

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY KHONG,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

**On Petition For A Writ of *Certiorari* To The United States Court of Appeals
for the Ninth Circuit**

**APPENDIX (VOLUME IV) – PRESENTED SEPARATELY UNDER S. CT.
R. 14.1(i)**

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

1 the Court has ordered that the testimony of Stacey T.
2 be transcribed, and it will be read to you in its
3 entirety, period.

4 Also, the testimony of Officer Winchester will
5 be transcribed and read to you in its entirety,
6 period.

7 Also, the Court directs the jury to People's
8 Exhibits 6 and 6-A.

9 Transcripts of clips four and eight will be given
10 to the jury for your review.

11 MS. DUNHAM: Should you just give the whole
12 transcript instead of --

13 Then you're going to have to cut it all apart.

14 THE COURT: I can do that if that's what you want.

15 MS. DUNHAM: That's my --

16 So they don't have to take it apart.

17 THE COURT: All right. Do you have any problem
18 with that?

19 MR. FARINA: I have no problem with that. That's
20 fine.

21 THE COURT: All right. I'll do that.

22 And transcripts of those exhibits will be provided
23 to you.

24 MS. DUNHAM: Yeah.

25 MR. FARINA: I agree.

26 THE COURT: But we do not leave those transcripts
27 in there with them. We bring those back.

28 And so, transcripts of these exhibits will be

1 provided to you while -- while you listen to the CD or
2 something like that.

3 MS. DUNHAM: Uh-huh.

4 THE COURT: We probably --

5 We should say the transcript of the preliminary
6 hearing is not in evidence.

7 However, in response to your question, the Court
8 has ordered that the testimony of Stacey T. be prepared
9 and be read to you in its entirety.

10 MR. FARINA: From the preliminary hearing
11 transcript.

12 THE COURT: No. That's from the Court transcript.

13 MR. FARINA: Because the prelim is not in
14 evidence.

15 THE COURT: It's not here.

16 MR. FARINA: That's fine.

17 THE COURT: Stay close because --

18 MR. FARINA: I'll stay here. I'm not going
19 anywhere. I'm staying here.

20 Realistically I don't know if they're going to
21 come back today.

22 THE COURT: We can't --

23 We won't have the transcripts ready.

24 We're off the record.

25 (Evening Recess)

26

27

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1 which he had a two-year prison sentence.

2 I haven't found anything in his criminal history,
3 his character or his prospects that makes me think that
4 he is on the path to a -- to a law abiding future.

5 Yes, he wants to have a job. He was working in an
6 auto parts -- or an auto repair shop, and that's fine,
7 but -- but while he was working in the auto repair
8 shop, he's pimping and pandering and trafficking girls,
9 little girls, children, 14-year-olds.

10 And for that, I think that these factors scream
11 for denial of the Romero motion. I will deny the
12 Romero on those grounds.

13 All right. We have to go to judgment and
14 sentencing.

15 Folks, I have to make a very quick phone call. I
16 just need a couple of minutes, because I have to cancel
17 something that I -- I didn't know we were going to be
18 this long, and it's not a problem. We'll take as much
19 time as we need on this.

20 Just give me two minutes to make a phone call.

21 MR. FARINA: Yes, your Honor.

22 (Short pause)

23 THE COURT: Back on the record.

24 Were you able to make the call for Mr. Farina?

25 Just so it's clear, my comment there a moment ago,
26 we'd be this long is because a prior matter went long,
27 not because of this matter has gone long.

28 MR. FARINA: Right.

1 these offenses were perpetrated on these children. But
2 I think if anyone's earned the upper term, it is this
3 defendant.

4 Regarding Count Seven, a felony violation of
5 Section 236.1(c), I sentence Mr. Khong to State Prison
6 for the upper term of eight years doubled to 16 years
7 because of his prior strike pursuant to Penal Code
8 Section 667(e)(1).

9 The upper term is certainly appropriate in this
10 case because the defendant was on parole when the
11 crimes were committed, the crimes against children were
12 committed and because of his prior experience as a
13 criminal, both as a juvenile and as an adult.

14 Regarding Count Eight, I sentence the defendant to
15 one-third the midterm, for a total of two years,
16 doubling that to four years for his prior strike,
17 pursuant to Section 667(e)(1) of the Penal Code.

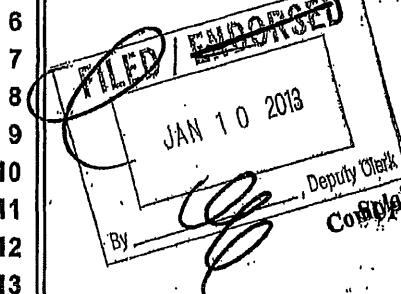
18 I'm going to order that this be served
19 consecutively, as these crimes were predominantly
20 independent of one another and included separate
21 victims.

22 Regarding Counts One and Two and Count Four, I
23 think I will not sentence. I'm going to stay those
24 pursuant to 654 rather than to sentence.

25 If this matter comes back to me, I'll sentence
26 appropriately at that time rather than do it here,
27 unless you have a strong feeling one way or the other

28 on that, Ms. Dunham.

2 DISTRICT ATTORNEY
3 901 G STREET
4 SACRAMENTO, CA 95814
5 (916) 874-6218



FILED / ENDORSED

2012 SEP -7 PM 4:41

ORIGINATOR

SPD-12-361289
A. DUNHAM, DDA
TEAM: (ASAP)
XRef: 3813903
XRef: 4779719
XRef: 4207692

2 STRIKES

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

TONY KHONG,
STEPHEN TRAN,
TYRON VAN TRAN,

Defendant(s).

The People of the State of California upon oath of the undersigned, upon information and belief complain against the defendant(s) above named for the crime(s) as follows:

COUNT ONE

On or about and between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of California, defendant(s) TONY KHONG, STEPHEN TRAN and TYRON VAN TRAN did commit a felony namely: a violation of Section 266h(b)(2) of the Penal Code of the State of California, in that said defendant knowing to be a prostitute, did unlawfully live and derive support and maintenance in whole and in part from the earnings and proceeds of said person's prostitution, at a time when CINDY T., was a minor under the age of 16 years, to wit, age 15 years.

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COUNT TWO

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Count One hereof: On or about and between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of California, defendant(s) TONY KHONG, STEPHEN TRAN and TYRON VAN TRAN did commit a felony namely: a violation of Section 266h(b)(2) of the Penal Code of the State of California, in that said defendant knowing to be a prostitute, did unlawfully live and derive support and maintenance in whole and in part from the earnings and proceeds of said person's prostitution, at a time when STACEY T., was a minor under the age of 16 years, to wit, age 15 years.

COUNT THREE

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Counts One and Two hereof: On or about and between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of California, defendant(s) TONY KHONG, STEPHEN TRAN and TYRON VAN TRAN did commit a felony namely: a violation of Section 266i(b)(2) of the Penal Code of the State of California, in that said defendant did unlawfully, and by threats, violence, promises, a device, and scheme, cause, induce, persuade, and encourage CINDY T., a person under the age of 16 years, to wit, age 15 years, to become a prostitute.

COUNT FOUR

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Counts One through Three hereof: On or about and between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of California, defendant(s) TONY KHONG, STEPHEN TRAN and TYRON VAN TRAN did commit a felony namely: a violation of Section 266i(b)(2) of the Penal Code of the State of California, in that said defendant did unlawfully, and by threats, violence, promises, a device,

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and scheme, cause, induce, persuade, and encourage STACEY T., a person under the age of 16 years, to wit, age 15 years, to become a prostitute.

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COUNT FIVE

10 For a further and separate cause of action, being a different offense of the same class of crimes
11 and offenses as the charges set forth in Counts One through Four hereof: On or about and
12 between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of
13 California, defendant(s) TONY KHONG did commit a felony namely: a violation of Section
14 261.5(d) of the Penal Code of the State of California, in that said defendant being over the age of
15 21 years, did engage in an act of unlawful sexual intercourse with STACEY T., a person under
16 the age of 16 years, to wit, age 15 years.

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COUNT SIX

22 For a further and separate cause of action, being a different offense of the same class of crimes
23 and offenses as the charges set forth in Counts One through Five hereof: On or about and
24 between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of
25 California, defendant(s) STEPHEN TRAN did commit a felony namely: a violation of Section
26 261.5(c) of the Penal Code of the State of California, in that said defendant engaged in an act of
27 unlawful sexual intercourse with CINDY T., age 15 years, not the spouse of the defendant, the
28 minor being more than three years younger than the defendant.

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PRIOR CONVICTION (TONY KHONG)

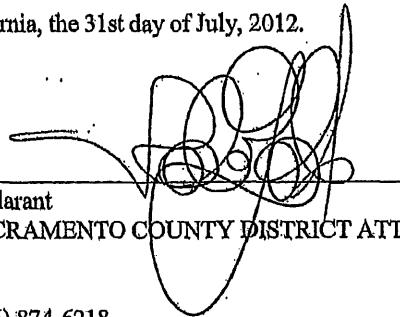
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It is further alleged that the said defendant(s), TONY KHONG, was on August 18, 2008, in the Superior Court of the State of California, for the County of Sacramento, convicted of the crime of First Degree Burglary in violation of Section 459 of the Penal Code, a serious felony, within the meaning of Section 1192.7(c) of the Penal Code, and that by reason thereof, that he/she comes within the provisions of Section 667(b)-(i) and Section 1170.12 of the Penal Code.

That attached hereto and by this reference incorporated herein is a declaration setting forth facts in support of probable cause for the issuance of a warrant of arrest herein.

I declare upon information and belief and under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento County, California, the 31st day of July, 2012.


Declarant
SACRAMENTO COUNTY DISTRICT ATTORNEY

(916) 874-6218
Telephone Number

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HOLDING ORDER - DEFENDANT STEPHEN TRAN

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It appearing to me that the offense(s) in the within complaint has/have been committed, and that there is sufficient cause to believe that the defendant, STEPHEN TRAN, is guilty thereof,

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The defendant, STEPHEN TRAN, having waived preliminary hearing to the offense(s) set forth in this complaint,

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Exceptions/Additions/Conditions: _____

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I order that the defendant be held to answer to same. In my capacity as Judge of the Superior Court, I deem the within complaint to be an Information and order it filed in the Superior Court.

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Date: 1-10-13 Dept. 38



Judicial Branch of the Superior Court Sitting as Magistrate

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HOLDING ORDER - DEFENDANT TONY KHONG

5 _____ It appearing to me that the offense(s) in the within complaint has/have been committed,
6 and that there is sufficient cause to believe that the defendant, TONY KHONG, is guilty
7 thereof,

8 _____ The defendant, TONY KHONG, having waived preliminary hearing to the offense(s) set
9 forth in this complaint,

10

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Exceptions/Additions/Conditions: _____

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14 I order that the defendant be held to answer to same. In my capacity as Judge of the Superior
15 Court, I deem the within complaint to be an Information and order it filed in the Superior
16 Court.

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Date: _____ Dept. _____
Judge of the Superior Court Sitting as Magistrate

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4 **HOLDING ORDER - DEFENDANT TYRON VAN TRAN**

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8 _____ It appearing to me that the offense(s) in the within complaint has/have been committed,
9 and that there is sufficient cause to believe that the defendant, TYRON VAN TRAN, is guilty
10 thereof,

11 _____ The defendant, TYRON VAN TRAN, having waived preliminary hearing to the
12 offense(s) set forth in this complaint,

13 Exceptions/Additions/Conditions: _____

14 I order that the defendant be held to answer to same. In my capacity as Judge of the Superior
15 Court, I deem the within complaint to be an Information and order it filed in the Superior
16 Court.

17 Date: _____ Dept: _____

18 _____
19 Judge of the Superior Court Sitting as Magistrate

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4 **DECLARATION IN SUPPORT OF ARREST WARRANT**

5 (Made under 2015.5 CCP)
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7 The undersigned hereby declares:
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9 That your declarant is currently employed as a Deputy District Attorney for the County
10 of Sacramento, State of California.

11 That pursuant to said employment, your declarant has been assigned to investigate
12 allegations that TONY KHONG, STEPHEN TRAN, and TYRON VAN TRAN, did commit
13 the crime(s) as set forth in the attached complaint.

14 That pursuant to said assignment, your declarant has contacted person(s) having
15 knowledge of said offense(s) and who has/have prepared written reports and/or statements,
16 and/or has received and read written reports and/or statements prepared by others known by
17 your declarant to be law enforcement officers, all of which reports and/or statements are
18 included in a report consisting of 11 page(s) which is attached hereto as Exhibit I and
19 incorporated by references as though fully set forth.

