No. 19-8409

IN THE

SUPREME COURT OF THE UNITED STATES

THANKSNIEKY PHUONG —PETITIONER
(Your Name)

vs.

RICK HILL, WARDEN, —RESPONDENT(S)

PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT of APPEALS, for the NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

THANKSNIEKY PHUONG
(Your Name)

Correctional Training Facility, EW-101U, P.O. Box 689
(Address)

Soledad, CA 93960
(City, State, Zip Code)

#AH2774
(Prisoner ID#)

QUESTIONS PRESENTED

1

WHETHER THE PEOPLE SUBMITTED INSUFFICIENT EVIDENCE THAT PETITIONER COMMITTED A KIDNAPPING FOR ROBBERY, AND SINCE THE CONVICTION, HERE VIOLATES PETITIONER'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH, AMENDMENT TO THE U.S. CONSTITUTION, PETITIONER'S CONVICTION MUST BE REVERSED. P.22

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WHETHER THE STATE COURT ALLEGED IN A COLD CASE OCCURRING IN 1983, CHARGES OF ROBBERY, ASSAULT WITH A DEADLY WEAPON COULD BE IMPOSED, BASE ON THE VICTIM WAS KIDNAPPED WHEN SHE WAS MOVED FROM THE BEDROOM TO THE BATHROOM. THE COURT STATED, KIDNAPPING IS A LIFE SENTENCE, APPLICATION AND HAS NO TIME LIMITATION TO BE ASSERTED IN THE YEAR 2011. p. 31

WHERE THEREFORE THE PETITIONER REQUEST THIS COURT TO GRANT A WRIT OF CERTIORARI OR THE FILING UNDER FEDERAL CIVIL CODE PROCEDURE 60 (b), AS THE FINDING OF GUILT UNDER KIDNAPPING, AS REFERENCE TO THE VICTIM MOVE FROM THE BEDROOM TO THE BATHROOM WAS AN UNAUTHORIZED AND UNCONSTITUTIONAL CONVICTION AS THE RECORD WAS UNSUPPORTIVE TO THE CRIMINAL CONDUCT OF KIDNAPPING, BUT THE COURT USED THE STATUTORY LANGUAGE, AS A MEAN TO IMPOSE A PROLONG CONDITION OF CONFINEMENT IN EXCESS OF THE JURISDICTION OF THE COURT. P. 37

EXHIBITS: PRIOR FILINGS

EXHIBIT-A SUPREME COURT OF CAL. S249477 (6-14-2018
EXHIBIT-B PROBATION REPORT (3-29-11)
EXHIBIT-C MINUTE ORDER (3-10-2019)
EXHIBIT-D FEDERAL HABEAS CORPUS (11-13-2018)case no. 2:18-03957
EXHIBIT-E OPPOSITION TO DENIAL (7-19-18)
EXHIBIT-F REQUEST FOR STAY .CN. 2-18-cv-06957 CJC-KES
EXHIBIT-G NOTICE OF CLOSE DATE 2-25-2019
EXHIBIT-H OBJECTION TO THE REPORT AND RECOMMENDATION DATE 2-3-2019
EXHIBIT-I ORDER DENYING CERTIFICATE OF APPEALABILITY DATE 2-12-2020
EXHIBIT-J JUDGEMENT 2-25-2019
EXHIBIT K MOTION FOR ENLARGEMENT OF TIME 1-13-2019
EXHIBIT-L ORDER ACCEPTING REPORT AND RECOMANDATION OF MAGISTRATE JUDGE 2-25-2019
EXHIBIT-M REQUEST FOR COA DATE 3-28-2019
EXHIBIT-N SECOND APPELLATE DISTRICT CASE NO. B285971
EXHIBIT-O SUPERIOR COURT LA COUNTY CASE NO. KA0504 9-27-2017

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

FOR CASES FROM FEDERAL COURTS:

THE OPINION OF THE UNITED STATES COURT OF APPEALS AT EXHIBIT- I TO THE PETITION AND IS UNPUBLISHED.

THE OPINION OF THE UNITED STATES DISTRICT COURT APPEARS AT EXHIBIT-D TO THE PETITION AND IS UNPUBLISHED.

FOR CASES FROM STATE COURTS:

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS APPEARS AT EXHIBIT-A TO THE PETITION IS UNPUBLISHED.

THE OPINION OF THE APPELLATE COURT APPEARS AT EXHIBIT-N TO THE PETITION IS UNPUBLISHED.

JURISDICTION

FOR CASES FROM FEDERAL COURT:

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE WAS 2-12-2020

NO PETITION FOR REHEARING WAS TIMELY FILED IN MY CASE.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1254(1).

FOR CASES FROM STATE COURTS:

THE DATE ON WHICH THE HIGHEST STATE COURT DECIDED MY CASE WAS FILE 10-10-2018

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1257(a).

LIST OF ALL PARTIES

ALL PARTIES APPEARS IN THE CAPTION OF THE CASES ON COVER PAGE.

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United States Constitutional Amendment

FACTUAL AND PROCEDURAL

The factual and actual matter before this court is base on the sentence and conviction is base on fraud,or when a judgment was secured by fraud,mistake,or inadvertence.(see Pacific Legal Foundation vs California Coastal Com.(1982) 33 Cal.3d. 158,165).

It is upon the discovery of fraud,mistake,the procedural requirement,is actually an exercise of an extraordinary substantive power,or reviewing under excess of the court jurisdiction to imposed the original judgment. This would require the court to revise or permit the lower court to revisit the illegal,unlawful or unconstitutional prolong condition of confinement prescribed in a sentence hearing.(see In Richard,(2011) 196 CA4th 647,663)

The Defendant/Appellant/Petitioner make the claim his current sentence is base on fraud,mistake or inadvertence.

He further makes the claim his sentence and conviction is not a clerical error,but an judicial error,as the record of conviction is insufficiently supportive to a finding of statutory guilty as cited under penal code section 209 ;

Therefore the sentence and punishment is in excess of the court jurisdiction,and require an exception by this court to review for statutory correction. As it is of not dispute,that the statutory language as cited under PC 209,was not proven conduct that would reflect a prohibited conduct.

The factual predicate for the claim as cited under penal code section 1473-1473.6,could not have been discovered previously through the exercise of due diligence and the clain itself,if proven,would established by clear and convincing evidence that no

no reasonable would have found the petitioner guilty of the underlying offense of kidnapping. Kidnapping is not a element of criminal conduct,if the person is taken from the bed room to the bathroom prior to being stabbed. The court alleged this falsity statutory material fact as a prohibited conduct under penal code ssection 209 subdivision (b)(1)

LEAVE TO FILE AN Federal Rule of Civil Procedure § 60,(b)(6) Motion:

The Petitioner contends the record of conviction is unsupportive to a finding of penal code section 209,subdivision (b)(1),as the victim was taken from her bedroom to the bathroom,and the said court deem this was kidnapping,as defined under penal code section 209,subdivision (b)(1).

the instant motion pursuant to Federal Rule of Civil procedure 60(b),or 60,(B)(6),and the inherent equitable powers conferred on on the federal courts by Article III,of the Constitution.(see Ganozalez vs Crosby,545 U.S. 524,(2005)

The Petitioner,Appellant contends he was expose to an illegal sentence scheme under penal code section 290,subd.(b)(1),as reference to kidnapping so that the statutory limitation would not bar the determinate statutory provision and filing within three years.

The court sought to imposed punishment for a 26 year cold case by alleging the victim was kidnapped,by moving her from her bedroom to the bathroom,and that movement carry a life sentence,and it is within the life sentence there exist no statutory time period for filing this statutory crimnal accusatory pleading outside of three year. There exist a defect in statutory application,resulting in an Eighth Amendment right violation by excessive sentence and the fundamental right to a fair trial was denied throught the application of law,in excess of the court jurisdiction..

In most cases,determining whether a rule 60(b) motion advances one or more "claims"will be relatively simple. A motion that seeks to add a new ground for relief...will of course qualify. A motion can also be said to bring a claim,if it attacks the federal court's previous resolution of a claim on the merits is effectively indistinguishable from alleging that the movant is under the substantive provisions of the statutes,entitled to habeas relief,

That is not the case,however,when a Rule (60)(b) motion attacks not the substance of the federal court's resolution of a claim on the merits,but some defect in the integrity of the federal habeas proceedings

Under Gonzalez,545 U.S. at 531-532,(footnotes omitted),(emphasis original); see also Post v Bradshaw,422 F3d. 419,424-425,(6th Cir. 2005. The court glossed the final sentence of the passage,just quoted in a footnote.

