury how various complicating factors she observed in this case are found to be "highly prejudicial to a defendant in an identification case" (7RT 1641,1662-66), and explained how she knew it was highly likely that the jury in this case would consist of all Caucasians whom she believed "have a difficulty" making accurate cross-racial identifications (7RT 1645-46). Yet, Thompson admitted "I did not file a motion to suppress, whether statutory or non-statutory" to suppress or attack the taint or influence she believed the identification process and these psychological factors would have on the identification of her client (7RT 1663-64).

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

(d) Six months before trial started, Petitioner made a formal request

in a letter to Thompson on January 29, 2009, for her to investigate and retain a cross-race identification expert for trial to help attack the discrepancies in the witnesses identifications, the tainted identification processes Miller and Graves were subjected to, and cross-race identification issues. Thompson admitted to receiving this letter on February 2, 2009. (7RT 1644-45) (also see Traverse, Exhibit F, p. 171-172; Sunkett's January 29, 2009 hand-written letter to Thompson). Thompson then admitted that she did not read this letter from petitioner. (7RT 1644-45).

(e) At this same hearing, Thompson's own lead investigator Mr. William Kidd testified that after reviewing discovery, he also believed an eyewitness identification expert was necessary and "talked to the attorney about.." contacting an eyewitness expert for trial very early on in the case. (7RT 1612-13). Thompson ignored Sunkett's request as well as her own investigator's advice and admitted that she conducted absolutely no investigation into the matter until nearly the end of trial. (7RT 1645).

(f) Thompson's own case notes show that she practically started work on this case one month before the start of trial (see traverse, Exhibit N p. 266-356, Thompson's complete file of investigative notes; also see federal habeas, Exhibits A-G, pgs. 148-175, Affidavits signed by witnesses contacted by phone in this case; and Exhibit I p. 178-179, Aziza Washington phone interview).

(g) Thompson's case notes and at least a half-dozen pre-trial letters sent to her by petitioner proves Thompson did not make herself available to interview Petitioner until one month before the start of trial, and she failed to contact various alibi witnesses Petitioner provided her with 6 months prior to that (See traverse., Exhibit F p.

166-216, Sunkett's letters to Thompson). Jail visitation logs, personal emails between Thompson and Kidd, the lack of any phone records or records of any mail correspondence from Thompson to Petitioner also supports this claim (Exhibit H p. 245-247, jail visiting records; Exhibits L-M pgs. 262-265, e-mails between Thompson and Kidd; also see EXHIBIT G, p. 217-244; Complete Matrix of all Documents found in Thompson's case file, and Declarations signed by the law office employees that constructed it).

(h) Thompson put on a defense of mistaken identification using scientific theories and expert conclusions without the expertise of an eyewitness expert to properly educate, explain, and authenticate such complicated information to a lame jury not expected to fully understand such science. Therefore, Thompson offered nothing of substance to validate the defense.

(h) Thompson failed to investigate and interview critical alibi witness Alan Gordon. Thompson was informed Gordon was in possession of evidence directly related to this case that could help prove petitioner's innocence. Gordon was never interviewed by Thompson or Kidd, but Gordon still showed for trial in attempt to offer testimony. Both Thompson and Kidd offered testimony admitting to knowing Gordon was present at the courthouse, and that they failed to meet with and interview him, take possession of this evidence, and use his testimony (7RT 1608, 1688-89).

(h) Thompson failed to investigate and introduce an audio recording as well as a coded letter given to her by the District Attorney's office allegedly produced by possible suspects in this crime expressing Sunkett's innocence (7RT 1671-74). Without at least

attempting to investigate this evidence first, Thompson concluded that she knew of no way to authentic these items so she didn't introduce it (7RT 1674-75). However, at the time, Sunkett suggested hiring a voice analysts, or audio forensic expert, or cryptography experts to authenticate the evidence (Sealed RT p. 1436; 7RT 1673-74). Thompson told the court that she did not know what a voice analysts' was or how it could be helpful to the defense so she didn't investigate it. (Sealed RT 1436; 7RT 1673-74).

Applicable Law.

To claim Thompson was ineffective, Petitioner must show that her performance fell below an objective standard of reasonableness, and establish that he was prejudiced by counsel's deficient performance or inadequately presented a potentially meritorious defense (see *Strickland v*. *Washington*, 466 U.S. 668, 687-688 (1984); also see *Cheney v*. *Washington*, 614 F.3d 987, 995 (9th Cir. 2010), *Strickland*, 466 U.S. at 693-694; *In Re Cordero*, Supra, at p. 180; *People v*. *Ledesma*, Supra, at pp. 217-218)). Appellant must also demonstrate that counsel's decision to exclude evidence was not a strategic choice stemming from a conscious, reasonably informed decision made by an attorney with an eye to benefiting his/her client (see *Cox v*. *Donnelly*, 387 F.3d 193, 198 (2nd Cir. 2004) (quoting *Pavel v*. *Hollins*, 261 F.3d 210, 218 (2d Cir. 2001)). Although whether counsel's actions were tactical or not is a question of fact (*Edwards v*. *Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007). Also, a "trial strategy" or "tactic" does not "automatically immunize an attorney's performance" from a sixth Amendment challenge (see *United States v*. *Span*, 75 F.3d 1383, 1389 (9th Cir. 1996); also *Brodit v*. *Cambra*, 350 F.3d 985 1003 (9th Cir. 2003) ["[C]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective."].The court must acknowledge that Thompson's investigation itself must be reasonable before she can make "tactical decisions"