20 That each of these documents is presently an official record of a law enforcement
21 agency.

22 WHEREFORE, your declarant prays that a warrant issue for the arrest of the
23 hereinabove-named defendant(s) and that said defendant(s) be dealt with according to law.

24 I declare under penalty of perjury that the foregoing is true and correct.

25 Executed on the 31st day of July, 2012, Sacramento, California.

26
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28 Declarant
29 901 G Street,
30 Sacramento, California 95814
31 Sacramento County District Attorney
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JAN SCULY

2 DISTRICT ATTORNEY
3 901 G STREET
4 SACRAMENTO, CA 95814
5 (916) 874-6218

6 *FILED*
7 *ENDORSED*

8 AUG - 1 2013
9 *FILED*
10 *ENDORSED*
11 *AMERICAN*
12 *Deputy Clerk*

FILED / ENDORSED

JUL 31 2013

By *[Signature]* Deputy Clerk

SPD-12-361289
A. DUNHAM, DDA
TEAM: (ASAP)
XRef: 3813903
XRef: 4779719
XRef: 4207692
2 STRIKES (KHONG)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

AMENDED COMPLAINT

13 vs.

No. 12F05779

14 TONY KHONG
15 STEPHEN TRAN
16 TYRON VAN TRAN

17 Defendants.

18 The People of the State of California upon oath of the undersigned, upon information and belief
19 complain against the defendants above-named for the crimes as follows:

20 COUNT ONE

21 On or about and between October 07, 2011, and December 07, 2011, at and in the County of
22 Sacramento, State of California, defendants TONY KHONG, STEPHEN TRAN and TYRON
23 VAN TRAN did commit a felony namely: a violation of Section 266h(b)(2) of the Penal Code of
24 the State of California, in that said defendants knowing to be a prostitute, did unlawfully live and
25 derive support and maintenance in whole and in part from the earnings and proceeds of said
26 person's prostitution, at a time when CINDY T., was a minor under the age of 16 years, to wit,
27 age 15 years.

28 COUNT TWO

29 For a further and separate cause of action, being a different offense of the same class of crimes
30 and offenses as the charges set forth in Count One hereof: On or about and between
31 October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of
32 California, defendants TONY KHONG, STEPHEN TRAN and TYRON VAN TRAN did
33 commit a felony namely: a violation of Section 266h(b)(2) of the Penal Code of the State of
34 California, in that said defendants knowing to be a prostitute, did unlawfully live and derive
35 support and maintenance in whole and in part from the earnings and proceeds of said person's
36 prostitution, at a time when STACEY T., was a minor under the age of 16 years, to wit, age 15
37 years.

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COUNT THREE

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COUNT SIX

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COUNT SEVEN

6 For a further and separate cause of action, being a different offense from but connected in its
7 commission as the charges set forth in Counts One through Six hereof: On or about and between
8 October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of
9 California, defendant TONY KHONG did commit a felony namely: a violation of Section
10 236.1(c)(1) of the Penal Code of the State of California, in that said defendant did willfully and
11 unlawfully cause, induce, and persuade, and attempt to cause, induce and persuade CINDY T.,
12 who was a minor at the time, to engage in a commercial sex act, with the intent to effect and
13 maintain a violation of Sections 266h and/or 266i, to wit human trafficking.

14

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COUNT EIGHT

16 For a further and separate cause of action, being a different offense from but connected in its
17 commission as the charges set forth in Counts One through Seven hereof: On or about and
18 between October 07, 2011, and December 07, 2011, at and in the County of Sacramento, State of
19 California, defendant TONY KHONG did commit a felony namely: a violation of Section
20 236.1(c)(1) of the Penal Code of the State of California, in that said defendant did willfully and
21 unlawfully cause, induce, and persuade, and attempt to cause, induce and persuade STACEY T.,
22 who was a minor at the time, to engage in a commercial sex act, with the intent to effect and
23 maintain a violation of Sections 266h and/or 266i, to wit human trafficking.

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PRIOR CONVICTION (CASE)

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I declare upon information and belief and under penalty of perjury that the foregoing is true and correct.

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Executed at Sacramento County, California, the 31st day of July, 2013.

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Declarant
SACRAMENTO COUNTY DISTRICT ATTORNEY

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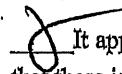
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MBA

HOLDING ORDER - DEFENDANT TONY KHONG

 It appearing to me that the offenses in the within complaint has/have been committed, and that there is sufficient cause to believe that the defendant, TONY KHONG, is guilty thereof.

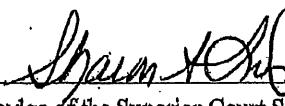
The defendant, TONY KHONG, having waived preliminary hearing to the offenses set forth in this complaint,

Exceptions/Additions/Conditions: Delete out 6 as it

Does not relate to the D. Khong

I order that the defendant be held to answer to same. In my capacity as Judge of the Superior Court, I deem the within complaint to be an Information and order it filed in the Superior Court.

Date: 8-1-2013 Dept. 38


Judge of the Superior Court Sitting as Magistrate

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HOLDING ORDER - DEFENDANT STEPHEN TRAN

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It appearing to me that the offenses in the within complaint has/have been committed, and
6 that there is sufficient cause to believe that the defendant, STEPHEN TRAN, is guilty thereof,

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The defendant, STEPHEN TRAN , having waived preliminary hearing to the offenses set
forth in this complaint,

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Exceptions/Additions/Conditions: _____

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I order that the defendant be held to answer to same. In my capacity as Judge of the Superior
Court, I deem the within complaint to be an Information and order it filed in the Superior Court.

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Date: _____ Dept. _____
Judge of the Superior Court Sitting as Magistrate

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HOLDING ORDER - DEFENDANT TYRON VAN TRAN

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10 _____ It appearing to me that the offenses in the within complaint has/have been committed, and
11 that there is sufficient cause to believe that the defendant, TYRON VAN TRAN, is guilty
12 thereof,

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_____ The defendant, TYRON VAN TRAN, having waived preliminary hearing to the offenses
set forth in this complaint,

Exceptions/Additions/Conditions: _____

I order that the defendant be held to answer to same. In my capacity as Judge of the Superior
Court, I deem the within complaint to be an Information and order it filed in the Superior Court.

Date: _____ Dept. _____
Judge of the Superior Court Sitting as Magistrate

1 Court believes were vulnerable victims, just the type of
2 victims that would engage in this.

3 And Stacey T. testified that the defendant Tony told
4 her, You can't always rely on Cindy. I mean, you have to
5 take care of yourself. This is how you'll take care of
6 yourself. So once that -- and Stacey described it as peer
7 pressure, peer pressure not just -- I think she mentioned
8 Cindy but from Tony. So pressure to do this. Sort of,
9 What else are you going to do? And he arranged for the
10 dates. He arranged for the clients. He arranged for the
11 transportation, whether it be through him, or Stephen, or
12 Tyron Tran.

13 So based on that, I find Counts One, Two, Three and
14 Four stand.

15 Count Seven and Eight, these are minors. And
16 another -- again, it was causing, inducing, persuading to
17 engage in commercial sex acts, providing the
18 transportation, providing the clients. So based on -- and
19 that section does specifically go to the age of the victims
20 in this case.

21 So based on that, I do find that -- it appears to
22 the Court that the offenses charged in Counts One, Two,
23 Three, Four, Five, Seven and Eight -- Count Six relates to
24 Stephen Tran and Cindy T. -- of the complaint have been
25 committed. I find there is sufficient cause to believe
26 that the defendant is guilty and he's, therefore, ordered
27 held to answer.

28 Do the People desire to deem the Complaint to be an

MICHELLE K. MADRID, CSR No. 11401
SACRAMENTO OFFICIAL COURT REPORTERS

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1 Information?

2 MS. DUNHAM: Yes.

3 THE COURT: Miss Dunham, I think you're going to
4 have to get rid of Count Five -- Count Six here. I'm
5 sorry.

6 MS. DUNHAM: Oh, concerning Stephen?

7 THE COURT: Yes.

8 MS. DUNHAM: Yes. I'm going to be amending it just
9 to clean it up, also kind of change the order of things. I
10 had already talked to Mr. Farina about that. So at this
11 point in time I'm going to ask for a holding order -- I'm
12 sorry. I'm going to ask that the Information be filed.

13 MS. DUNHAM: Okay.

14 THE COURT: Acting in my capacity as judge of the
15 Superior Court, I deem the Amended Complaint on file in
16 this matter to be an Information and order that it be filed
17 such.

18 Mr. Khong, you have the right to be represented by
19 counsel at all stages of the proceedings. And if you
20 cannot afford counsel, one will be appointed for you. If
21 you are unable to retain counsel --

22 Mr. Farina, are you from the panel?

23 MR. FARINA: Yes. I'm court-appointed.

24 THE COURT: Okay. I will reappoint the panel to
25 represent you.

26 Are you requesting that I appoint an attorney to
27 represent you?

28 MR. FARINA: Yes.

MICHELLE K. MADRID, CSR No. 11401
SACRAMENTO OFFICIAL COURT REPORTERS

169

00198

1 THE DEFENDANT: Yes. Yes, your Honor.

2 THE COURT: Mr. Farina -- the panel is appointed.

3 Mr. Farina, do you accept appointment in this
4 matter?

5 MR. FARINA: I do. Waive further reading, further
6 arraignment. Stipulate Mr. Khong has been advised of his
7 constitutional rights.

8 Request the setting of a trial date within the 60
9 days.

10 Madam Clerk, what is the sixtieth day?

11 THE COURT: Mr. Farina, are you entering not guilty
12 pleas at this time?

13 MR. FARINA: I am.

14 THE COURT: Thank you. All right.

15 MR. FARINA: And denial of all enhancements. There
16 is a strike charge.

17 THE COURT: The sixtieth day is September 30th?

18 THE CLERK: Yes, your Honor.

19 THE COURT: Thank you.

20 MR. FARINA: May we go off the record for a moment?

21 THE COURT: Sure.

22 (Off the record.)

23 MR. FARINA: Your Honor, if we may go back on the
24 record.

25 THE COURT: Sure.

26 MR. FARINA: The following dates we have agreed to:
27 For jury trial, September 25th?

28 MS. DUNHAM: 24th.

MICHELLE K. MADRID, CSR No. 11401
SACRAMENTO OFFICIAL COURT REPORTERS

170

00189

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	APRIL 9, 2014 9:00 A.M.	DEPT. NO	37
JUDGE	BEN DAVIDIAN	CLERK	C. LEWIS
REPORTER	S. CAROLLO #5659	BAILIFF	M. THUREIN
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,		PRESENT:	
VS.	Case No.: 12F05779	ALLISON DUNHAM DDA	
TONY KHONG, Defendant.		JOSEPH FARINA CAC	

Nature of Proceedings: JURY TRIAL - DAY 8 - CT 1-3 266H(B)(2), ET AL

The above-entitled cause came on calendar this date for further jury trial with the defendant, above-noted counsel and the jury and alternate jurors present.

Defense presented their closing argument.

The People gave their rebuttal closing.

The Court gave final instructions to the jury.

Bailiff MIKE THUREIN was sworn to take charge of the jury during deliberations. Deliberations began at 11:05 a.m.

At 1:37 p.m., the following written communication was received from the jury:

Question No 1: We, the jury, request any testimony, comments, or discussion by Cindy T. that can be used as evidence in this case.
Dated 4/9/14 Presiding Juror #4.

The defendant and counsel were present in the courtroom at 2:25 p.m. Discussions were held regarding Juror Question #1.

During the course of discussions on how to answer Question #1, further written communication was received from the jury as follows:

BOOK : 37
PAGE :
DATE : APRIL 9, 2014 9:00 A.M.
CASE NO. : 12F05779
CASE TITLE : PEO V KHONG

Superior Court of California,
County of Sacramento

BY: C. LEWIS, Ch
Deputy Clerk

Page 1 of 2

Z1--57790TDAY8

:00275

CASE NUMBER: 12F05779

DEPARTMENT: 37

CASE TITLE: PEO V KHONG

PROCEEDINGS: JURY TRIAL - DAY 8 - CT 1-3 266H(B) (2), ET AL

Question No. 2: We, the jury, request the transcript of the preliminary hearing where Stacey testified regarding sex with Tony Khong.
Dated 04/9/14 Presiding Juror #4

The following written responses we provided to the jury.