The term on the merits has multiple usages,we refer here to a determination that there exist or do not exist grounds entitled a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds,(or asserts that a previous ruling regarding one of those grounds was in error,) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error,for example,a denial for such reasons as failure to exhaust,procedural default,or statute-of -limitation bar.(id at 532()

As mentioned,the sentence and conviction under the penal code section 209,was unauthorized,when the information was base on move a individual from the bedroom to the bathroom,this is not kidnapping.

The relief and reviewing is cited by two sources of authority;(1): what petitioner terms the district court's plenary inherent Article III equitable powers to revise or amend a judgment in the interest of justice,(2),rule 60(b0. The district court declined to base its authority upon Article III,and instead recognized that FRCP § 60(b),which in inherently equitable in nature,empowers district courts to revise judgments when necessary to ensure their integrity.

Therefore the Petitioner/Appellant seek relief under 28 U,S.C.§ 2253(c). Base on in the year of 2011,petitioner received a sentence and conviction for kidnapping in 1983,and base on the wording of kidnapping,has a life sentence application,there was no statutory time limitation.

The Los Angeles Prosecutor knowingly and with intent alleged falsely the criminal element of kidnapping, in oder to circumvent the statutory time limitation,for charging all other statutory language,like robbery,assault with usage of a knife.

When a person,defendant has been convicted under a constitutionally invalid provision of a statutory language,unsupportive by evidence in the record,the defendant/person/appellant is actually innocent of the offense because his conduct as alleged in the indictment was not a crime of kidnapping by removing someone or the victim from the bedroom to the bathroom,in the same house.(see Chanlder v U.S.,(2017) (USDL-2322)

The act of prosecutor misconduct,miscarriage of justice, in charging a life sentence statutory under a cold case or for allegedly criminal conduct of robbery in 1983 deprive the substantive due process right to imposing a statutory violation beyond statutory time limitation or in excess of the court jurisdiction.

The Prima facie case and prejudicial,is that the Petitioner/ Appellant was disadvantage by the denial of due process and statutory protective application prohibit imposing state statutory determine prison term,for the violation beyond three years.(see 28 U.S.C.§ 2253(c)(2)

the petitioner/appellant was denies his established protective state and federal constitutional right,in which the United States Supreme court has construed to mean that an applicant showing that reasonable jurists could not debate out of time statute imposed in an indictment,as was known to be prohibited under penal code section 799-801),or that information filed under penal code section 1054,would have been resolved differently or that the claims raised deserved further review.(see Miller-El v Cockrell,537 U.S. 322,336,(2003).

Rather

the court must accept the matter under COA-or- Federal Rule of Civil procedure § 60(b) provision,as the mistake is clear,the record was insufficiently supportive to the life criminal act of kidnapping,and should not have been charged as a element of the crime,to circumvent the statutory time limitation.

Federal rule of Civil Procedure 60(b),is an motion appropriate vehicle to bring forward a claim for fraud on the court,(Carter v Anderson, 585 F3d. 1007,1011,(6th cir. 2009),and Petitioner/ Appellant has produced the evidence supporting the 1983 criminal conduct and the cold case determination in 2011,was only permitted to be charged as a direct result in falsely alleged kidnap as cited under penal code section 209,subd.(b)(1).

this record of charged and finding of guilt,is a product of modicum of evidence in support of this claim of fraud.

Fraud on the court consist of conduct;(1) on the part of an officer of the court; (2)is directed to the judicial machinery itself;(3) is intentionally false,willfully blind to the truth,or is in reckless disregard of the truth;(4) is a positive averment or a concealment when one is under a duty to disclose;and (5) deceives the court.(see carter 585 F3d. 1011,(citing Demjanjuk v Petrovsky,10 f3d. 338,348,(6th Cir. 1993)

The Petitioner/Appellant has satisfy the burden is requestion for COA by the Ninth Circuit or Federal rule of civil Procedure 60 (b) motion.(see Info-Holding Inc. vs Sound Merch Inc. 538 F3d. 448,454,96th Cir. 2008)

The original cause before this court is as following:

STATEMENT OF THE CASE

The Thanksnieky Phuong Case Chronology

2009

June 18. WCPD Detective Irene Meza and Detective Kennedy deliberately fabricated a non-existent case to improperly arrested me. I was interrogated without legal counsel. Detective Meza accused me attempted murder a woman. She told me the police discovered my fingerprints evidence all over the crime scene. During the time of 72 hours custody, the police proceeded the forensic fingerprint identification. To match a print, the proof is in the minutiae. Three days later it turned out Detective Meza arbitrary accusation is groundless, disprove, and the fact prove otherwise.

June 21. The police dismissed the case and released me, because they're determined two prints did not share enough unique characteristics for a positive identification, the result is inconclusive evidence. Clearly, this factual police record standing alone constituted sufficient evidence to vindicate in jury trial I was not the perpetrator of the crime, because there is no legal justification at all for the police to freed a felony offender from custody for the next five long months to endanger the public safety. This contradictory factual record of itself is evidence - evidence that the jury could and should hear. It is evidence that Thanksnieky Phuong's jury never had the opportunity to hear.

November 19. The police arrested me again. Detective Travis told me they had recovered a cigarette butt with my DNA on it from the crime scene. The next three days I was detained inside the West Covina police station.

November 22. The police escorted me to Pomona Court. A female public defender named Blanca Estela Torres came to see me, she perfunctory questioned about the police accusation and the cigarette butt DNA evidence. Afterward I requested to review the discovery package and police reports. Torres told me

she didn't have it with her, but she promised next time she will let me see it. Later that day the police relocated me to L.A. county jail.

Altogether I only met this public defender three times at court. Each time Torres reiterated the groundless accusation and the cigarette butt DNA evidence perfunctorily. As usual, she excuses she was too busy and forgot to bring the discovery package and police reports. Five months later Torres irresponsible disappeared without explanation. To contact Blanca Estela Torres, call 1-(909) 868-6439.

2010

Late April. A second female public defender named Joonjin Park came to see me at court. I was told Torres no longer represent me, and Park have been assigned to takeover my case. After we're exchanged the selfsame conversation, in her own words Park told me, "I can't let you review the discovery package and police reports, we're still investigate the case at this time." But Park promised she will go talk to the victim, and investigate my background.

Mid-September. Detective Irene Meza and Detective Travis showed up together at Pomona Court. They're flashed a court warrant and took swab from my saliva for DNA test.

September 28. Before the preliminary hearing, I met Joonjin Park again at court. In her own words she told me, "I went to talk to the victim, there's no positive I.D. that indicate you were the perpetrator of the crime. I also went to your house and talk to your family. After I examined the computer works you do for living, there's no evidence indicate that you have a motive to attempted murder this woman."

STATEMENT OF THE CASE

The Thanksnieky Phuong Case Chronology

Preliminary hearing commenced, Defendant plead not guilty. Ms. Chao took the stand and testified. She did not make an in court identification of Defendant. More importantly, from 1983 to 2010 Ms. Chao consistently never mention the suspect who attacked her have a identifiable description on his face. Not even once. On the contrary, I have a conspicuous birth wart on my right eyebrow, and people recognized me easily if they see me again. What makes birth warts both unique and valuable is because no two birth warts are alike between two people, not even identical twin. Accordingly, birth wart is a reliable source of the Defendant's identity just as fingerprints, because I can always be identified without doubt. This impression can be used to prove that an witness has seen a particular person who was in a specific place. Clearly, my positive I.D. standing alone constituted sufficient evidence to vindicate in open court I was not the perpetrator of the crime.

Afterward Park came to see me at MCJ (Men Central Jail), and in her own words she told me, "Based on the case paperwork, there's no substantial evidence for me to believe you were the perpetrator of the crime. For this reason, I came down here today to let you know I quitted. They're will assign someone else to takeover your case." I was perplexed and asked, "Why? I don't understand." Park told me, "I am sorry. I just can't do my job. I don't want to see someone have a clean slate like you lockup in prison." I gazed at her in silence. A few moments later, Park continued, "The last thing I can do to help you is let you review the discovery package and police reports." To fact check my account, please review the visiting room record from MCJ database. To contact Joonjin Park, call 1-(909) 868-6902.

October 13. The People filed a one count felony information charging Thanksnieky Phuong with one count of violating section 209, subdivision (b) (1) - kidnapping for robbery. LA Sup. No. KA090504.

STATEMENT OF THE CASE

The Thanksnieky Phuong Case Chronology

2011

Mid-January. A male public defender named Manuel Marin, Jr. came to see me at court. In order for me to understand the legal terminology, I decided to use a interpreter. After we're exchanged the selfsame conversation, Marin told me, "They're charged you kidnapping for robbery." I asked, "And who did I kidnapped for robbery?" Marin replied, "The same woman." I asked perplexedly, "So you telling me at first I attempted murder this woman, and then I kidnapped her for robbery. Is that correct?" Marin equivocated with my questioned, and then he excuses and left hastily.