based on that investigation. (*Wiggins v. Smith,* 539 U.S. 510, 523-24 (2003). As noted in *Renoso v. Giubino*, (9th Cir. 2006) 462 F.3d 1099, 1113 (citing *Sanders v. Ratelle* (9th Cir. 1994) 212 F.3d 1446, 1457), the law continues to be that, "Ineffectiveness is generally clear in the context of complete failure to investigate, because counsel can hardly be said to have made a strategic choice when she/he has not yet obtained the facts upon which such a decision could be made." This same decision, *Renoso v. Giubino*, holds that "the duty to investigate is especially pressing where..the witnesses and their credibility are crucial to [the Prosecution's] case. (Also see *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir. 1998); *United States v. Burrows* (9th Cir. 1989) 872 F.2d 915, 918).

(3). Petitioner has clearly proven by citing the trial record that the state appellate court has clearly erred in interpreting the GPS evidence in this case, and has falsely used evidence that does not exist to corroborate the eyewitness identification of petitioner. The appellate court did not even cite where in the trial record did it find that a GPS tracking device "left the crime scene and ended up at Petitioner's office some three hours later." Petitioner provided this court with the GPS coordinates from his trial to prove the appellate court's error. Yet, this court made no mention of this blatant error, nor explain how this false evidence either fairly or unfairly corroborates the eyewitness identification of petitioner. Yet it still found that no constitutional violation occurred in the trial court's denying the petitioner's right to present a defense by prohibiting expert testimony to combat the identifications.

The state appellate court's error in the facts and it's unfair opinion of whether the defendant had a constitutional right to present expert witnesses favorable to the defense, has bled on to each of the higher court opinions on this matter. No court, including this one, has yet to acknowledge and/or address this issue, and correct the appellate court's error.

Lastly, petitioner also showed that the appellate court erred when it used two rolls of tape and a pair of gloves seized from petitioner's office by law enforcement to corroborate the eyewitness identification, which then lessens the need to present expert testimony in this case.

There is absolutely no trial record or any other evidence that demonstrates that these to items were involved in this crime. At no point in time during trial did detectives, witnesses, or the people testify or suggest that these items were the actual items used in commission of this crime. There is no evidence that supports the appellate opinion that these items correctly corroborate the eyewitness identification of the petitioner.

Remove these two appellate court errors from consideration and there is absolutely no evidence that corroborates the eyewitness identification. This court should have found that a reasonable jurists could have decided the district court opinion on this matter differently based on these two errors, and with no other evidence provided by the appellate court to consider that would corroborate the eyewitness identification. Also, due to counsel's lack of investigation and preparation, and the trial court's prohibiting expert testimony due to counsel introducing this evidence "late," this court should have found that petitioner's constitutional right to due process, a fair trial, and to present expert witness testimony under such circumstances was indeed violated, and such a violation warrants a new trial that is fair.

Applicable Law.

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

In sum, due to the errors the trial record proves the appellate court made when evaluating the evidence pertaining to the corroboration of the eyewitness identifications, a COA must now

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

CONCLUSION.

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

appellant's innocence approximately 6 months before trial. Due to Thompson's neglect to conduct a reasonable pretrial investigation, almost all evidence that was likely to add any substance to the defense was removed.

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

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

Because reasonable jurists could find the district court’s holding debatable, it is respectfully requested that this court grant appellant's request to file this late response, reconsider the facts and supporting case law appellant outlined and cited in his COA, and grant

appellant's request for Certificate of Appealability on these issues. Thank you for your time and consideration.

Dated: September 14, 2017

By: _____

Mr. GLENN SUNKETT

In Propria Persona

EXHIBIT A

(Order from the court proving date of re-mailing and Appellant's reception of the order after September 11, 2017).

VERIFICATION

State of California

County of Kern

_____

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

EXECUTED THIS 14th DAY OF SEPTEMBER, 2017 AT KERN VALLEY STATE PRISON, DELANO, CALIFORNIA 93216.

x._____ (declarant/appellant)

SIGNATURE.

_____

PROOF OF SERVICE BY MAIL

I, GLENN SUNKETT, AM A RESIDENT OF KERN VALLEY STATE PRISON, IN THE COUNTY OF KERN, STATE OF CALIFORNIA. I AM OVER EIGHTEEN (18) YEARS OF AGE AND I AM A PARTY OF THE ABOVE ENTITLED ACTION. MY STATE PRISON ADDRESS IS P.O. BOX 5102, DELANO, CA. 93216.

ON DECEMBER 30, 2016 I SERVED THE ATTACHED A MOTION REQUEST FOR LATE RESPONSE, AND MOTION REQUESTING RECONSIDERATION BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE IN THE U.S. MAIL COLLECTION SYSTEM ADDRESSED AS FOLLOWS:

CLERK, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

P.O. BOX 193939

SAN FRANCISCO, CA 94119- 3939

I DECLARE UNDER PENALTY OF PURJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FORGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION WAS EXECUTED ON SEPTEMBER 14, 2017 IN DELANO, CALIFORNIA.

x._____ (declarant/appellant)

SIGNATURE.