In response to Question #1: The Court has ordered that the trial testimony of Stacey T. be transcribed and it will be read to you in its entirety. Also, the trial testimony of Officer Winchester will be transcribed and read to you in its entirety. Also, the Court directs the jury to People's exhibits 6 and 6A. Transcripts of these exhibits will be provided to you while you listen to the CD.
Dated 9 April 2014 Honorable Ben Davidian

In response to Question #2: The transcript of the preliminary hearing is not in evidence. The Court has ordered that the trial testimony of Stacey T. be transcribed and it will be read to you in its entirety.
Dated 9 April 2014 Honorable Ben Davidian

At 3:48 p.m. further written communication was received from the jury as follows:

Question #1 supplemental clarification: We, the jury, request only the cross-examination from the defense attorney of Stacey T testimony as well as the rebuttal from the Deputy District Attorney is all that we require. We don't need her entire testimony.
Dated 4/9/14 Presiding Juror #4.

Counsel was notified of the request and with their approval, the Court Reporter was directed to prepare cross and redirect testimony of Stacey T.

At 4:28 p.m., further communication was received from the jury as follows:

Question No 1 - Change: We, the jury, no longer need Officer Winchester's testimony. Dated 04/9/14 Presiding Juror #4.

Counsel was notified of the request.

The jurors adjourned for the evening recess and the matter continued April 10, 2014, at 9:00 a.m.

The defendant remained in the custody of the Sheriff.

BOOK : 37
PAGE :
DATE : APRIL 9, 2014 9:00 A.M.
CASE NO. : 12F05779
CASE TITLE : PEO V KHONG

Superior Court of California,
County of Sacramento

BY: C. LEWIS,
Deputy Clerk

Page 2 of 2

Z1--5779JTDAY8

00276

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

FILED / ENDORSED

APR - 9 2014

By, C. Lewis, Deputy Clerk

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

Department: 37

vs.

Case Number: 12F05779

TONY KHONG,

Defendant.

Jury Question No. 1
Change

We, the jury in the above-entitled action, request the following:

No longer need official Winchester's
testimony. - T. C. H.

Dated:

4/9/14

Time Received

1628

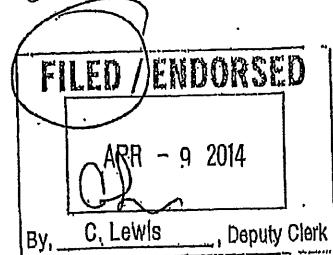
*mt
689*

4
Seat Number of Foreperson

CRIMXTRA

File # : 002277

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO



THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

TONY KHONG,

Defendant.

Department: 37

Case Number: 12F05779

Jury Question No. 1

We, the jury in the above-entitled action, request the following:

Can we please get any testimony,
comments, or discussion by
Cindy T. That can be used as
evidence in this case.

Dated: 4/9/14

#4

Seat Number of Foreperson

Time Received 1337

mr-689

CRIMXTRA

00278

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11 THE PEOPLE OF THE STATE OF Department Number: 37
12 CALIFORNIA, Case Number: 12F05779
13 Plaintiff,
14 vs. JURY TRIAL
15 TONY KHONG, RESPONSE TO JURY'S
16 Defendant. QUESTION 1

17 TO THE JURY IN THE ABOVE-ENTITLED CASE:

18 In response to Question No. 1:

19 The Court has ordered that the trial testimony of Stacey T. be transcribed and it will
20 be read to you in its entirety. Also, the trial testimony of Officer Winchester will be
21 transcribed and read to you in its entirety. Also, the Court directs the jury to People's
22 exhibits 6 and 6A. Transcripts of these exhibits will be provided to you while you listen to
23 the CD.

24

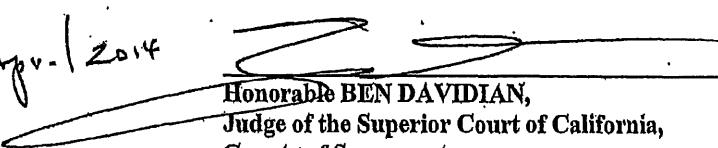
25

26

27

28

Date: 9 Aug. 2014


Honorable BEN DAVIDIAN,
Judge of the Superior Court of California,
County of Sacramento

00279

FILED/ENDORSED

APR - 9 2014

By C. Lewis, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

TONY KHONG,

Defendant.

Department: 37

Case Number: 12F05779

Jury Question No. 1

Response/Clarification
of Question

We, the jury in the above-entitled action, request the following:

only the cross-examination from the
Defense attorney of Stacy T ^{testimony} is well as
the Rebuttal from the Deputy District
Attorney is all that we require.
We don't need her entire testimony.

Dated:

4/9/14

#4

Time Received

1548 mt.

Seat Number of Foreperson

#689

CRIMXTRA

: 00280

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	: APRIL 10, 2014 9:00 A.M.	DEPT. NO	: 37
JUDGE	: BEN DAVIDIAN	CLERK	: C. LEWIS
REPORTER	: S. CAROLLO #5659	BAILIFF	: M. THUREIN

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS. Case No.: 12F05779

TONY KHONG,
Defendant.

PRESENT:
ALLISON DUNHAM DDA
JOSEPH FARINA CAC

Nature of Proceedings: JURY TRIAL - DAY 9 - CT 1-3 266H(B) (2), ET AL

The above-entitled cause came on calendar this date for further jury deliberations. Bailiff Mike Thurein escorted the jurors to the deliberation room where deliberations resumed at 9:05 a.m.

The Court Reporter entered the deliberation room and readback the testimony of witness STACEY T. requested the previous evening.

Prior to the completion of the cross examination and redirect readback request, the jurors stated they no longer needed to hear all of the testimony. The Court was notified and sent the following communication to the jury:

In further response to Question No. 1:

Please provide a note to the Court confirming that all jurors are in agreement that no further read back of Stacey T.'s cross examination will be needed. Dated 04/10/14 Honorable Ben Davidian

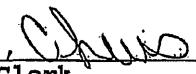
The jurors responded thru written communication that all jurors agreed no further reading would be necessary.

At 11:00 a.m., the jurors announced that they had reached verdicts.

The defendant and above-noted counsel were present at 11:25 a.m.

BOOK : 37
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CASE NO. : 12F05779
CASE TITLE : PEO V KHONG

Superior Court of California,
County of Sacramento

BY: C. LEWIS, 
Deputy Clerk

Page 1 of 3

21-5799JTDAY9

: 00284

CASE NUMBER: 12F05779
CASE TITLE: PEO V KHONG

DEPARTMENT: 37

PROCEEDINGS: JURY TRIAL - DAY 9 - CT 1-3 266H(B)(2), ET AL

The Court read into the record, the addendum questions to juror question #1.

The defendant reaffirmed his waiver of jury trial on his priors.

The jury entered the courtroom.

The Court confirmed with the Presiding Juror that they had reached verdicts. The response was "all but one."

In chamber discussions were held with counsel, after which, the Court confirmed with the jury that they were hung on Count 5. After further discussion with counsel, the Court directed the Clerk to read the verdicts:

VERDICT COUNT 1

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 266h(b)(2) of the Penal Code of the State of California, (knowing to be a prostitute, did unlawfully live and derive support from the earnings and proceeds of person's prostitution, CINDY T., a minor under the age of 16, to wit, 14 years), as charged in Count 1 of the Information.

Dated 04/10/14 Presiding Juror #4.

VERDICT COUNT 2

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 266h(b)(2) of the Penal Code of the State of California, (knowing to be a prostitute, did unlawfully live and derive support from the earnings and proceeds of person's prostitution, STACEY T., a minor under the age of 16, to wit, 15 years), as charged in Count 2 of the Information.

Dated 04/10/14 Presiding Juror #4.

VERDICT COUNT 3

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **NOT GUILTY** of the crime of violation of Section 266i(b)(2) of the Penal Code of the State of California, (persuade and encourage CINDY T., a person under the age of 16, to wit, 14 years to become a prostitute), as charged in Count 3 of the Information.

Dated 04/10/14 Presiding Juror #4.

BOOK : 37 Superior Court of California,
PAGE : County of Sacramento
DATE : APRIL 10, 2014 9:00 A.M.
CASE NO. : 12F05779
CASE TITLE : PEO V KHONG

BY: C. LEWIS,
Deputy Clerk

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21-5799JTDAY9

:00285

CASE NUMBER: 12F05779

DEPARTMENT: 37

CASE TITLE: PEO V KHONG

PROCEEDINGS: JURY TRIAL - DAY 9 - CT 1-3 266H(B)(2), ET AL

VERDICT COUNT 4

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 266i(b)(2) of the Penal Code of the State of California, (persuade and encourage STACEY T., a person under the age of 16, to wit, 15 years to become a prostitute), as charged in Count 4 of the Information.

Dated 04/10/14 Presiding Juror #4

VERDICT COUNT 7

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 236.1(c)(1) of the Penal Code of the State of California, (induce and persuade CINDY T., a minor, to engage in a commercial sex act with the intent to effect and maintain a violation of Sections 266h and/or 266I, to wit, human trafficking) as charged in Count 7 of the Information.

Dated 04/10/14 Presiding Juror #4

VERDICT COUNT 8

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 236.1(c)(1) of the Penal Code of the State of California, (induce and persuade STACEY T., a minor, to engage in a commercial sex act with the intent to effect and maintain a violation of Sections 266h and/or 266I, to wit, human trafficking) as charged in Count 8 of the Information.

Dated 04/10/14 Presiding Juror #4

At the request of the Defense, the jurors were polled as to all counts. With all jurors answering in the affirmative, the Court ordered the verdicts recorded. A mistrial was declared as to Count 5.

The jurors were released from their admonition and thanked for their service. Juror identifying information was ordered sealed.

The matter was referred to probation for a presentence report. Judgment and Sentence was placed on calendar for May 9, 2014, at 1:30 p.m.

The defendant remained in the custody of the Sheriff.

BOOK : 37
PAGE :
DATE : APRIL 10, 2014 9:00 A.M.
CASE NO. : 12F05779
CASE TITLE : PEO V KHONG

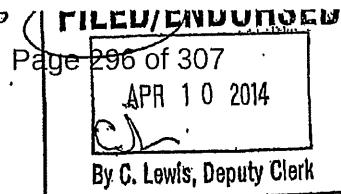
Superior Court of California,
County of Sacramento

BY: C. LEWIS,
Deputy Clerk

Page 3 of 3

21--5799JTDAY9

00286



SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE
OF CALIFORNIA

Plaintiff,

Case Number: 12F05779

vs.

VERDICT
COUNT 1

TONY KHONG,

Defendant.

Department: 37

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, **GUILTY** of the crime of violation of Section 266h(b) (2) of the Penal Code of the State of California, (knowing to be a prostitute, did unlawfully live and derive support from the earnings and proceeds of person's prostitution, CINDY T., a minor under the age of 16, to wit, 14 years), as charged in Count 1 of the Information.

Dated: 4/10/14

#4
Presiding Juror/Foreperson

Original is sealed by Order
of the Court and can only be
accessed with a court order
purs to CCP Section 237 (b).

z14g

00269

FILED/ENDORSED

APR 10 2014

By C. Lewis, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE
OF CALIFORNIA

Plaintiff,

Case Number: 12F05779

Department: 37

vs.

VERDICT
COUNT 2

TONY KHONG,

Defendant.

We, the jury in the above-entitled cause, find the Defendant, TONY KHONG, GUILTY of the crime of violation of Section 266h(b) (2) of the Penal Code of the State of California, (knowing to be a prostitute, did unlawfully live and derive support from the earnings and proceeds of person's prostitution, STACEY T., a minor under the age of 16, to wit, 15 years), as charged in Count 2 of the Information.

Dated: 4/10/14

4
Presiding Juror/Foreperson

Original is sealed by Order
of the Court and can only be
accessed with a court order
purs to CCP Section 237 (b).

z14g

: 00290

FILED/ENDORSED

APR 10 2014

By C. Lewis, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE
OF CALIFORNIA

Plaintiff,

Case Number: 12F05779

vs.

Department: 37

TONY KHONG,

Defendant.

VERDICT
COUNT 3

We, the jury in the above-entitled cause, find the Defendant, **TONY KHONG**, NOT GUILTY of the crime of violation of Section 2661(b) (2) of the Penal Code of the State of California, (persuade and encourage CINDY T., a person under the age of 16, to wit, 14 years to become a prostitute), as charged in Count 3 of the Information.