The second time I met this public defender at court, via the interpreter Marin told me, "That's all they got, one latent print." I asked him, "Where did that fingerprint came from?" Marin replied, "From the crime scene 27 years ago." I asked perplexedly, "That doesn't square with the fact at all. If I was the perpetrator of the crime, then why on June 21, 2009 the police dismissed the case and released me?" Marin told me, "I don't have the answer for you. I can't speak for the police." I reminded him, "But you are a public defender, it's your responsibility to inspect whether the fingerprint evidence is beyond a reasonable doubt. What about the cigarette butt? Where is the DNA test result from my saliva?" Once again, Marin equivocated with my questioned and left hastily.

The third time I met this public defender at court, via the interpreter Marin told me, "Today I filed a motion to dismiss this case." I asked him, "Can you tell me why?" Marin replied, "The police provided insufficient evidence." I reminded him, "What about the cigarette butt DNA evidence? What about the fingerprint evidence the police claimed they lift from the crime scene 27 years ago?" Time and again Marin equivocated with my questioned and left hastily.

The fourth time I met this public defender at court, he brought his male supervisor along with him. Via the interpreter Marin told me, "The D.A. offered you a deal. Do you want to take it?" I asked him, "I don't understand. Why did they have to offered me a deal if I was the perpetrator of the crime?" Marin replied, "That's how the system works, it's called plea bargain." I perplexed, "Plea bargain for what?" Marin told me, "The D.A. get what she wants; you get what you can, and we're close the deal." I explicitly refused, "No. No deal. I am not going to accountable for the crime I did not commit at all." All of a sudden, his supervisor ranted at me, in his exact own words this man threaten, "Nobody give a fuck whether you guilty or not! If you don't take the fucking deal today, we'll locked you up for the rest of your fucking life behind bars." To contact Manuel Marin, Jr., call 1-(909) 868-6432.

About two weeks later, the D.A. opted to moved this case from Pomona Court to West Covina Court, and the jury trial was proceedings with overwhelmingly biased and injustice.

February 22. Jury trial commenced. Defendant plead not guilty. According to the prosecutor, the offense occurred in 1983, and the case was prosecuted in 2010 - twenty-seven years after the fact. A review of the record shows that the complainant did not make an in court identification of Defendant. The defense lawyer failed to file a motion to introduced Defendant's birth wart into evidence for the purpose of identification. The judge consensual to banned the police reports from the jury. Accordingly, time and again the jury were kept completely in the dark about the existence of the contradictory evidence in rebuttal of the charge that the fingerprint evidence in truth did not match Defendant. Otherwise on June 21, 2009 the police wouldn't dismissed the case and released him.

STATEMENT OF THE CASE

The Thanksnieky Phuong Case Chronology

In order to portrayed Thanksnieky Phuong was the perpetrator of the crime at no matter what cost to justice, the police fabricated a non-existent circumstantial evidence to misled the jury's judgment. The prosecutor Stacy L. Wiese had obstructed justice by evasive to talk about the questionable latent print, the public defender play along to cover-up the flagrant police misconduct, and the judge Douglas Sortino make sure everything is proceedings as they're carefully planned with partiality.

According to evidence adduced at trial, the police were irresponsible lost or destroyed forty items out of forty-four evidence in this case before they're deliberately fabricated a non-existent case to improperly arrested Defendant. The law speaks of a chain of evidence, which must remain unbroken to prevent tampering. The police are held accountable for every item of evidence from the time it is discovered at the scene of a crime until it is presented in court. However, the impartial legal procedure never happen in this case, because the police failed to follow the rules of the law. More importantly, the police did not accountable for their own misconduct.

Among other evidence adduced at trial, the police were able to seized a cigarette butt from the crime scene. The witness and two police officers took the stand and testified the suspect who assaulted Ms. Chao had smoked a cigarette and had left the cigarette butt at the scene of the crime. On September 2010, under a court warrant Detective Irene Meza and Detective Travis came to Pomona Court and took swab from Defendant's saliva for DNA test. Under Brady and its progeny, the State has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. But the fair trial laws never happen in this case, because the prosecutor failed to follow the rules of the law. False statement was egregious used by the prosecution to concealed the DNA evidence from the jury. If the exculpatory DNA evidence been disclosed to the jury,

the result of the trial would have been different. Based on a Brady Violation by a preponderance of the evidence, the prosecutor was dishonestly and willingness to committed Brady Violations, perjury, and prosecutorial misconduct under oath to secure a criminal conviction.

The prosecutor was full of lies and prevarication. There was not a scintilla of truth in the People accusation, and the only item of circumstantial evidence that places Defendant at the scene of the offense is one latent fingerprint, but that latent print later transpired was a manufactured evidence. During jury trial Defendant took the stand and testified. Via the court appointed interpreter named Jack Chau, Defendant explicitly told the jury, "Someone tampered with evidence." But in order to limit the jury's ability to discover all the facts and learn the truth about the flagrant police misconduct, the prosecutor interfered Defendant point out the fact and speak the truth with the connivance of the arbitrary lower court. Here, due process violated when Defendant was not permitted to introduce counter-evidence to vindicate for his innocence.

There is no evidence to corroborate or substantiate Defendant commit the crime. On the contrary, there is significant evidence to prove in open court the police tampered with evidence. The difference between a true and false fingerprint evidence is glaringly obvious when you see them side by side as Defendant meticulously demonstrated in a writ of Habeas Corpus. A manufactured evidence is the product of police misconduct in order to secure a criminal conviction. When the police are desperate and have no evidence, they're fabricate everything. In this case, the police fabricated a fingerprint evidence that don't exist, because the lawless officers overconfident they can break the law with impunity. Here, securing a false evidence to close a case is doubly horrendous, both in the cost to the innocent man and his family, and in the cost to society of allowing an actual perpetrator to escape punishment.

STATEMENT OF THE CASE

The Thanksnieky Phuong Case Chronology

In the absence of motive, eyewitness, and substantial evidence that incriminate Defendant to the crime. I was falsely accused, and my conviction was obtained by the use of perjured testimony and manufactured evidence which violated due process right under the Fourteenth Amendment. Accordingly, the jury's verdict was supported by false evidence, and the defects so affected the trial as to violate the fundamental aspect of fairness and result in a miscarriage of justice. More specifically, there is no substantial evidence to support the verdict under any hypothesis.

The Petitioner is factually,actually and legally innocence in committing the crime alleged within the permitted statutory application under the law for all determine term to be imposed or filed under the state statutory definition of penal code section 1054 et seg.

The court must reverse,remand,set aside the verdict of conviction,base on the court lack jurisdiction.

STATEMENT OF FACTS

Petitioner Thanksnieky Phuong,is so unlawfully confined as a result (1)ineffective assistance of counsel in and throughout trial,(2) miscarriage of justice and abuse of discretion in stating the evidence of DNA-Deoxribunlic acid result and fingerprint was of the petitioner and gave support to his criminal act of kidnapping and robbery, contrary to expert opinion,as (3) prejudicial harm is evidence in the denial of substantivce due process right to a fundamental fair criminal procedural hearing in order to prove guilt or innocence as to the violation of penal code section 209 and 211 statutes.

Petitioner challenged his unlawful,illegal unauthorized confinement is in violation of both state and federal constitutional right as cited under the color of the law and territory of state law,or the constitutionality of the application of state statute which creates an unlawful and unauthorized sentence and excessive jurisdiction prolong condition of confinement. Petitioner liberty interest rights to the prohibitation of unlawful restraint is violated by the confinement in prison custody restraint,having knowledge of his factual,actual and legal innocence is supportive by the insufficient evidence in the record concluding his guilt was not determine by some evidence alleged by the prosecutor,but was overwhelingly determine that,proved; petitioner was not the person committing the criminal act of kidnapping or robbery by left saliva on a cigarette butt or by the leaving of fingerprint .(see Murgio,15 Cal.3d 286,293,124 CR 204,208)(Penal Code § 1054(e)(f).

The petitioner remain in prison custody,solely base on fraudulent conveyance by prosecutor to his guilt was established by expert opinion, without the expert testimony given to the juror prior to judgment or jury decsion of guilt.

GROUND I

FOURTEENTH AMENDMENT RIGHT WERE VIOLATED BY THE ACT OF MISCARRIAGE OF JUSTICE,AND ABUSE OF DISCRETION BY THE LOS ANGELES PROSECUTOR, AS CITED BY AND THROUGHT ACT OF MISCARRIAGE OF JUSTICE.AS THE ELEMENT OF GUILT,PROLONG CONDICTION OF CONFINEMENT AND THE CONVICTION ONLY OCCURRED AS A DIRECT RESULT THE SAID PROSECUTOR WITHHELD KNOWN EXONERATE EVIDENCE IN WHICH REFLECT MR. PHUONG DID NOT KIDNAPPED,STABBED,AND OR TAKE PROPERTY.