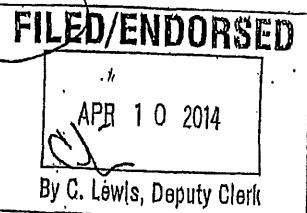
Dated: 4/10/14

4
Presiding Juror/Foreperson

Original is sealed by Order
of the Court and can only be
accessed with a court order
purs to CCP Section 237 (b).

z14g

: 00291



SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE
OF CALIFORNIA

Case Number: 12F05779

Plaintiff,

Department: 37

vs.

VERDICT
COUNT 4

TONY KHONG,

Defendant.

We, the jury in the above-entitled cause, find the Defendant, TONY KHONG, GUILTY of the crime of violation of Section 266i(b) (2) of the Penal Code of the State of California, (persuade and encourage STACEY T., a person under the age of 16, to wit, 15 years to become a prostitute), as charged in Count 4 of the Information.

Dated: 4/10/14

4
Presiding Juror/Foreperson

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#14g

: 00292

FILED/ENDORSED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

APR 10 2014
By C. Lewis, Deputy Clerk

THE PEOPLE OF THE STATE
OF CALIFORNIA

Case Number: 12F05779

Plaintiff,

Department: 37

vs.

VERDICT
COUNT 7

TONY KHONG,

Defendant.

We, the jury in the above-entitled cause, find the Defendant, TONY KHONG, GUILTY of the crime of violation of Section 236.1(c)(1) of the Penal Code of the State of California, (induce and persuade CINDY T., a minor, to engage in a commercial sex act with the intent to effect and maintain a violation of Sections 266h and/or 266I, to wit, human trafficking) as charged in Count 7 of the Information.

Dated: 4/10/14

#4

Presiding Juror/Foreperson

Original is sealed by Order
of the Court and can only be
accessed with a court order
purs to CCP Section 237 (b).

214g

: 00293

FILED/ENDORSED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

APR 10 2014

By C. Lewis, Deputy Clerk

THE PEOPLE OF THE STATE
OF CALIFORNIA

Case Number: 12F05779

Plaintiff,

Department: 37

vs.

VERDICT
COUNT 8

TONY KHONG,

Defendant.

We, the jury in the above-entitled cause, find the Defendant, TONY KHONG, GUILTY of the crime of violation of Section 236.1(c)(1) of the Penal Code of the State of California, (induce and persuade STACEY T., a minor, to engage in a commercial sex act with the intent to effect and maintain a violation of Sections 266h and/or 266I, to wit, human trafficking) as charged in Count 8 of the Information.

Dated: 4/10/14

#4

Presiding Juror/Foreperson

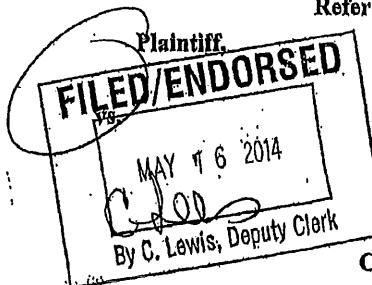
Original is sealed by Order
of the Court and can only be
accessed with a court order
purs to CCP Section 237 (b).

x14g

: 00294

The People of the State
of California

TONY KHONG



Defendant.

Department : 37

Court No. : 12F05779

Referral Court/Date : (37) 4/10/2014

J&S Date : 5/9/2014

J&S Time : 1:30 p.m.

Probation No. : A-481,052

CJL Number : A23272965

D.L. No. : D4114919

D.L. Status : Valid

CJIS XREF No. : 3813903

District Attorney : A. Durham

Defense Attorney : J. Farina (CAC)

PURSUANT TO STATUTE AND DIRECTION OF THIS COURT, THE PROBATION OFFICER RESPECTFULLY SUBMITS THIS REPORT AND RECOMMENDATION.

	Yes	No
296 P.C. Completed:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
296 P.C. Required:	<input type="checkbox"/>	<input checked="" type="checkbox"/>

ICE Hold

Plea & Conditions:

Convicted by Jury: Counts 1 and 2, 266h(b)(2) P.C. (Pimping a minor under the age of 16 years old); Count 4, 266i(b)(2) P.C. (Pandering a minor under the age of 16); Count 7 - 8, 236.1(c) P.C. (Human trafficking of a minor).

Found not Guilty: Count 3, 266i(b)(2) P.C.

Mistrial: Count 5, 261.5(d) P.C.

Report to be prepared, assuming Prior Conviction #1 will be found true, pursuant to 667(b)(i) P.C. and 1170.12 P.C., and that Count 5, 261.5(d) P.C. (Unlawful sexual intercourse with a minor; to wit, 15 years of age) will be dismissed.

Date Committed: October 7, 2011, to December 7, 2011 Date Arrested: June 4, 2013

Age: 27 DOB: 9/12/1986 Sex: Male Race: Asian

Ht: 5'5" Wt: 160 Eyes: Brown Hair: Black

Home Phone: (916) 689-5030 Residence Address: 8249 Scottsdale Drive, Sacramento, CA 95828

Occupation: Auto Body/Custom Part Installer Income: Varies

Attachments:

Fixed Term Worksheet: 2900.5 P.C. Credits: Other: Character Letters

Available Upon Request: CII: FBI: DMV:

TONY
KHONG
COURT NO. 12F05779

96519.doc

: 00383

Court No. 12F05779
KHONG, TONY

1 restitution is not an issue and she had no comment for sentencing
2 on the defendants.

3 The other victim, Cindy T., is currently a runaway out
4 of Butte County. This officer spoke with her probation officer
5 who confirmed Cindy's whereabouts are unknown and there is an
6 active warrant.

7 Victim Loss/Restitution

8 Restitution is not being recommended.

9

10

11 IV. CRIMINAL RECORD:

12 The following information has been summarized from the
13 defendant's CII Record #A23272965, and prior Sacramento County
14 Probation file #A-437,667.

15 Juvenile

16 Prior Adjudications

17 12/29/01, 69 P.C. (Obstructing an Officer with Violence
or Threat of Violence) SSD Report #01-87617: The defendant
18 fought with deputies and tried to pull free of their hold as they
19 attempted to handcuff him. Disposition: On 4/3/02, a
20 misdemeanor Petition alleging a violation of Section 148(a) P.C.,
21 was found true, and the defendant was adjudged a Ward of the
22 Court.
23

24 4/3/03, 602/777 W&I (Failure to obey Court Order): The
25 defendant's probation officer filed a three-count Violation of
26 Probation alleging the defendant was absent from school and used

LEE SEAL
CHIEF PROBATION OFFICER
SACRAMENTO COUNTY
CALIFORNIA

Court No. 12F05779
KHONG, TONY

1 marijuana and cocaine. Disposition: On 4/10/03, the Petition
2 was sustained and the defendant was continued a Ward.

3 6/10/03, Transfer-in from Solano County, Solano County
4 Sheriff's Department: The defendant along with two accomplices
5 were observed entering a shoe store and concealing shoes under
6 their jackets, walking out of the store, making no attempt to pay
7 for the merchandise. Once outside, they were contacted by
8 officers and returned to the store. Employees positively
9 identified the defendant and his two accomplices as the ones
10 responsible for stealing the shoes. Disposition: On 7/6/13, the
11 defendant appeared in Solano County Juvenile Court relative to
12 the Petition filed on 4/23/03, alleging felony burglary. On
13 6/6/03, the defendant admitted to commercial burglary as a
14 misdemeanor. At the time, the defendant's legal residence was
15 found to be in Sacramento County, and the matter was ordered
16 transferred to Sacramento County for Disposition. On 8/8/03, the
17 Transfer-in from Solano County was accepted and the defendant was
18 continued a Ward of the Court and committed to the Warren E.
19 Thornton Youth Center.

20 7/21/04, 529 P.C., (False impersonation), Elk Grove
21 Police Department Report #04-57851: The defendant was contacted
22 as the driver of the vehicle during a vehicle stop. During
23 questioning, the defendant gave a false name and a search of the
24 vehicle revealed .65 grams of rock cocaine. The defendant was
25 initially booked at the main jail, as it was assumed he was an
26 adult. Several hours later, it was discovered the defendant had

LES BEALE
CHIEF PROBATION OFFICER
SACRAMENTO COUNTY
CALIFORNIA

Court No. 12F05779
KHONG, TONY

1 given the name of his adult brother and the defendant was
2 transported and booked into the Sacramento County Juvenile Hall.
3 Disposition: On 8/13/04, the defendant was continued a Ward and
4 committed to the Warren E. Thornton Youth Center after a
5 misdemeanor Petition alleging 529 P.C. was sustained. Wardship
6 was terminated on 3/2/05.

7 Adult

8 Prior Convictions

9 5/4/08, 12025(a)(1) P.C., (Carrying a concealed weapon
10 in a vehicle), 12031(a)(1) P.C., (Carrying a loaded firearm in a
11 public place), 11377(a) H&S, (Possession of a controlled
12 substance), 11364 H&S, (Possession of drug paraphernalia),
13 2800.1(a) P.C., (Evading an officer), 22350 V.C., (Unsafe speed),
14 40508(c) V.C., (Failed to comply with Court Order), SSD Report
15 #08-24451: Officers were dispatched to a residence regarding a
16 burglary. The text of the call stated the victim was an officer
17 with the SPD, and an unknown subject entered his garage and took
18 his departmental handgun and other departmental equipment.

19 Officers arrived on scene and made contact with the
20 victim who indicated someone pried open the side door of his
21 garage, entered his take-home vehicle and took his handgun, radio
22 and navigation unit.

23 The victim informed officers his handgun had already
24 been recovered by SSD Gang Officers, during a vehicle stop made
25 at 0200 hours that morning.

26

LEE BEALE
CHIEF PROBATION OFFICER
SACRAMENTO COUNTY
CALIFORNIA

Court No. 12F05779
KHONG, TONY

1 Officers obtained a search warrant for the defendant's
2 residence. During the search, a portable sheriff's radio and
3 computer jump drive were found in the defendant's bedroom, hidden
4 beneath a dresser. The victim later identified the equipment as
5 belonging to him. Disposition: On 8/18/08, the defendant was
6 convicted of a felony violation of Section 459 P.C., 1st degree
7 and sentenced to two years State Prison (Prior Conviction #1,
8 Docket #08F03597).

9 5/6/11, 484 P.C., (Theft), SPD Report #11-135057: The
10 defendant entered a "GAP" store with Tyron Tran and stole three
11 pair of pants, valued at \$185.85. Two juvenile females were
12 present with the defendant, one which had an active warrant.
13 Disposition: On 5/25/11, the defendant was placed on three years
14 informal probation and ordered to serve 90 days in the county
15 jail, following a misdemeanor conviction for 484(a) P.C. (Docket
16 #11M03633).

17 Department of Motor Vehicles (DMV)
18 4/1/3, 14601 V.C. (DMV)

19
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25
26

LEO SEAL
CHIEF PROBATION OFFICER
SACRAMENTO COUNTY
CALIFORNIA

Court No. 12F05779
KHONG, TONY

1 **V. SOCIAL HISTORY:**

2 **Personal Data**

3 The 27-year-old defendant was born to the wedded union
4 of Peter Khong and Tam Lee. The defendant is the youngest of
5 five siblings, having two brothers and three sisters.

6 The defendant stated while growing up, his father was
7 disabled and collected SSI income and his mother was a homemaker.
8 The defendant stated money was tight, all family members helped
9 out, and his family was close. He stated they attended temple
10 together and the family liked to spend time visiting other
11 relatives and travelling for holidays.

12 The defendant stated while growing up, he attended
13 school on a regular basis and played basketball and volleyball.
14 He stated when he turned approximately 15 years old, he began
15 running with the wrong crowd at high school, which he attended
16 through the twelfth grade. However, the defendant did not
17 graduate. The defendant reported he has since obtained his GED.

18 The defendant has never married and does not have any
19 children.

20 Prior to his incarceration for the present matter, the
21 defendant had been residing with his father and brother for the
22 past eight years. He reported the mother passed away from cancer
23 in 2007.