The Case the Petitioner relies on In Re Winship 358 U.S. 397

The Petitioner Phuong; contends,he was convicted of statutory language,when the prosecutor had overwhelming evidence to established his factual,actual,and legal innocence. The trial and court proceeding regarding the criminal conduct of kidnapping,robbery was false charges,as the conviction for the said state was base on evidence that failed to support guilt in the record.

The conviction,sentence and prolong condition of confinement cannot stand where the petitioner did not commit the alleged crimes as claim,or where the only evidence alleged is one finger print found with several other unidentifiable prints. The conviction of the alleged charges are base on mere present.

The court exceeded its jurisdiction to tried and convict petitioner solely base on alleged knowledge of the crime as to co-herst his testimony,knowing that he was not the actual kidnapper.

On the date of the incident,Los Angeles Police Department investigators retrieved known DNA of a left **cigarette Butt**,this was related, relevant evidence for the jury or the court consideration for the proven specific individual identification,but was withheld, after the prosecutor discovered the DNA was not Phuong,

The Cigarette Butt,found at the scene of the crime,was not the victim.,but the intruder,and was some evidence requiring the LA-Police forensic lab to test for aiding the conviction or used in the nature of conviction,as the state prosecutor alleged the cigarette butt was some evidence proven Thanksnieky Phuong,was one of several participant in the kidnapping and robbery criminal conduct.

What the court and the jury did not hear,because the prosecutor withheld the none guilty information,is that the DNA on the Cigarette butt was not that of Mr. Phuong. The Los Angeles Prosecutor obtained a court order for DNA as cited under penal code section 1405,for the procedural testing of **"saliva"** to be performed on the petitioner and never disclosed the result of the statutory procedure to the court of the jury,. If the test was conclusively positive identifying petitioner,when would have been charged with attempted murder under penal code section 187,189. But because the test for DNA resulted in negative,the prosecutor charged the petitioner with the false charged of kidnapping and robbery.

The said prosecutor assigned to the case knowingly and intentionally conceal,withheld the petitioner innocence from the court and the jury deliberation,and thereby deprived the petitioner of his substantive due process right to an fundamental fair trial and criminal court proceeding,while under the color or territory of state law. (see also Penal Code section 851.8)(People v Perez (1962) 58 Cal. 2d. 229,245,23 Cal. ptr. 569,578))(U.S. v Young, (1985) 470 U.S. 1,8,105 S.CT. 1038)((People v Modesto,(1967) 66 Cal.2d. 695,714)(59 CR 124,137)(People v Dillinger,(1964) 268 CA2d. 140,144; 73 CR 720,723)(Prosecutor maynot argue fact not to the record or not in the evidence;(see People v Kirks,(1952) 39 Cal. 2d. 719,249 P.2d. 1;)(People v Villa,(1980) 109 Cal App. 2d. 360,167 CR 265) (Geglkio v U.S. 92 S.Ct. 763,766).

The Petitioner was prejudicial harm by the deprived unanimous decision by the jury,as being factual,actual and legal innocence in committing the criminal conduct of kidnapping,and robbery, base on the evidence discovered. The prejudicial harm was some evidence that would have concluded or a more favorable result would have occurred,if not exonerated from the criminal conduct of kidnapping and robbery,as the miscarrigae of justice committed by prosecutor misconduct was the deprivation of established constitutional right to an fundamewntal fair trial.

GROUND II

PETITIONER CONTENDS THE CONVICTION MUST BE REVERSE,SET ASIDE OR DEEMED UNLAWFUL CONFINEMENT,WHEN THE CONVICTION OF KIDNAPPING AND ROBBERY WAS KNOWN TO BE BASE ON PROSECUTOR FRAUDULENT CONVEYACE, PREJURED TESTIMONY,MISSTATEMENT OF FACTS FOR THE PURPOSE OF DECEIVING THE HEARER OF FACTS OR THE JURY,AND DENING AN UNANIMOUS DECISION FROM JURY OF NOT GUILTY OF KIDNAPPING AND ROBBERY.

THIS ACT OF ABUSIVE DISCRETION VIOLATES PETITIONER'S SIXTH AND FOURTEENTH AMENDMENTY RIGHT TO AN FUNDAMENTAL FAIR TRIAL IN THE PRESENTATION OF HIS INNOCENCE.

THE CONTROLLING CASE LAW RELIED ON:U.S. v Taylor,102 S.CT. 329)

The Petitioner contends he cannot be found guilty of a crime,that was falsily charged to circumvent the statutory time limitation, or be tried and convicted by the state prosecutor for the County of West Covina,(Los Angeles) using insufficient evidence or fraud application,of fraudulent conveyance to the jury or the court,under the theories,known not to be true,as the act of filing the falsity material facts was denied to be corrrected at anytime the matter appeared in the court record,in a memo,letter,discussion,or court record filing. The known false information T. Phuong kidnapped the victim was known by the report,because the victim never left the house,and robbery was disproven,because the house had several prints,but his print was not found on the container of the stored owner funds,money was kept.

The Petitioner also contends he cannot be tried and convicted by the state prosecutor using insufficient evidence or fraudulently conveying misprision allegation,or theories,known not to be true as this act in alleging an exhibit or exhibits demonstrated beyond a reasonable doubt,finger prints belonging to the petitioner Thanksnieky Phuong,was found at the scene of the crime.

The LA-Prosecutor,for the County of West Covina,)knew or should have known suppression of known evidence supporting factual innocence was permitting the prosecution of the innocence,in which demonstrate the DA-misconduct,and exposed the petitioner to the denial of his fundamental right to an substantive due process criminal procedure trial or hearing,under the fundamental principle of a fair trial,being held in the interest of justice.

The speicific evidence withheld from the jury consideration,

in which permitted the finding of guilt on a lesser standard than beyond a reasonable doubt as cited under Cal. Jic 2.90, was the expert report and testimony that the DNA-found on the cigarette butt did not belong to T.Phuong,(2) only one finger print on a door knob was allegedly his,but there was several other unidentifiable,(3) all other evidence found under the jurisdiction of forensic lab investigation cited did not belong or identify T. Phuong as being at the crime scene when the assault with a deadly weapon and robbery occurred in 1983.

Matter of fact the state prosecutor knew,if she did not charged the petitioner with kidnapping,as cited under penal code section 209,she would not;beable to charge him with robbery,base on the criminal act occurred in 1983,and he was place on trial in the year of March 2011.

The laymen prosecutor information given to the jury,T. Phuong prints was found at the scene,**but,the LA-forensic expert,stated;** the Los Angeles fingerprints analysis expert determined,after conducting a examination of the left print,it was concluded by expert that the print was not that of the petitioner and was inconclusive to know who they were.

By expert opinion testimony,the factual innocence of T. Phuong was known to the DA of West Covina county,at the time of judicial criminal proceeding,as she/him never disturb the fraudulent conveyance,with the truth. The question of guilt and innocence was completely known of the laten print adduced at trial,were incontrovertible false,but was express in an manner to deceive, mislead the jury in believing or influence guilt of a criminal conduct committed by the petitioner.

The prejudicial harm is in the denial of substantive due process procedural right to an fundamental fair trial,criminal proceeding or within the presentation of factual,actual and legal innocent as cited under penal code section 851.8.

The state deprived such relief without nothing being available for a more favorable result.

The application of alleging guilty,by the prosecutor deprives the required proven in writing of the content,the reports related to DNA and fingerprints was a crucial information related to factual innocence,or within the definition of legally he cannot be charged with evidence not proven or establishing a wrong doing and when the petitioner did not do the crime alleged,his liberty interest right are deprived,by the unlawful restraint.

Once the prosecutor established the fingerpints left at the scene did not belong to T. Phuong and the DNA on the Cigarette butt was not a match,was an element of evidence that should have been made known to Trial attorney,but was not. This in itself was prejudicial harm and biasness,as the withholding of the evidence prohibited the research and discovery of rebuttable evidence.

Base on the statement made by non expert testimony,or layman testimony,as the record was known to be unsupportive to a criminal conduct of kidnapping for robbery act,the petitioner would have been exonerated for act allegedly committed in 1983,in the trial held in 2011,of the month in March(see California Penal Code sections 85.18,subd. a-d,;Penal code section 1473-1473.6);State v Roulette 75 F3d. 418,423,(519) U.S. 853,117 S.CT. 147;Tome v U.S. 513 U.S. 150,115 S.CT. 696)(Fabricated Arose)

In this case the false allegation resulted in a conviction that neither the statutory law,gives support to a conviction,base on evidence in which is supportive by the court record,and yet Mr. Phuong remain unlawfully incarcerated under a statutory provision that is not lawfully,legal or constitutionally sound.

The judgment must be reverse,set aside or remand back to the lower court for reversal.