24 The defendant stated his future plans involve appealing
25 his conviction regarding the current matter.

26

LEE BRAE
CHIEF PROBATION OFFICER
SACRAMENTO COUNTY
CALIFORNIA

12

:00394

April 11, 2014

The Honorable Judge Ben Davidian
800 H Street, Ste#300
Sacramento, CA 95814

Dear Honorable Judge Davidian,

My name is Helen Khong and I am the sister of Tony Khong. I am reaching out to you because Tony is an extraordinary person. He is a respectful son, brother and uncle to 10 nieces and nephews. I have always known him as a kind, giving, helpful and loving person. He is the kind of person who would give you the shirt off his back if you needed it and that is how he has always been. He comes from a strong family oriented background and has always tried to do the right thing. However, after my mother's passing a few years ago from cancer, he's been lost without her guidance. He was very close to my mom, who is virtuous, kind, soft spoken and loving. Those are values our parents always tried to instill in all of their kids. What Tony has been charged with seems out of character, which is not like the brother I knew all my life.

Tony has been trying to get his life together. He found stable work at an auto shop doing what he loved. Although work at the auto shop was long and arduous, he found joy and pride in what he did. He would buy toys or books for his nieces and nephews when he received his paycheck. On his days off, he would take our elderly father to his favorite breakfast place or drive him to his doctor appointments. He helps with our father's prescription, translating the dosage and reminds him when to take them. He is a caring and overall good person who enjoyed spending his free time with family.

Our main concern is that Tony's chance of reforming would be hampered if he is incarcerated for a very long time. He is a non-violent person who has been charged of a crime and we believe sending him to prison will do more harm than good. We believe it would be more economical to rehabilitate Tony versus extended imprisonment. Society can benefit from Tony doing community service so that he can educate others on the dangers of a certain action. If you could please find it in your heart to give my

100418

ATTORNEY GENERAL'S

OFFICE COPY

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FILED

THIRD APPELLATE DISTRICT

AUG 27 2015

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TONY KHONG,

Defendant and Appellant.

Court of Appeal, Third Appellate District
Debra C. Fawcett, Clerk
By _____ Deputy

Case No. C076416

GRANT
DOCKETED

AUG 28 2015

By R. Ferris

No ED 2014117633

AOB F: 8/3/15

Sacramento County Superior Court, Case No. 12F05779
The Honorable Ben Davidian, Judge

RESPONDENT'S BRIEF

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GERALD A. ENGLER
Chief Assistant Attorney General
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Attorneys for Plaintiff and Respondent

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**IN THE SACRAMENTO COUNTY SUPERIOR COURT OF THE STATE OF
CALIFORNIA, APPELLATE DIVISION**

--oo--

TONY KHONG,) NO. _____
Petitioner,)
vs.) (Sacramento County Superior
THE SACRAMENTO COUNTY) Court, #12F05779)
SUPERIOR COURT,)
Respondent.)

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
Real Party in Interest.)

--oo--

PETITION FOR WRIT OF HABEAS CORPUS

**TO THE HONORABLE PRESIDING JUDGES OF THE SACRAMENTO
COUNTY SUPERIOR COURT, APPELLATE DIVISION:**

Writ of Habeas Corpus

Petitioner: Tony Khong

Petitioner, Tony Khong, (hereinafter "Khong"), by and through his attorney, James M. Warden, hereby petitions this Court for a Writ of Habeas Corpus, directed to the Superior Court of the State of California, to grant the requested relief for violation of *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny.

By this verified petition, James M. Warden, alleges as follows:

I.

Tony Khong stands convicted of the violations of Penal Code sections 266h(b)(2), (pimping a minor under 16 years of age) (Counts 1 and 2); one count of Penal Code section 266i(b)(2), (pandering a minor under 16 years of age) (Count 4); and two counts of Penal Code section 236.1(c)(1), (Counts 7 and 8) (human trafficking of a minor.) A prior strike conviction was found true. Defendant was sentenced to an aggregate determinate term of 20 years.

II.

The Information alleged these violations occurred between the dates of October 7, 2011 and December 7, 2011.

III.

The following summary of the facts as they relate to Noah Webster are derived from the Court of Appeal opinion, pages 6-7. A copy of the Third District Court of Opinion is attached as Exhibit "A".

One of the witnesses in the investigation of this case was then-Officer Noah Winchester of the Los Rios Police Department. (Noah Winchester will be referred to as Winchester in these pleadings.)

Winchester testified that on December 7, 2011, he was on patrol at Cosumnes River College. A vehicle drove by playing loud music. Winchester initiated a traffic stop. The driver of the vehicle appeared to be nervous. Winchester identified the driver as "Stephen." A female passenger appeared to be "overly nervous." Winchester asked the passenger to step away from the vehicle and accompany him to his vehicle. The passenger, according to Winchester, told her name was S.T. Winchester warned her that providing false information to a police officer is a crime. The young, 14-year-old passenger, told her name was C.T. Winchester searched C.T.'s purse and found contraceptive pills, 20 to 30 condoms, and other items of that nature. Winchester put C.T. in the back of his patrol car and returned to Stephen.

Winchester noticed that Stephen's phone was ringing continuously. According to Winchester, Stephen gave permission to look at the phone. Winchester noticed a number of missed calls. The caller ID identified the caller as "Tony Khong."

Additionally, Winchester saw a text message on the phone from "Tony Khong" which read, "grab the girl and dip, Nigga." According to Winchester, in his experience, that message would be telling the recipient to "go, run." Winchester testified that this text message was received during the time the

vehicle stop was ongoing. Winchester obtained a photograph of defendant and showed it to C.T. C.T. identified the person in the photograph as the defendant, Tony Khong. Winchester contacted C.T.'s father since C.T. had been reported missing on November 10, 2011.

This initial contact between Winchester, C.T., and the defendant led to the subsequent investigation that provided the remaining evidence produced at trial.

IV.

Petitioner's attorney was informed of these articles and all articles attached to this Petition were copied from the internet from apparently reliable sources of information. The copies of those articles are attached to this Petition and referenced below.

An article dated July 21, 2016, "Ex-California police officer charged with on-duty sexual assault of five women" (A copy of which is attached as Exhibit "B"), indicates among other factual allegations that Winchester assaulted two victims in Sacramento in 2013. One of the two alleged attacks occurred during the summer of 2013 when he told the 17-year-old victim to get into his car. The assault then occurred. The article indicates the common thread amongst the victims is "that the women appeared to be vulnerable or disadvantaged in some way. Some may have been homeless or 'living in tough times'...." The article further notes that Winchester would take them to different locations, including a motel room. The article further notes that when Winchester worked at the Los Rios District, "Sacramento police began a sexual assault investigation of him but

no charges were filed." Further, that the "probe began in 2013 and the Los Rios officials were notified of it at the time." Apparently, a second investigation relating to sexual assault allegations was conducted by the Sacramento County Sheriff's Department involving a 2013 incident not reported until 2015. (Exhibit "B".)

V.

In a Sacramento Bee article, the writer indicates Winchester was being investigated by the Sacramento County Sheriff's Department. The investigation involved a 2013 incident that was not reported to authorities until 2015. Those investigations remained open. (Attached as Exhibit "C".)

VI.

In yet another article, Winchester had assaulted the first of two victims in Sacramento in the summer of 2013. The attack involved a 17-year-old victim near the campus. Winchester "told her to get into his car, and that's when the sexual assault occurred." Winchester's five victims all appeared to "be vulnerable or disadvantaged in some way. Some may have been homeless or "living in tough times."

The Sacramento District Attorney's office was interviewed and confirmed that the office was investigating two allegations of sexual assault by Winchester while he was a Los Rios officer. (Attached as Exhibit "D".)

VII.

Petitioner's trial occurred from April 1, 2014 through April 10, 2014.

VIII.

On July 20, 2016, a Felony Complaint was filed against Noah White Winchester in San Mateo County. (Case Number 16SF008803A) (A true and correct copy of the complaint is attached as Exhibit "E".)

Petitioner's attorney, upon learning of the articles printed about Winchester (Exhibits B, C, D), requested a copy of the Complaint or any Amended Complaint filed in San Mateo Superior Court. This request was made in a letter dated September 19, 2016. During the week of December 10, 2016, the San Mateo Superior Court clerk responded to Petitioner's attorney that the request was being processed. Petitioner's attorney received a copy of that complaint (Exhibit "E") before February 7, 2017.

IX.

The extent of the investigation relating to the prosecution's witness, Noah Winchester is unknown to Petitioner. Petitioner requests this Court to direct the Sacramento County District Attorney's office to conduct such an investigation and relay to the Court and counsel, if the Court so directs, the results of such investigation. In addition, Petitioner requests that this Court order the production of any and all information relating to the investigation of Noah Winchester, including, but not limited to the dates any complaints about Noah Winchester were received by any law enforcement. Further, Petitioner requests that this

Court make any additional order consistent with the prosecution's duty to disclose evidence relating to Noah Winchester.

X.

The contentions in support of this petition are fully set forth in the accompanying points and authorities which are incorporated by reference herein.

XI.

Mr. Khong has no plain, speedy, or adequate remedy at law.

The allegations and information contained in the Petition for Writ of Habeas Corpus, Judicial Council Form MC-275, is incorporated by reference as if fully set forth in these attached statement of facts, statement of the case, points and authorities, and any attached Exhibits.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, by and through his attorney, James M. Warden respectfully pray that:

A writ of Habeas Corpus be issued by this Court directing the Superior Court for Sacramento County to take one of the following actions: (1) Vacate and reverse defendant's conviction and release defendant; (2) vacate defendant's conviction and allow a new trial to occur as quickly as trial counsel may be available and prepared; (3) direct the Sacramento County District Attorney's office to disclose to court and counsel the information relating to Noah Winchester's investigation consistent with the continuing duty of counsel to disclose potentially exculpatory evidence pursuant to *Brady v. Maryland* (1963)

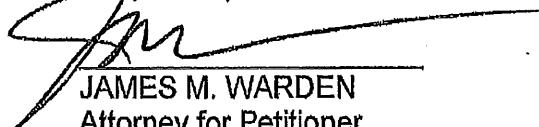
Writ of Habeas Corpus

Petitioner: Tony Khong

373 U.S. 83; and/or, (4) issue an order to show cause and directing that discovery be provided to defense counsel for the purpose of reviewing for any further argument that may be appropriate relating to any Brady/discovery issues; and , (5) for any other relief as this Court may deem just and proper.

DATED: April 4, 2017

Respectfully submitted,

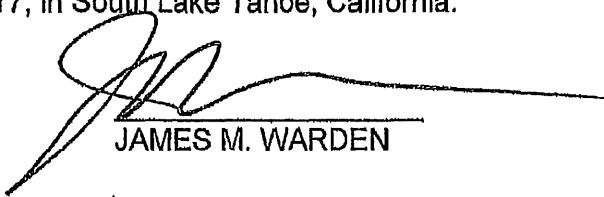

JAMES M. WARDEN
Attorney for Petitioner
TONY KHONG

VERIFICATION

I, James M. Warden, declare that I have read the attached documents and know the contents thereof to be true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this April 4, 2017, in South Lake Tahoe, California.



JAMES M. WARDEN

POINTS AND AUTHORITIES

I. Once the Petitioner state a prima facie case for relief, the Court must issue an order to show Cause. (California Rules of Court, Rule 4.551(c); *Durdines v. Superior Court* (1999) 76 Cal.App.4th 247, 249.

As this Court knows, "an order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition." (California Rules of Court, Rule 4.551(c)(3); see *People v. Romero* (1994) 8 Cal.4th 728, 740.)

In determining whether a prima facie case exists, the court accepts the facts stated in the petition as true and 'makes a preliminary assessment' whether the petitioner would be entitled to relief if those facts were established. (California Rules of Court, Rule 4.551(c)(1).)

In this case, there is a prima facie showing when a critical witness for the prosecution, who testified in the present case, was, at some point, being investigated for similar and serious crimes. Such information would have potentially affected the jury's decision and would have been information the defense would have been entitled to have and review.

II. Generally, discovery in habeas corpus proceedings are not available until an Order to Show Cause has been issued. However, exculpatory evidence should be provided regardless of the issuance of an Order to Show Cause.

The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis. (*In re Scott* (2003) 29 Cal.3rd 783, 814.) The reciprocal discovery provisions of Penal Code section 1054-

1054.10, by analogy, make it appropriate for this Court to order discovery to be provided to petitioner's counsel.

Even if no party has requested discovery, if this Court believes discovery is necessary to ensure a full and fair hearing and a determination of the case, the Court has the discretion to order discovery on its own motion. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241.)

Further, if there is exculpatory evidence, such evidence should be provided regardless of the issuance of an Order to Show Cause. (*Brady v. Maryland* (1963) 373 U.S. 83; *People v. Garcia* (1993) 17 Cal.App.4th 1169.

In the present case, the ultimate question to be answered is whether or not Noah Winchester was being investigated by any law enforcement agency before or during the time of Petitioner Khong's trial.

There may be inherent difficulties with obtaining, disseminating, and reviewing the discovery in this matter because there is the pending criminal charges pending against Noah Winchester. These difficulties may be managed by first obtaining the underlying reports and having the Court review, in camera, those records for further determination as to the merits of Petitioner's claims. A referee may be appointed for the purpose of conducting such a review and making its report to this Court. Or, this Court could order the documents produced to counsel under a protective order for review and further presentation of argument.

III. The prosecution's duty of disclosure does not end even when the trial is over.

The duty to disclose material, exculpatory evidence, does not end when the trial is over. "[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, n25. See also, *People v. Johnson* (2006) 142 Cal.App.4th 776, 782.) (prosecutor improperly withheld police reports of gang-related incident involving chief prosecution witness that occurred between defendant's first and second trials.) (See also, *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1377; *People v. Garcia* (1993) 17 Cal.App.4th 1169.)

It appears from some of the information contained in the newspapers articles that the Sacramento District Attorney's Office was interviewed, at some point, about the allegations concerning Noah Winchester. Defense counsel does not know the particulars of when that occurred, what information the Sacramento District Attorney's Office had, the extent of the information available to law enforcement at any relevant time. It is appropriate for this Court to Order a response by the prosecutor's office to address, at least, the initial issue presented.

If the prosecutor's office or the law enforcement agencies had or might have had information relating to the credibility of Noah Winchester, then that information should have been provided to defense trial counsel, even absent a

request. (*Brady v. Maryland* (1963) 373 U.S. 83, 87. See also *United States v. Bagley* (1985) 473 U.S. 667; *United States v. Agurs* (1976) 427 U.S. 97, 107; *Giglio v. United States* (1972) 405 U.S. 150, 154.)

Further, Noah Winchester was a material witness. Winchester was the first officer to make contact with the alleged victim. He was the first to take a statement from the alleged victim in this case. In addition, during deliberations, the jurors requested Noah Winchester's testimony for read-back but then later changed their minds during deliberations. (A copy of pages 275-277 of the Clerk's Transcript on Appeal is attached as Exhibit "F" in support of the assertion that Noah Winchester was a material witness.) Also, it appears that some of the conduct alleged for which Winchester is currently charged seems to have similarities to some of the factual aspects of the case for which Petitioner was convicted. In any case, the prosecutor's duty to disclose evidence favorable to the accused extends to evidence that may reflect on the credibility of a material witness. (*People v. Rutherford* (1975) 14 Cal.3d 399, 406, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545.)

Finally, the prosecutor's duty of disclosure extends to all material evidence or material information that is favorable to the accused, and is in the possession of the prosecutor, investigating law enforcement agency, or other governmental agency that is part of the "prosecution team." (*In re Brown* (1998) 17 Cal.4th 873, 879; *Strickler v. Greene* (1999) 527 U.S. 263; *Kyles v. Whitley* (1995) 514 U.S. 419. See also, Penal Code section 1054.1.)

Name: TONY KHONG
Address: P.N.S.P. D4-201
P.O. Box 8500
COAVINGA, CA. 93210
CDC or ID Number: G 32579

FILED

MC-275

JUL 28 2017

Xref:
CO76414

COURT OF APPEAL - THIRD DISTRICT
ANDREA K. WALLIN-ROHMANN, CLERK
BY JRS DEPUTY

COURT OF APPEALS
THIRD APPELLATE DISTRICT COURT OF APPEAL
(Court)

<u>KHONG</u>	
Petitioner	vs.
Respondent	

PETITION FOR WRIT OF HABEAS CORPUS

C085202

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are not represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

RECEIVED

Page 1 of 8

Penal Code, § 1473 et seq.,
Cal. Rules of Court, rule 8.380

JUL 28 2017 www.courtsinfo.ca.gov

MC-275

This petition concerns:

<input checked="" type="checkbox"/> A conviction	<input type="checkbox"/> Parole
<input type="checkbox"/> A sentence	<input type="checkbox"/> Credits
<input type="checkbox"/> Jail or prison conditions	<input type="checkbox"/> Prison discipline
<input type="checkbox"/> Other (specify):	

1. Your name: Petitioner's name is Tony Khong
2. Where are you incarcerated? Pleasant Valley State Prison, P.O. Box 8600, Coalinga, CA 93210
3. Why are you in custody? Criminal conviction Civil commitment

Answer items a through i to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").
Charged with violations of Penal Code sections 266H(B)(2) (Counts 1 and 2) (plumping a minor under 16 years of age); sections 266(b)(2) (Counts 3 and 4) (pandering a minor under 16 years of age); section 261.5(d) (Count 5) (unlawful sexual intercourse with a minor under 16 years of age); sections 236.1(c)(1) (Counts 7 and 8) (human trafficking). With prior Strike. (PC 1197.2(c); 667 (b)-(i), 1170.12.)
- b. Penal or other code sections: 266H(b)(2), 266(b)(2), 261.5(d), 236.1(c)(1). Allegations: PC 1192.7(c), 667, subd (b)-(i)
- c. Name and location of sentencing or committing court:
Sacramento County Superior Court, 720 Ninth Street, Sacramento, CA 95814
Department 37
- d. Case number: 12F05779
- e. Date convicted or committed: April 10, 2014
- f. Date sentenced: May 16, 2014
- g. Length of sentence: 20 years
- h. When do you expect to be released? approximately 17 years (2031)
- i. Were you represented by counsel in the trial court? Yes No If yes, state the attorney's name and address:
Joseph Farina, Attorney at Law, 1296 E Gibson Road, Suite A, PMB 145, Woodland, CA 95776 (SBN 129055)

4. What was the LAST plea you entered? (Check one):
 Not guilty Guilty Nolo contendere Other:
5. If you pleaded not guilty, what kind of trial did you have?
 Jury Judge without a jury Submitted on transcript Awaiting trial

MC-275

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

See Attached additional documents

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

See attached additional documents

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

See attached additional documents

MC-275

7. **Ground 2 or Ground _____ (if applicable):**

a. **Supporting facts:**

b. **Supporting cases, rules, or other authority:**

MC-275

8. Did you appeal from the conviction, sentence, or commitment? Yes No If yes, give the following information:

- a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"): Third Appellate District Court of Appeal
- b. Result: Judgment affirmed but modified
- c. Date of decision: 6/18/2016
- d. Case number or citation of opinion, if known: Not published (see attached opinion), 3rd DCA case number C076416
- e. Issues raised: (1) Prosecutorial misconduct during closing argument
(2) Effective Assistance of Counsel by failing to object timely to prosecutor's misconduct
(3) Abuse of discretion by sentencing defendant to upper term
- f. Were you represented by counsel on appeal? Yes No If yes, state the attorney's name and address, if known: James M. Warden (SBN 133536), Attorney at Law, P.O. Box 19150, South Lake Tahoe, CA 96151

9. Did you seek review in the California Supreme Court? Yes No If yes, give the following information:

- a. Result:
- b. Date of decision:
- c. Case number or citation of opinion, if known:
- d. Issues raised: (1)
(2)
(3)

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
The opinion of the Third District Court of Appeal was filed June 8, 2016. The case was complete as of August 9, 2016. The news articles about Noah Webster (one of the investigating offices in the case) did not become known to counsel and defendant until about August 13, 2016. (see attached documents for further information.)

11. Administrative review:

- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:
- b. Did you seek the highest level of administrative review available? Yes No
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? Yes If yes, continue with number 13. No If no, skip to number 15.

13. a. (1) Name of court: SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

(2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS PETITION

(3) Issues raised: (a) PLEASE SEE ATTACHED, NEXT PAGES

(b) _____

(4) Result (attach order or explain why unavailable): PLEASE SEE ATTACHED, NEXT PAGES

(5) Date of decision: 6/1/2017

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (attach order or explain why unavailable): _____

(5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

PLEASE SEE ATTACHED DOCUMENTS FOR TIME LINE OF DISCOVERY
OF THIS NEW INFORMATION.

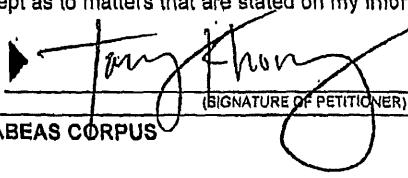
16. Are you presently represented by counsel? Yes No If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? Yes No If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 7/20/17


(SIGNATURE OF PETITIONER)

IN THE THIRD APPELLATE DISTRICT COURT OF APPEAL

--oo--

TONY KHONG,) NO. _____

Petitioner,)

vs.) (Sacramento County Superior
Court, #12F05779)

THE SACRAMENTO COUNTY)

Respondent.)

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)

Real Party in Interest.)

--oo--

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE PRESIDING JUDGES OF THE
THIRD APPELLATE DIVISION:

Petitioner, Tony Khong, (hereinafter "Khong"), by and through his attorney, James M. Warden, hereby petitions this Court for a Writ of Habeas Corpus, directed to the Superior Court of the State of California, to grant the requested relief for violation of *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny.

By this verified petition, James M. Warden, alleges as follows:

1. Tony Khong stands convicted of the violations of Penal Code sections 266h(b)(2), (pimping a minor under 16 years of age) (Counts 1 and 2); one count of Penal Code section 266i(b)(2), (pandering a minor under 16 years of age) (Count 4); and two counts of Penal Code section 236.1(c)(1), (Counts 7 and 8) (human trafficking of a minor.) A prior strike conviction was found true.

Defendant was sentenced to an aggregate determinate term of 20 years.

II.

The Information alleged these violations occurred between the dates of October 7, 2011 and December 7, 2011.

III.

The following summary of the facts as they relate to Noah Webster are derived from the Court of Appeal opinion, pages 6-7. A copy of the Third District Court of Opinion is attached as Exhibit "A".

One of the witnesses in the investigation of this case was then-Officer Noah Winchester of the Los Rios Police Department. (Noah Winchester will be referred to as Winchester in these pleadings.)

Winchester testified that on December 7, 2011, he was on patrol at Cosumnes River College. A vehicle drove by playing loud music. Winchester initiated a traffic stop. The driver of the vehicle appeared to be nervous.

Winchester identified the driver as "Stephen." A female passenger appeared to be "overly nervous." Winchester asked the passenger to step away from the vehicle and accompany him to his vehicle. The passenger, according to Winchester, told her name was S.T. Winchester warned her that providing false information to a police officer is a crime. The young, 14-year-old passenger, told her name was C.T. Winchester searched C.T.'s purse and found contraceptive pills, 20 to 30 condoms, and other items of that nature. Winchester put C.T. in the back of his patrol car and returned to Stephen.

Winchester noticed that Stephen's phone was ringing continuously. According to Winchester, Stephen gave permission to look at the phone. Winchester noticed a number of missed calls. The caller ID identified the caller as "Tony Khong."

Additionally, Winchester saw a text message on the phone from "Tony Khong" which read, "grab the girl and dip, Nigga." According to Winchester, in his experience, that message would be telling the recipient to "go, run." Winchester testified that this text message was received during the time the

vehicle stop was ongoing. Winchester obtained a photograph of defendant and showed it to C.T. C.T. identified the person in the photograph as the defendant, Tony Khong. Winchester contacted C.T.'s father since C.T. had been reported missing on November 10, 2011.

This initial contact between Winchester, C.T., and the defendant led to the subsequent investigation that provided the remaining evidence produced at trial.

IV.

Petitioner's attorney was informed of these articles and all articles attached to this Petition were copied from the internet from apparently reliable sources of information. The copies of those articles are attached to this Petition and referenced below.

An article dated July 21, 2016, "Ex-California police officer charged with on-duty sexual assault of five women" (A copy of which is attached as Exhibit "B"), indicates among other factual allegations that Winchester assaulted two victims in Sacramento in 2013. One of the two alleged attacks occurred during the summer of 2013 when he told the 17-year-old victim to get into his car. The assault then occurred. The article indicates the common thread amongst the victims is "that the women appeared to be vulnerable or disadvantaged in some way. Some may have been homeless or 'living in tough times'...." The article further notes that Winchester would take them to different locations, including a motel room. The article further notes that when Winchester worked at the Los Rios District, "Sacramento police began a sexual assault investigation of him but

no charges were filed." Further, that the "probe began in 2013 and the Los Rios officials were notified of it at the time." Apparently, a second investigation relating to sexual assault allegations was conducted by the Sacramento County Sheriff's Department involving a 2013 incident not reported until 2015. (Exhibit "B".)