GROUND III.

PETITIONER SIXTH AMENDENT RIGHT WERE VIOLATED BY THE FAILURE TO DEVELOP EXCULPATORY EVIDENCE IN THE FALSE REPORTING OF GUILT, USING RECORD OF DNA OR FINGERPRINT OR REBUTTAL TO THE CRIMINAL ELEMENT OF KIDNAPPING WAS NOT SUPPORTIVE BY THE RECORD OF CONVICTION PREJUDICIAL HARM OCCURRED,AS TO RELIEF OR SUBSTITUTION LEGAL REPRESENTATION PROVIDED TO REBUTT THE LAYMAN PROSECUTOR TESTIMONY OR THEORY OF GUIT,IN WHICH THE DNA OR FINGERPRINT RESULTED IN A WRONGFUL CONVICTION OF THE INNOCENCE,BY THE STATE PROSECUTOR GIVEN REFERENCE GUILT

The case law relied on Strickland v Washington 466 U.S. 668,684-90)

The Petitioner contends under the Sixth and Fourteenth Amendments to the United States Constitutional,he has a right to adequate legal representation to the degree or norms,as cited under Business and Professional code section_____;Government Code § 6068 and Civil Code Procedure § 340.6)

The trial counsel representation is not normal,when the trial counsel failed to conduct an investigation into DNA,when prosecutor advise trial counsel his guilt,would be proven by DNA sample left on a cigarrette butt or by fingerprint left at the scene of the crime. Had counsel gave legal representation to the standard of norms,(1) she would have rebutted no kidnapping occurred base on the victim never left the house.(2) The petitioner fingerprint was not discovered at the scene of the crime,(3) Expert testimony was some evidence to be considered by the jury,without such testimony the jury was force to rely on layman testimony.

Trial counsel had an obligation to protect the Petitioner from infraction of guilt,base on lesser standard that beyond a reasonable doubt.

Petitioner also contends,had appointed counsel obtained the records, documents in which she/he made reference to for examination,under the identity of DNA examination prove the saliva belong to petitioner, or the fingerprint taken from the scene of the crime exmined by expert disproved guilt,or was not true in being present at the time of the natural of the committed offense. The Petitioner would not have suffered a conviction under the penal code section 209 and 211,for the offense of kidnapping and robbery.

Trial counsel defaulted,abandon, forfeited the rebuttal or legal defense necessary to present the said evidence to the court for

exoneration to the committed offense of kidnapping and robbery.

The prejudicial harm was within the deprivation of the Supreme Court case law decision as cited under Strickland v Washinton 466 U.S. 668,to be deprived,permitting prejudicial harm in the denial of fundamental right to a fair trial,and lessen the burden of proof than beyond a reasonable doubt.

There was also an breaching of fudiciary duties of attorney skills,knowledge and performance in and throughout trial proceeding.

The right under the adequate defense would not have been deprived by ineffective assistance of trial counsel failure to research,the evidence used by the record reporting guilt,related to expert opinion.

This is what is known to be true,the District Attorney is not a expert in (1) taken fingerprint and examine them or providing the court with a conclusive testing result, in order to established expert truth,so her/his testimony to the jury was given as a lay person;(2) The evidence of Deoxribunclic Acid testing for the producing individual identification,can only be conduct by a expert in DNA. The expert would give his expert opinion,after completing his/her examination of the individual traits,component the petitioner genetic DNA . As stated,the expert testimony was beyond the qualification of a prosecutor for West Covina County, therefore when the said prosecutor gave testimony to DNA matching the said petitioner,it was given as a non-expert.

The lesser element of proven guilt occurred by the prosecutor given testimony to DNA and fingerprint ,as a element pointing to guilt of the petitioner,which was below the standard of norm,as this reference was made without rebuttal.

Aggravating the denial of protective constitutional right as cited under the Sixth Amendment,reference to trial counsel failed to object to the presentation of lawmen or non-expert testimony, in order to preserved the cause for direct appeal.

Under the more severe prejudicial harm,by trial counsel to ignored the readily available evidence for the presentation of an legal defense to guilt under kidnapping and robbery charges,,occurred when trial counsel failure to rebutt,object,or request for dismissal and or expert testimony.

Trial counsel failed to give reference to no expert testimony was consider in its true form. Had expert testimony been given related to DNA or Fingerprint analysis,the expert testimony would have rebutted the prosecutor theory of guilt,or a more favorable result would have occurred,and a fair trial would have been render.

Trial counsel abandon,default the rebuttal to guilt,as the default prohibit scientific evidence to be considered by the juror for deliberation,prior to verdict.

Therefore the standard as cited under the precedent case law Supreme Court Strickland v Washington 466 U.S. 668;People v Ledesma, (1987) 43 Cal. 3d. 171,217;People v Ratiff,(1986) 41 Cal. 3d. 675 694,was deprived,without no relief.

The Prejudicial harm was to be denied the standard as cited under the Supreme Court precedent case law standard as cited under Strickland v Washington, 466 U.S. 668,684-690),this lower standard permitted a conviction for a crime in 1983,to be found true under the false application that Mr. Phuong had committed the act of kidnapping,in a act,that the victim was never move from her home. The court lack jurisdiction to file indictment charges under penal code section 211,as the offense occurred in the year of 1983,but was found to be true in 2011,under the fraudulent conveyance that the robbery was apart of kidnapping,.

Had adequate legal representation been provided,this would have prohibited the application of 211 as cited under penal code section 799-801.

GROUND IV

DUE PROCESS AND EQUAL PROTECTION PROTECTION IMPLICATED IN CASES, WHERE TIMELINESS AND WAIVER RULE NOT APPLIED IN CASES INVOLVING UNLAWFUL CONFINEMENT,ILLEGAL AND UNAUTHORIZED PRISON TERM USING INSUFFICIENT EVIDENCE TO SUPPORT GUILTY OF A CRIMINAL CONDUCT.

The essence of petitioner claims and constitutional questions are predicated upon an claim of legal innocence,actual innocence or illegal sentence scheme not authorized by law. It is as much a denial of due process to send a man to prison following conviction for a charge for which there is no evidence to support that conviction.(see In Re Oliver 333 U.S. 257,275,92 L.Ed.2d. 682,694)

A Petitioner in a criminal case is presumed to be innocent until the contrary is proved and in the case of a reasonable doubt,whether his guilt is satisfactorily shown,he is entitled to a verdict of not guilty.(see Cal. Jic 2.90;People v Saldivan,(1941) 45 CA2d. 460, 463-464,114 P.2d. 415,416).

In this case the petitioner has claim he is innocence in committing the crimnal offenses of robbery and kidnapping,as such,they are reviewable at anytime the error is found regardless of (A); Affirmative of judgment;(B) Direct Appeal,and (C) Timeliness and may be the subject of later review or review for a sentence and conviction imposed in excessive of the court jurisdiction.(see In Re Billy Paul Birdwell, 58 CAl Rptr.2d. 244)

The sentence seven years to life,could not be given under any circumstances,without first depriving the petitioner of expert testimony to reference DNA exonerated him,and Finger print was inconclusive to reference to guilt by some proven evidence,and yet the prosecutor alleged both evidence reference to guilt in a fraudulent manner, without rebuttal from trial counsel.

GROUND V.

The violation of the United States Constitutional Fourteenth Amendment,result in the intentional and invidious discriminatory enforcement of the law,as the acts,action and decision resulting in a conviction render upon innocence,as the state prosecutor violated the statutory language as cited under California Penal Code section 1053 subd.(f),and California Constitutional Artcile I § 30 subd(c). There the prejudicial harm is defined within the denial of established statutory standard to prohibit the denial of substantial due process right to an fundamental fair trial. This court has jurisdiction under penal code section 1474 as the current 7 years to life is in excessof the court jurisdiction,as the criminal conviction is insufficiently supportive by the court record.

The prosecutor committed miscarriage of justice and prejudicial harm by perjury which violated Petitioner's right to due process under the Federal and State constitution. (In violation of Fourteenth Amendment)

The standard case law: U.S. vs Bagley 473 U.S. 667,676)

a. Supporting facts:

The People filed a one count felony information on October 13, 2010 charging Petitioner with one count of violating section 209, subdivision (b) (1) - kidnapping for robbery. LA Sup. No. KA090504 (CT 69.) Petitioner plead not guilty. (CT 73.) The offense occurred in 1983, and the case was prosecuted in 2010 - twenty-seven years after the fact. A review of the record shows that the complainant did not make an in court identification of Defendant. On February 22, 2011 jury trial commenced. (CT 86.) Among other evidence adduced at trial, the police were able to seized a cigarette butt from the crime scene.

The People first called Robert Tibbetts, who testified that on the date of the occurrance in this case, he was a West Covina police officer, and that he retired in 2001. (II RT 614-615.) He testified a cigarette butt that was seized because witness accounts indicated that the suspect in the case had smoked it. (II RT 658.)

The People next called Cindy Chao. She testified that she lived in West Covina in June 1983, and that she ran a babysitting service, and she advertised her services in local Chinese language newspaper. (II RT 717.) She recalled that the man smoked a cigarette in her home and that she went to the kitchen to get an ashtray for him. (II RT 725.)

The People also called Tony Chan, who testified that he was an officer with the West Covina Police Department in 1983, but was currently retired. (III RT 992.) He said he interviewed Ms. Chao in 1983 and she told him that the man smoked a cigarette in her home at the time. (III RT 997.)

Here, the suspect who assaulted Ms. Chao had smoked a cigarette and had left the cigarette butt at the scene of the crime. The DNA evidence contained biological material on it that was actually left by the perpetrator. Like fingerprints, DNA can be used to make a positive identification, and it can be found in saliva cells left on the cigarette butt. Under proper conditions DNA can remain viable for thousands of years, and all it take is one small cell to reproduce and create a profile. In this instance, the perpetrator smoked a cigarette, the epitherial cells on the inside of the cheek are expelled in his saliva, and a DNA profile can be developed from them. However, the prosecutor told the jury in open court the seized cigarette butt was lost and was never subjected to any forensic testing, but the fact prove otherwise.

EXHIBIT 1

According to the traceable factual record, on November 19, 2009 the police arrested Petitioner again. Detective Travis told him they had recovered a cigarette butt with his DNA on it. (4RT 1624.) Here, contrary to the prosecutor false statement, the explicit factual record indicates that in truth the police did have the DNA evidence fifteen months earlier before trial, and the seized cigarette butt was not lost as the prosecutor intentionally concealed the exculpatory evidence from the jury. **(See Murgio 15 Cal. 286,293)(Penal Code § 1054(e))**

EXHIBIT 2

On September 2010, Detective Irene Meza and Detective Travis showed up together at Pomona Court. They're flashed a court warrant and took swab from Petitioner's

saliva for DNA test. Here, contrary to the prosecutor false statement again, the explicit factual record indicates that in truth the police did run a DNA test on Petitioner's saliva six months earlier before trial, and the seized cigarette butt was not never test as the prosecutor intentionally concealed from the jury. In addition, it is notable that Petitioner maintained his innocence from the date of his arrest to this day. If Petitioner is the perpetrator of the crime, then why the police never get his latent print off the filter?

Under Brady and its progeny, the prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. The government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. (See supporting cases 1) However, the fair trial laws never happen in this case, because the prosecutor failed to follow the rules of the law.

Clearly, the prosecutor had obstructed justice by consistently used of false statement and deceptive method to misled the jury's judgment to believe the seized cigarette butt was lost and was never subjected to any forensic testing. But in truth the prosecution was well aware of the police did have the seized cigarette butt, and under the court warrant the officers did test Petitioner's saliva on the DNA evidence. False statement was egregious used by the prosecution to limit the jury's ability to discover all the facts and learn the truth, because apparently the DNA evidence from a cigarette butt found at the crime scene that did not match a known DNA sample from Petitioner. (See supporting cases 2) If the exculpatory DNA evidence been disclosed to the jury, the result of the trial would have been different. **(see California Constitutional Article I § 30(C)).**

Based on a Brady violation by a preponderance of the evidence, the prosecutor was dishonestly and willingness to committed Brady Violations, prosecutorial misconduct, and perjury under oath in order to secure a criminal conviction. Accordingly, the prosecutor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process. Significantly, prosecutorial misconduct violates due process when it has a substantial effect and influence in determining the jury's verdict. **(see Geglio v U.S.,92 S.Ct.766)**

To supporting a claim of Brady violation, prosecutorial misconduct, and perjury, Petitioner demonstrates: (1) The evidence at issue is favorable to the Defendant, either because it is exculpatory, or because it is impeaching; (2) That evidence have been willfully suppressed by the State; and (3) Prejudice have been ensured. Because the trial court violated Petitioner's right to due process, equal protection, and a fair trial.**(see Izazaga;54 Cal.3d. 356,378)**

Finally, to support a claim of actual innocence Petitioner demonstrates exculpatory evidence that goes to the heart of the Defendant's guilt or innocence as well as that which might well alter the jury's judgment of the credibility of prosecution false statement and deceptive method, society wins not only when the guilt are convicted but when criminal trial is fair and impartial. **But for the denial a more favorable result would have occurred; (See Murgio 15 Cal.3d. 286,293)(Penal Code section 1054(f);People v Hayes 3 CA4th 1238,5 CR 2d. 105) (U.S. v Cadet,727 F2d. 1453,1468)**

b. Supporting cases, rules, or other authority:

1. In the landmark case of Brady v. Maryland, the Supreme Court fashioned a rule under which the Government is constitutionally required to disclose "evidence that is both exculpatory and material." 373 U.S. 83, 87, 83 S. Ct. 1194, 10L. Ed. 2d 215 (1963). The Supreme Court has since made clear that the duty to disclose such evidence applies even when there has been no request by

the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 94L. Ed. 2d 342 (1976). Evidence is deemed "material" if there is "a reasonable probability that, had the evidence been disclose to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 87L. Ed. 2d 481 (1985). When considering information that might fall under the Brady rule, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131L. Ed. 2d 490 (1995).

2. A prosecutor's false statement constitutes misconduct under California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." People v. Strickland, 11 Cal. 3d 946, 955 (1974). Accordingly, the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91L. Ed. 2d 144 (1986). "A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted." Barrientes v. Johnson, 221 F. 3d 741, 753 (5th Cir. 2000).

The writ of habeas Corpus or the great writ act as cited under 1654,penal code section 1473-1505,or as cited under the federal language 2254,this matter relates to an constitutional issue that require the court to concern itself with the violation of substanmtial due process right to an procedural fair trial,as two relevant evidence (2253)..factual,actual and legal innocent was withheld from the jury consideration and in this act,the unanimous decision by the jury to guilty and innocence was deprived,therefore violation the petitioner right to presented his factual claim as cited under the Sixth Amendment and Fourteenth Amendment.

This court must order to show cause why relief should not be granted,as the expert testimony established by the prosecutor would have contradicted her closing argument,and rebutted the statement of guilt by expert opinion,in which reflected there was no positive finger prints and the DNA did not positive ID the petitioner.

GROUND VI.

THE MISCARRIAGE OF JUSTICE WAS DEFINED IN THE OVERWHELMING EVIDENCE POINTING TO FACTUAL INNOCENT,WAS CONSCIOUSLY DISREGARDED FOR PROVEN GUILT TO A CRIME NOT POSSIBLY HAVING COMMITTED. (THIS VIOLATIONS IS PROHIBITED UNDER THE FIFTH AND FOURTEENTH AMENDMENT)

The Petitioner relies on Jackson v Virginia 443 U.S.307

I. FACTUAL BACKGROUND

The People filed a one count felony information on October 13, 2010, charging Thanksnieky Phuong with one count of violating section 209 subdivision (b) (1) - kidnapping for robbery. LA Sup. No. KA090504 (CT 69.) But from the beginning of the case, the unilateral accusation is disprove and insubstantial, because there is no substantial evidence to proven the Defendant guilty to the crime. Especially the sole latent print adduced at trial. The circumstantial evidence is irrelevant. Such opinion evidence does not directly prove the Defendant was (1) the assailant, (2) the robber, and (3) the individual. Admittedly, this new discovery evidence unerringly proven Petitioner is factual innocence and complete undermine the prosecution's case, because there is no substantial evidence to support the verdict under any hypothesis.

Significantly, the pivot of the whole legal dispute in this case is not whether the sole latent print adduced at trial is SUFFICIENT OR INSUFFICIENT to established the Defendant was the perpetrator of the crime, but in truth there is NO EVIDENCE to support Petitioner was the kidnapper. Regardless of how the jury could reasonably deduce from the irrelevant circumstantial evidence. In plain terms, there is no substantial evidence to established the Defendant was present at the crime scene when the crime occurred. This is fact. Irrefutable fact that proven THANKSNIEKY PHUONG WAS NOT THE KIDNAPPER BEYOND A REASONABLE DOUBT.

II. THE IRREFUTABLE EVIDENCE

In crime investigation, to accuse someone committed a crime, the prosecution need more than bare assertion. Due process mean listening to both sides, what bring truth, and what bring false. The standard of review is the same regardless of whether the rebuttal evidence is circumstantial or direct, here is the proof that Thanksnieky Phuong was not the kidnapper.