V.

In a Sacramento Bee article, the writer indicates Winchester was being investigated by the Sacramento County Sheriff's Department. The investigation involved a 2013 incident that was not reported to authorities until 2015. Those investigations remained open. (Attached as Exhibit "C".)

VI.

In yet another article, Winchester had assaulted the first of two victims in Sacramento in the summer of 2013. The attack involved a 17-year-old victim near the campus. Winchester "told her to get into his car, and that's when the sexual assault occurred." Winchester's five victims all appeared to "be vulnerable or disadvantaged in some way. Some may have been homeless or "living in tough times."

The Sacramento District Attorney's office was interviewed and confirmed that the office was investigating two allegations of sexual assault by Winchester while he was a Los Rios officer. (Attached as Exhibit "D".)

VII.

Petitioner's trial occurred from April 1, 2014 through April 10, 2014.

VIII.

On July 20, 2016, a Felony Complaint was filed against Noah White Winchester in San Mateo County. (Case Number 16SF008803A) (A true and correct copy of the complaint is attached as Exhibit "E".)

Petitioner's attorney, upon learning of the articles printed about Winchester (Exhibits B, C, D), requested a copy of the Complaint or any Amended Complaint filed in San Mateo Superior Court. This request was made in a letter dated September 19, 2016. During the week of December 10, 2016, the San Mateo Superior Court clerk responded to Petitioner's attorney that the request was being processed. Petitioner's attorney received a copy of that complaint (Exhibit "E") before February 7, 2017.

IX.

The extent of the investigation relating to the prosecution's witness, Noah Winchester is unknown to Petitioner. Petitioner requests this Court to direct the Sacramento County District Attorney's office to conduct such an investigation and relay to the Court and counsel, if the Court so directs, the results of such investigation. In addition, Petitioner requests that this Court order the production of any and all information relating to the investigation of Noah Winchester, including, but not limited to the dates any complaints about Noah Winchester were received by any law enforcement. Further, Petitioner requests that this

Court make any additional order consistent with the prosecution's duty to disclose evidence relating to Noah Winchester.

X.

The contentions in support of this petition are fully set forth in the accompanying points and authorities which are incorporated by reference herein.

XI.

Mr. Khong has no plain, speedy, or adequate remedy at law.

The allegations and information contained in the Petition for Writ of Habeas Corpus, Judicial Council Form MC-275, is incorporated by reference as if fully set forth in these attached statement of facts, statement of the case, points and authorities, and any attached Exhibits.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, by and through his attorney, James M. Warden respectfully pray that:

A writ of Habeas Corpus be issued by this Court directing the Superior Court for Sacramento County to take one of the following actions: (1) Vacate and reverse defendant's conviction and release defendant; (2) vacate defendant's conviction and allow a new trial to occur as quickly as trial counsel may be available and prepared; (3) direct the Sacramento County District Attorney's office to disclose to court and counsel the information relating to Noah Winchester's investigation consistent with the continuing duty of counsel to disclose potentially exculpatory evidence pursuant to *Brady v. Maryland* (1963)

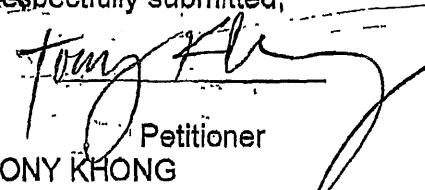
Writ of Habeas Corpus

Petitioner: Tony Khong

373 U.S. 83; and/or, (4) issue an order to show cause and directing that discovery be provided to defense counsel for the purpose of reviewing for any further argument that may be appropriate relating to any Brady/discovery issues; and , (5) for any other relief as this Court may deem just and proper.

DATED: 7/20/17

Respectfully submitted,

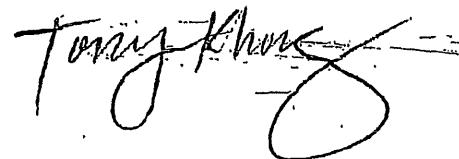

Petitioner
TONY KHONG

VERIFICATION

I, Tony Khong, declare that I have read the attached documents and know the contents thereof to be true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this JULY 20, 2017 P.V.S.P., California.



POINTS AND AUTHORITIES.

- I. Once the Petitioner state a *prima facie* case for relief, the Court must issue an order to show Cause. (California Rules of Court, Rule 4.551(c); *Durdines v. Superior Court* (1999) 76 Cal.App.4th 247, 249,

As this Court knows, "an order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition." (California Rules of Court, Rule 4.551(c)(3); see *People v. Romero* (1994) 8 Cal.4th 728, 740.)

In determining whether a *prima facie* case exists, the court accepts the facts stated in the petition as true and 'makes a preliminary assessment' whether the petitioner would be entitled to relief if those facts were established. (California Rules of Court, Rule 4.551(c)(1).)

In this case, there is a *prima facie* showing when a critical witness for the prosecution, who testified in the present case, was, at some point, being investigated for similar and serious crimes. Such information would have potentially affected the jury's decision and would have been information the defense would have been entitled to have and review.

- II. Generally, discovery in habeas corpus proceedings are not available until an Order to Show Cause has been issued. However, exculpatory evidence should be provided regardless of the issuance of an Order to Show Cause.

The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis. (*In re Scott* (2003) 29 Cal.3d 783, 814.) The reciprocal discovery provisions of Penal Code section 1054-

1054.10, by analogy, make it appropriate for this Court to order discovery to be provided to petitioner's counsel.

Even if no party has requested discovery, if this Court believes discovery is necessary to ensure a full and fair hearing and a determination of the case, the Court has the discretion to order discovery on its own motion. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241.)

Further, if there is exculpatory evidence, such evidence should be provided regardless of the issuance of an Order to Show Cause. (*Brady v. Maryland* (1963) 373 U.S. 83; *People v. Garcia* (1993) 17 Cal.App.4th 1169.

In the present case, the ultimate question to be answered is whether or not Noah Winchester was being investigated by any law enforcement agency before or during the time of Petitioner Khong's trial.

There may be inherent difficulties with obtaining, disseminating, and reviewing the discovery in this matter because there is the pending criminal charges pending against Noah Winchester. These difficulties may be managed by first obtaining the underlying reports and having the Court review, *in camera*, those records for further determination as to the merits of Petitioner's claims. A referee may be appointed for the purpose of conducting such a review and making its report to this Court. Or, this Court could order the documents produced to counsel under a protective order for review and further presentation of argument.

III. The prosecution's duty of disclosure does not end even when the trial is over.

The duty to disclose material, exculpatory evidence, does not end when the trial is over. "[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, n25. See also, *People v. Johnson* (2006) 142 Cal.App.4th 776, 782.) (prosecutor improperly withheld police reports of gang-related incident involving chief prosecution witness that occurred between defendant's first and second trials.) (See also, *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1377; *People v. Garcia* (1993) 17 Cal.App.4th 1169.)

It appears from some of the information contained in the newspapers articles that the Sacramento District Attorney's Office was interviewed, at some point, about the allegations concerning Noah Winchester. Defense counsel does not know the particulars of when that occurred, what information the Sacramento District Attorney's Office had, the extent of the information available to law enforcement at any relevant time. It is appropriate for this Court to Order a response by the prosecutor's office to address, at least, the initial issue presented.

If the prosecutor's office or the law enforcement agencies had or might have had information relating to the credibility of Noah Winchester, then that information should have been provided to defense trial counsel, even absent a

request. (*Brady v. Maryland* (1963) 373 U.S. 83, 87. See also *United States v. Bagley* (1985) 473 U.S. 667; *United States v. Agurs* (1976) 427 U.S. 97, 107; *Giglio v. United States* (1972) 405 U.S. 150, 154.)

Further, Noah Winchester was a material witness. Winchester was the first officer to make contact with the alleged victim: He was the first to take a statement from the alleged victim in this case. In addition, during deliberations, the jurors requested Noah Winchester's testimony for read-back but then later changed their minds during deliberations. (A copy of pages 275-277 of the Clerk's Transcript on Appeal is attached as Exhibit "F" in support of the assertion that Noah Winchester was a material witness.) Also, it appears that some of the conduct alleged for which Winchester is currently charged seems to have similarities to some of the factual aspects of the case for which Petitioner was convicted. In any case, the prosecutor's duty to disclose evidence favorable to the accused extends to evidence that may reflect on the credibility of a material witness. (*People v. Rutherford* (1975) 14 Cal.3d 399, 406, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545.)

Finally, the prosecutor's duty of disclosure extends to all material evidence or material information that is favorable to the accused, and is in the possession of the prosecutor, investigating law enforcement agency, or other governmental agency that is part of the "prosecution team." (*In re Brown* (1998) 17 Cal.4th 873, 879; *Strickler v. Greene* (1999) 527 U.S. 263; *Kyles v. Whitley* (1995) 514 U.S. 419. See also, Penal Code section 1054.1.)

In the present case, it appears that Noah Winchester, a material witness whose credibility was at issue at trial, committed sexual assaults about September in 2013. Petitioner's trial occurred in April 2014. Noah Winchester's victims appeared to be "vulnerable or disadvantaged" in some way. The victim in Petitioner's trial was homeless or a runaway or had other attributes of vulnerability. Sacramento law enforcement began an investigation when Winchester worked at the Los Rios District. Winchester worked at the Los Rios District when he first contacted the alleged victim in Petitioner's case. Los Rios officials were notified of the probe in 2013.

Based on this information, a *prima facie* showing that Petitioner may be entitled to the relief requested.

DATED: 7/20/17

Respectfully submitted,


Tony Khong
Petitioner
TONY KHONG

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of El Dorado. I am over the age of eighteen years and not a party to the above-entitled action; my business address is James M. Warden, Attorney at Law, P.O. Box 19150, South Lake Tahoe, CA 96151.

On the date below, I served the following document(s):

Petition for Writ of Habeas Corpus and all attached documents

() BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at South Lake Tahoe, California, addressed as follows:

Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

Attn: Honorable Ben Davidian
Trial in Department 37

Office of the District Attorney
Sacramento County
901 G Street
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2017, at South Lake Tahoe, California.

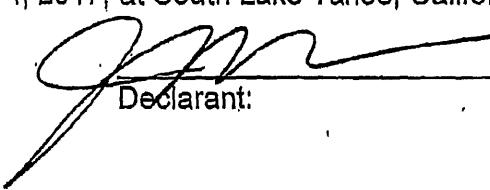

Declarant:

EXHIBIT "A"

Filed 6/8/16 P. v. Khong CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

C076416

Plaintiff and Respondent.

(Super. Ct. No. 12F05779)

v.

TONY KHONG,

Defendant and Appellant.

A jury found defendant guilty of two counts of pimping a minor under 16 years of age (Pen. Code, § 266h, subd. (b)(2) (counts one & two)¹), one count of pandering a minor under 16 years of age (§ 266i, subd. (b)(2) (count four)), and two counts of human trafficking a minor (§ 236.1, subd. (c)(1) (counts seven & eight)). The trial court sentenced defendant to an aggregate determinate term of 20 years.

¹ Further undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

On appeal, defendant contends that the prosecutor committed misconduct in her closing argument by: (1) using a puzzle analogy that reduced the burden of proof; (2) referring to matter outside of the record to establish the veracity of the prosecution's primary witness; and (3) appealing to the passions of the jurors. Defendant asserts that these instances of prosecutorial misconduct, individually and cumulatively, resulted in prejudice, and, consequently, the judgment must be reversed. Defendant also asserts that, insofar as his contentions have been forfeited, he was deprived of his constitutional right to the effective assistance of counsel. Finally, defendant contends that the trial court abused its discretion in sentencing him to the upper term on count seven.

We conclude that the instances of alleged prosecutorial misconduct raised by defendant either did not constitute misconduct or did not result in prejudice. Furthermore, defendant was not denied the effective assistance of counsel. We also conclude that the trial court did not abuse its discretion in sentencing defendant to the upper term on count seven.

We modify the judgment to correct the trial court's section 654 sentencing error. Given that the trial court chose to exercise its discretion to impose the upper term on the base term count, it is clear the trial court would impose the maximum sentences on the counts that are subject to section 654 if we were to remand. Accordingly, we: (1) impose upper term sentences of eight years on counts one and two, pimping a minor under 16 years of age (§ 266h, subd. (b)(2)), and stay execution of those sentences pursuant to section 654; and (2) impose an upper term of eight years on count four, pandering a minor under 16 years of age (§ 266i, subd. (b)(2)), and stay execution of that sentence pursuant to section 654.