The illegal sentence as reflected in the court record failed to give support the the conviction under kidnapping and robbery was an proven element committed:

EXHIBIT 1: THE FACTUAL EVIDENCE

During jury trial, the prosecutor adamantly accused the Defendant committed kidnapping for robbery, because the People's expert witnesses unanimous testified the sole latent print adduced at trial belong to Thanksnieky Phuong. But beneath the disprove and insubstantial accusation, the fact prove otherwise.

In criminal investigations, a theory can be a powerful tool for clarifying confusion, but it can also lead to distortion and unreliability when the People make fact fit theory and close their minds to the real meaning of the facts. Significantly, once a thesis gets established, it becomes an unquestioned fact. Because the prosecutor well aware of when anything is represented time and again as a fact, one unthinkingly accepts it as the truth. As in this case, the prosecutor deployed the suggestibility factor to misled and influence the lay jury's deduction and fabricated truth out of what the People needed and partial to believed by unilateral ignoring the circumstantial evidence is irrelevant.

Indisputably, such OPINION EVIDENCE CANNOT BE PROVEN PETITIONER WAS THE KIDNAPPER BEYOND A REASONABLE DOUBT. It is notable that trained law enforcement officers collected the following physical evidence "just hours after the attack", (Return. September 25, 2012. P6; L6. Filed by clerk Joseph A. Lane) and none of these crucial evidence in this case support the Defendant was the kidnapper. Here is the factual evidence in rebuttal of the charge:

(A) The latent print was not lifted from the knife handle that the assailant used to stabbing the victim. (III RT 920-921.)
(B) The latent print was not lifted from the rope that the kidnapper brought with him and used it to tied the victim. (III RT 913.)
(C) The latent print was not lifted from the cigarette butt filter that the perpetrator smoked and had left at the crime scene. (II RT 725.)

Clearly, nothing matter but fact. Because only stark facts can link the Defendant to this crime, or exonerated him from responsibility. Accordingly, no one can deny the hard facts speak for themselves, there is NO SUBSTANTIAL EVIDENCE TO SUPPORT THANKSNIEKY PHUONG WAS THE KIDNAPPER UNDER ANY HYPOTHESIS. (People v. Bolin (1998) 18 Cal. 4th 297, 331.) Regardless of how deliberate the prosecutor and her expert witnesses tried to obfuscated the preceding simple fact with the irrelevant circumstantial evidence. This is fact. Irrefutable fact that the People cannot continue disregard or evade with ulterior partiality.

Research and courtroom experience provide ample evidence if the police lied once, they will lie all in order to secure a criminal conviction. As in this case, the prosecutor told the jury the police were able to lifted two latent prints from Chao's residence. But in truth that was AN OUTRIGHT LIE. According to the internal Probation Officer's Report, "AT THE TIME OF OFFENSE, SEVERAL FINGERPRINTS WERE LIFTED FROM THE CRIME LOCATION." (P4; L9-10. Filed by clerk John A. Clarke on March 29, 2011) Additionally, officer Tedde Stephan disguised himself as a forensic fingerprint expert and misled the lay jury to believed the irrelevant circumstantial evidence is an unquestioned fact, but in truth as a layman, he have no credential to testify at jury trial. In March 2004 examiner Gema Reyes claimed the fingerprint evidence belong to the Defendant, but in June 2009 the police were in fact refute their own expert witness by determined two prints did not share enough unique characteristics for a positive identification, the result is inclusive evidence. In plain terms, THERE IS NO CREDIBLE FACT ON THE PROSECUTION GROUNDLESS ACCUSATION.

EXHIBIT 2: THE EXCULPATORY EVIDENCE

The prosecutor adamantly accused the Defendant used a knife to stabbing the victim, but in truth there is no evidence to established Petitioner was the assailant. According to the People argument, trained law enforcement officers collected the crucial weapon "just hours after the attack", and THERE IS NO DEFENDANT'S FINGERPRINT ON THE KNIFE HANDLE. For the record, not just one knife, but two knives according to eyewitness Cindy Chao testimony. (III RT 908-917.) Clearly, THIS FACTUAL EVIDENCE PROVEN PETITIONER WAS NOT THE ASSAILANT with scientific certainty, because he was not present at the crime scene when the crime occurred.

The prosecutor also adamantly accused the Defendant committed robbery, but again in truth there is no evidence to established Petitioner was the robber since he was not the assailant. According to FBI's criminologists, "robbery offenders do recidivate, and they'll do it again and again. The robbers are always broke after a big score, and they're will go for bigger caper to loot more swags. Niety-nine percent of the robbers earn a poor living through crimes, and they all spend much of their lives locked up in jail or prison." (John E. Conklin. Robbery and The Criminal Justice System. 1972) In plain terms, once a robbery offender, always a robbery offender.

Clearly, Petitioner background is contrary to the foregoing authoritative documentation. Accordingly, there is no credible fact on the prosecution insubstantial accusation. Here is the proofs that points out the facts and speak the truth.

(A) Petitioner was not present at the crime scene when the crime occurred.
(B) Petitioner have a clean slate with no prior jail record or prison record.
(C) Petitioner have a stable social history. But more importantly, if Petitioner was the robber in this case, then why he never recidivate for the past thirty-five years since 1983?

Indisputably, this is fact. Irrefutable fact that the jury could and should hear. However, due to the prosecutor's devious trial tactics and trial counsel abandoned in the performance of his professional duties, the lay jury did not hear everything to discover all the facts and learn the truth before they are deliberate whether the Defendant guilty beyond a reasonable doubt. The preceding exculpatory evidence was not presented at trial. THIS FACTUAL EVIDENCE PROVEN THANKSNIEKY PHUONG WAS NOT THE ASSAILANT, THE ROBBER, OR BOTH UNDER ANY HYPOTHESIS. Significantly, the naked truth will stand up for the reviewing court to close scrutiny.

EXHIBIT 3: EYEWITNESS' DIRECT EVIDENCE

According to the police reports, Cindy Chao is the sole eyewitness in this case. During jury trial, Chao testified, "she agreed to meet him at a Bank of America branch,.. and that he would follow her back to her home." (II RT 720-722.) and "she recalled that the man was in her home... she went to the kitchen to get an ashtray for him." (II RT 725-909.) Here, Cindy Chao herself is the eyewitness' direct evidence, because she had ample time and opportunity to see, to remember, and to recognize the lineaments of the man who attacked her. Therefore, if the perpetrator have a conspicuous big wart on his right eyebrow, there is no justification at all why Chao failed to give her Testimonial Evidence to the police, or point out the Defendant's identifiable description on his face at preliminary hearing and jury trial.

Clearly, THE MAN WHO ATTACKED AND ROBBED CINDY CHAO IN HER HOME IN 1983 DO NOT HAVE A CONSPICUOUS BIG WART ON HIS RIGHT EYEBROW. For the record, which is contrary to the Defendant's individual evidence. The preceding eyewitness' direct evidence was not presented at trial. THIS NEW RELIABLE EVIDENCE PROVEN THANKSNIEKY PHUONG WAS NOT THE INDIVIDUAL who entered Chao's residence in 1983.

EXHIBIT 4: DEFENDANT'S INDIVIDUAL EVIDENCE

On August 1, 1965, Thanksnieky Phuong was born with a conspicuous big wart on his right eyebrow due to birth defected, and without a doubt people recognized him easily if they're see him again. Years later on February 14, 1980, Petitioner was legally entry into United States, Alien Registration Number 025105530. Petitioner Green Card photo in 1980 and his Driver Licence photo in 1981 in Columbia City, South Carolina, these public records are the proofs that the Defendant's individual evidence was long exist before 1983. Accordingly, in crime investigation, this unalterable physical evidence classified into individual evidence, because this impression can be used to prove that an witness has seen a particular person who was in a specific place. The preceding Defendant's individual evidence was not presented at trial. THIS NEW RELIABLE EVIDENCE PROVEN THANKSNIEKY PHUONG WAS NOT PRESENT AT THE CRIME SCENE WHEN THE CRIME OCCURRED.

EXHIBIT 5: THE POLICE MISCONDUCT

November 19, 2009, the police arrested Petitioner again. Detective Travis told him they had recovered a cigarette butt with his DNA on it. (4RT 1624.) On this issue the People argued "the likeliest explanation of such a statement is that the police lied to Petitioner in an attempt to prompt a confession." (Report and Recommendation of U.S. Magistrate Judge. August 29, 2018. P8; L5-6) Assuming the foregoing explanation is true, the People fails to elucidate why did the police bother "lied to Petitioner in an attempt to prompt a confession" when they're already recovered his fingerprint evidence from the crime scene in 1983?

Clearly, this contradictory evidence allows of only one conclusion. Ostensibly the police claim they're recovered Petitioner's fingerprint evidence from

Chao's residence, but in truth that never happen. This was especially true here because California Supreme Court has repeatedly emphasized that fingerprints are the strongest evidence of identity and ordinarily are sufficient by themselves to identify the perpetrator of the crime.

Additionally, there is something beneath the questionable police tactics remain untold to this day. On one side, the People argued that "the police lost the cigarette butt, so they never took a DNA sample from it; the jury knew that the police had never compared Petitioner's DNA to DNA on the cigarette butt." (Report and Recommendation of U.S. Magistrate Judge. August 29, 2018. P7; L26-28) But on the other side, according to the internal Probation Officer's Report, the factual evidence indicates "THE DEFENDANT SUBMITTED TO DNA TESTING ON JANUARY 5, 2010. (P4; L13-14) To bring out the truth of a matter, the People have to elucidate in open court for a serious legal challenge.

(1) Did the jury also know why the police bother to took swab from the Defendant's saliva and not use his DNA to compare the DNA on the cigarette butt?

(2) What is the purpose of the court to issue the court warrant to took swab from the Defendant's saliva for DNA testing if the police lost the cigarette butt before 2010?

(3) Why did the police redundantly bother to assigned two detectives went to Pomona Court to took swab from the Defendant's saliva for DNA testing if they're do not possess the exculpatory DNA evidence?

On this questionable issue, the People also argued on the ground that "in 1983 DNA analysis was not a regular practice. It did not become a regular practice until the late 1980s and early 1990s." (Report and Recommendation of U.S. Magistrate Judge. August 29, 2018. P3; L1-2)

Apparently the People argument on this legal challenge is irrelevant, untenable, and irresponsibility. Because the main point of this controversy is not WHEN the police start their regular practice for DNA analysis, but WHY the police failed to follow the rules of the law to preserve evidence from being lost, destroyed, or contaminated. Any evidence, regardless of whether is DNA or not. Because only evidence from the crime scene can link the Defendant to this crime, or clear him of suspicion. More specifically, the pivot of the whole legal dispute on this issue is about PRESERVE the evidence, not regular practice for DNA ANALYSIS. The most important task to crime scene investigation is the collection and preservation of physical evidence. A chain of custody is a written record, with signatures and dates, showing who had possession of the evidence from when it was collected to the time it went to court.

Clearly, the law speaks of a chain of evidence, which must remain unbroken to prevent tampering. The police are held accountable for every item of evidence from the time it is discovered at the scene of a crime until it is presented in court. Here, indisputably, THE POLICE VIOLATED PETITIONER'S DUE PROCESS RIGHTS TO PROVE FOR HIS FACTUAL INNOCENCE, whether by design or not. Therefore, the defects so affected the trial as to violate the fundamental aspect of fairness and result in a miscarriage of justice. This is fact. Irrefutable fact that the People cannot continue to disregard or evade responsibility with ulterior partiality. The law apply to everyone irrespective of profession, and the police is no exception. Accordingly, in the name of justice, the People must hold the police accountable for their own misconduct. The preceding police misconduct was not presented at trial. This factual evidence corroborated in truth the police did possess the cigarette butt, and the exculpatory DNA evidence have been willfully suppressed by the State of California.

GROUND VII,.

THE PETITIOENR IS FACTUALLY INNOCENT IN COMMITTING THE CRIME OF KIDNAPPING AND ALL OTHER CHARGES ARE NOT APPLICABLE FOR CHARGING UNDER THE CRIMINAL CONDUCT BASE ON EXCEEDING THE JURISDICTION OF THE COURT

IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENT:

The Petiitoner contend under the California Penal Code section 207,or 209, (Kidnapping or Kidnapping for Robbery, the definition is cited as ,a defendant is accused in court of having committed the crime of kidnapping a violation of section 207,subdivision (a) of the penal code .

Every person who unlawfully and with physical force,steals or takes,nor holds, detains,or arrests another person and carries that person without his or her consent compel any other person without consent and because of a reasonable apprehension of harm to move for a substantial distance,that is,a distance more than slight or trival,is guilty of the crime of kidnapping in violation of the penal code section 207 subd. (a).

Under the definition of kidnapping for Robery,:

Every person who with the specific intent to commit robbery,kidnaps any individual is guilty of the crime of kidnapping to commit robbery in violation of penal code section 209 subd (a). The specific intent to commit robbery must be present when the kidnapping commences.

Now.the instruction is limited to simple kidnapping where there is no other underlying crime.

if the victim of the alleged kidnapping is incapable of giving consent, the people must prove the movement was done for an illegal purpose or with an illegal intent.(see cal. Jic. § 9.57)(People v Oliver,(1961) 55 Cal. 2d. 761,768) 12 CR 865,869)

Under the simple kidnapping the evidence do not support the application in a general intent crime,as cited under people v Thorton,(1974) 11 Cal. 3d. 738, 114 CR 467,485. (Moving the victim 465 feet within the""family compound" during the course of a robbery is not a kidnapping.(see Poeple v John,(1983) 149 CA3d. 798,805,197 CR 340,344)(Cal. Jic 9.50)(,nor should the crime be used for enhancement

since it does not require a special finding that the kidnapping was done to perpetrate another crime. (see People v White,(1987) 188 CA3d. 1128,1138-1139) (233 CR 772,779-780)

In People v Daniel,(1993) 18 Cal. CA4th 1046,1053]22 CR2d. 877,881],it was held to be error to instruct the jury that 500 feet constitute a substantial movement. Lacking any clear definition of substantial,the court suggested that the jury if it requested further explanation of the meaning of substantial be told; " the issue is one of fact for you to decide,not one of law for the court to decide. Based upon the fact to determined form the evidence,you may decide the distance was substantial or that it was not substantial.

But under Penal Code section 209 and 211,intent to rob must be presented at the time of the original asportation.(see People v Tribble,(1971) 4 Cal. 3d. 826, 832,[94 CR613,616.)

The asportation must be for a substantial distance and not merely incidental to the commission of the robbery. see People v Daniels,(1969) 71 CA. 2d. 1119 1139-1140))(80 CR 897.)

The record is not supportive to an act of kidnapping,as the evidence only support that the victim was stabbed,only after moving from the bedroom to the bathroom,jointly connected. Therefore the court could not charge a life crime under penal cde section 209 subdivision(b),inorder to circumvent the maximum statutory of time limitation period for filing criminal charges under assault with a deadly weapon,which was 3 to 6 years.(see Penal code section 799-803) The Penal code section must be dismissed from the record,as the record of conviction is not supportive to the correct charged application.

As alleged it was only through the miscarriage of justice and wrongful prosecution was Mr.Puong; was permitted to be charged with a crime not committed.

A defendant cannot be convicted or be found guilty of a crime that is impossible to commit under the facts. However,the individual may still be guilty of the primary statute if the application of the law permit the statute to be tried and proven.

The statute of limitation in criminal action is jurisdictional,(see People Zamora,(1976) 18 Cal. 3d. 538,134 CR 784) Thus,whenever the prosecution fails to plead and prove that the offense occurred within the applicable period,and does not set forth an exception to the running of the statute,the action will be deemed fundamentally defective and will be barred,(see People vs Mc Gee, (1934) 1 Cal. 2d. 611,613-614),

It will not matter whether or not the Petitioner has raised the issue at the pleading stage.(see In Re Demillo,(1975) 14 Cal. 3d. 598,601,121 CR 725)

When the bar of the statute of limitation is raised,the prosecutor or attorney general has the burden of proving by a preponderance of the evidence that the crime was committed within the statute of limitations period(see People v Crosby,(1962) 58 Cal. 2d. 713,725,25 Cal. Rptr. 847)

If on collateral review ,the state fails to sustain this burden,the conviction must be vacated and reverse. In this case the court failed to prove that **" Kidnapped was committed" for a life sentence to be the direct cause of staying the timelimintation.**

Base on the assault with a weapon has a determine date,the court was under obligation to deem the statutory timelimited had expired under the applicable charged,and when the prosecutor charged in the indictment the application of penal code section 209,it was an miscarriage of justice,as the record of conviction was not supportive to an act of kidnapping,as cited under penal code section 209 subd.(a). The Petitioner is factually,actually innocense in committing the conduct of kidnapping and must be exonerated.

CONCLUSION

Therefore Petitioner respectfully requests this court:

1. Order respondents to show cause, why Petitioner is not entitled to the relief sought;

2. Issue it writ of habeas corpus to vacate the sentence, conviction imposed upon Petitioner and grant Petitioner a new trial

3. Issue an immediate stay to the application of the sentencing terms of the 2011 conviction, related to the 1983 indictment or discovery of criminal evidence for indictment as cited under penal code section 1054

4. Deem, base on there was no kidnapping, the additional charges was barred by the statutory or limitation or the court lack jurisdiction to make a finding of guilt

5. Appoint counsel in the said matter

6. Grant Petitioner such other relief as is appropriate and in the interest of justice

Date: 4-28-2020

RESPECTFULLY SUBMITTED

Thanksnieky Phuong