As so modified, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Charges and Enhancement Allegation

Defendant was charged with two counts of pimping a minor under 16 years of age (§ 266h, subd. (b)(2) (counts one & two)), two counts of pandering a minor under 16 years of age (§ 266i, subd. (b)(2) (counts three & four)), unlawful sexual intercourse with a minor under 16 years of age (§ 261.5, subd. (d) (count five)), and two counts of human trafficking a minor (§ 236.1, subd. (c)(1) (counts seven & eight)).²

It was further alleged that defendant had a prior serious felony conviction within the meaning of section 1192.7, subdivision (c), rendering him eligible for second strike sentencing (§§ 667, subds. (b)-(i), 1170.12).

The People's Case-in-Chief

S.T., a minor, was 17 years old at the time of trial. In 2011, when S.T. was 15 years old, she met a girl named C.T., also a minor. On a day approximately three weeks after S.T. met C.T., she received a text from C.T. asking her to pick her up from a gas station in Elk Grove. At the time, S.T. was with her friends Tyrone Tran, whom she had known for five years, and defendant, whom she had just met that day through Tyrone. Defendant, Tyrone, and S.T. went to pick up C.T. in defendant's car. Defendant then dropped S.T. off at her home.

Approximately one week later, S.T. decided to run away. She was experiencing difficulties at home; she testified that her mother "was not really mom material." When she decided to run away, S.T. called Tyrone and asked him to pick her up. Tyrone took S.T. to his house. A day or so later, S.T. again met up with C.T., and they began to spend time together.

² Count six charged Stephen Tran with unlawful sexual intercourse with C.T. He is not a party to this appeal.

Having run away from home, S.T. moved around to "fl]ots of places." She did not have a job or any way to earn a paycheck, and C.T. bought food for her. S.T. did not know how C.T. made money, but she did sometimes see C.T. leave with defendant to go somewhere. Defendant would be talking on the phone and he would leave the room. When he returned, he would tell C.T. that she had work. C.T. would leave with defendant, and she would return approximately an hour later. S.T. did not know where C.T. would go, but when she returned, C.T. would have money and food.

At some point during the time between October and December 2011, defendant had a conversation with S.T. about how she could earn money. Defendant told S.T. that she "could either do this or [she] can just work at the strip bar." When defendant stated she could "do this," S.T. assumed that he was referring to prostitution. She had never engaged in prostitution before. S.T. knew it was wrong, she did not want to do it, and she knew that it would be a bad decision, but she felt pressured. S.T. initially refused.

C.T. continued to pay for S.T.'s food. Approximately two weeks after defendant's conversation with S.T., C.T. talked to S.T. and asked S.T. to help her. C.T. told S.T. that they both had to "do this in order to have a living." S.T. felt bad that C.T. continued to provide food for her. She felt that she could no longer let C.T. do everything for her, and that she needed to contribute. After considering the matter for some time, S.T. "decided to do it." Thereafter, she engaged in approximately 30 acts of prostitution.

S.T. did not find her own customers. Defendant made the arrangements. Defendant would receive a call, leave the room, return, and tell S.T. and C.T. that they had work. Defendant was the only person who told her when she had work. Defendant, Tyrone, or Stephen Tran would drive them to their destination, usually a motel. Sometimes Stephen would drive her to customers' homes. Tyrone had introduced S.T. to Stephen Tran at some point after S.T. had run away. If Tyrone or Stephen drove, defendant would tell them what to do. She never saw Tyrone or Stephen make the arrangements.

At the motel, a man would be waiting out front. They would follow the man to a motel room. Once in the room, they would not discuss with the man how much certain acts would cost. Instead, they would "just automatically do it," meaning either vaginal or anal intercourse. Sometimes S.T. and C.T. would go together, and other times they would go individually. When they went together, one of them would have intercourse with a customer while the other waited outside. S.T. would use condoms provided by defendant, Tyrone, or Stephen. After engaging in intercourse with S.T., the man would give money either to S.T. or to defendant. Defendant would be waiting outside when they were done. S.T. would receive \$40 for each occurrence. She would give defendant \$20. The amount of money she gave defendant was "[d]ue to the sex act." When asked why she gave defendant \$20, S.T. said, "It was for respect. For me, he let me sleep over. He gave me a roof over my head. He gave me food. [¶] I mean, he gave me a living, like, although it was hard for me." S.T. would keep the other \$20. S.T. testified that she also bought food for defendant, also for "[r]espect." S.T. never gave Tyrone or Stephen money when they drove her. S.T. engaged in prostitution from approximately October 2011 to December 2011.

During this period of time, S.T. was staying at defendant's house and Tyrone's house. When she stayed at defendant's house, she stayed in his room with him. S.T. testified that defendant's bedroom was on the ground floor, "[r]ight next to" the garage. They entered the home through the garage. C.T. would sometimes stay in that room as well. They would all sleep in defendant's bed. S.T. testified at trial that she had sex with defendant on one occasion.³ Defendant told her that he was "testing [her] to see if it was easy for [her] to have sex with clients." S.T. was not sure whether she ever saw

³ At the preliminary hearing, S.T. testified that she did not recall ever having sex with defendant.

defendant and C.T. having intercourse. However, S.T. saw "a lot of movements on the bed," leading her to believe that defendant had sex with C.T.

Eventually, S.T. stopped participating in prostitution. S.T. was at defendant's house when defendant told her that C.T. and Stephen had been contacted by a police officer and that they had to go because S.T. and C.T. were "hot right now." S.T. assumed that meant that the police were looking for them. Defendant took S.T. to Tyrone's house. That was the last time S.T. saw defendant until trial.

Detective Derek Stigerts, assigned to the FBI's Innocence Lost Task Force dealing with juvenile prostitution cases, testified as an expert in juvenile prostitution. Among other things, Stigerts testified that it was uncommon for prostitutes to buy food for their pimp out of respect. He testified that, customarily, pimps have the money, and therefore "it's usually the other way around . . .," although he testified that he had "seen where it does happen."

Officer Noah Winchester of the Los Rios Police Department, which worked directly for the Los Rios Community College District, testified that, on December 7, 2011, he was on patrol at Cosumnes River College. A vehicle drove by playing loud music. Winchester initiated a traffic stop. The driver of the vehicle appeared to be nervous. Winchester identified the driver as Stephen. A female passenger, who looked very young and who Winchester thought may be truant from a local school, appeared to be "overly nervous." Her hands were shaking, her eyes were darting around, and she could not sit still. Winchester asked the passenger to step away from the vehicle and accompany him to his vehicle. She initially told Winchester her name was S.T. After Winchester warned her that providing false information to the police is a crime, the passenger stated that her name was C.T., and gave her date of birth, indicating that she was 14 years old. Winchester searched C.T.'s purse and discovered several emergency contraceptive pills, 20 to 30 condoms, and other items of that nature. Winchester placed C.T. in the back of his patrol car and returned to Stephen.

Winchester noticed that Stephen's phone was ringing continuously. Stephen gave Winchester permission to look at his phone, and Winchester observed that there were a number of missed calls. The caller ID identified the caller as "Tony Khong." Additionally, Winchester saw a text message on the phone from "Tony Khong" which read, "grab the girl and dip. Nigga." In Winchester's experience, that message would be telling the recipient to "go, run." Winchester testified that this text message was received during the time the vehicle stop was ongoing. Winchester obtained a photograph of defendant and showed it to C.T. She identified the individual in the photograph as defendant. Winchester contacted C.T.'s father, as C.T. had been reported missing on November 10, 2011.

C.T.'s father testified that he was contacted by the Los Rios Police Department on December 7, 2011, and that the police indicated that they had his missing daughter. He picked her up and returned with her to their home in Oroville.

Sergeant Jeff Morris of the Sacramento Police Department testified that, on or around December 19, 2011, he began investigating allegations of pimping, pandering, and human trafficking of minors by defendant. Morris spoke with Winchester about his encounter with Stephen and C.T. Morris obtained a statement from C.T. on January 17, 2012, at her residence in Oroville. At that time, C.T. was 15 years old. A little over a month later, Morris interviewed S.T. at her residence. She was also 15 years old at that time.

Eventually, C.T. ran away from home again. At the time of trial, C.T.'s father had not spoken with her in about a week, and he had not seen her for three months. He did not know her whereabouts.

Cathy Barker was employed by the Sacramento County District Attorney's Office, and she was assigned to assist in the investigation of this case. She had met with C.T. three times between March and June 2013. Barker described her subsequent attempts to get C.T. to appear at the preliminary hearing in this case. On the night before the

preliminary hearing, C.T. contacted Barker and told her that she would appear at the hearing, but, the following day, she did not show up. Barker and other authorities continued to look for C.T. as the trial date approached, but they were unable to find her, and she did not testify at trial.

Defendant's Case

Muey Saetern testified that she was married to defendant's brother.⁴ Until 2013, she and her husband and their four children lived in the same house as defendant as well as defendant's father. As of October 2011, Saetern only worked a few days a month, and, otherwise, she would be at home. Saetern testified that, during the period between October and December 2011, she never saw defendant bring any girls home. She testified that, had defendant brought girls or women home, she would have remembered it. Saetern had not heard of C.T. or S.T., and she never saw either of those girls at the house. However, Saetern also testified that defendant's bedroom was on the ground floor and all the other bedrooms were on the second floor. She also said defendant's room was located near the door to the garage.

Lani Khong,⁴ defendant's sister, testified that she was at the house in which defendant lived three or four times a week during the period between October and December 2011. She never saw defendant bring girls to the residence. Lani had not heard of C.T. or S.T. Lani testified that there was a general restriction in the house that defendant could not have people over because of the children who lived there.

Stipulation

The prosecution and the defense stipulated that, if Detective Morris was recalled, "he would testify that on February the 6th of 2012, he contacted Muey Saetern at the . . .

⁴ Because she shares the same last name with defendant, we refer to this witness by her first name.

residence [where defendant lived], wherein she stated that [defendant] does not work and gets home late at night and leaves the residence in the morning."

Verdict and Sentencing

The jury returned verdicts, finding defendant guilty of two counts of pimping a minor under 16 years of age (§ 266h, subd. (h)(2) (counts one & two)), one count of pandering a minor under 16 years of age (§ 266i, subd. (b)(2) (count four)), and two counts of human trafficking a minor (§ 236.1, subd. (c)(1) (counts seven & eight)). The jury found defendant not guilty of one count of pandering a minor under 16 years of age. (§ 266i, subd. (b)(2) (count three).) The jury could not reach a verdict on count five, unlawful sexual intercourse with a minor under 16 years of age (§ 261.5, subd. (d)), and the trial court declared a mistrial as to that count. On the prosecution's motion, count five was later dismissed in the interest of justice.

The trial court found the allegation of defendant's prior strike conviction of burglary in the first degree to be true. Defendant's *Romero* motion⁵ to dismiss the strike conviction was denied.

The trial court sentenced defendant to an aggregate term of 20 years calculated as follows: the upper term of eight years on count seven, human trafficking a minor (§ 236.1, subd. (c)(1)), doubled to 16 years for the prior strike conviction, and a two-year consecutive term (one-third the midterm) on count eight, human trafficking a minor (§ 236.1, subd. (c)(1)), doubled to four years for the prior strike conviction. With regard to counts one, two, and four, the court stated: "I think I will not sentence. I'm going to stay those pursuant to 654 rather than to sentence."

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.

DISCUSSION

I. Prosecutorial Misconduct

A. Defendant's Contentions

Defendant contends the prosecutor committed multiple acts of prejudicial misconduct in her closing argument. Specifically, defendant contends that the prosecutor committed misconduct by: (1) employing a puzzle analogy in closing argument that reduced the burden of proof; (2) referring to matter outside of the record to establish S.T.'s veracity; and (3) appealing to the passions of the jurors. Defendant did not object at trial and thereby failed to preserve for appellate review his right to challenge the alleged misconduct. In any event, we conclude that defendant's contentions are without merit, or that any misconduct was not prejudicial.

B. Additional Background

I. Relevant Jury Instructions

In its jury charge, the trial court instructed the jury with CALCRIM No. 220 as follows: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt,

he is entitled to an acquittal and you must find him not guilty." (CALCRIM No. 220, as given to the jury in this case.)

The court also instructed the jury, as set forth in a portion of CALCRIM No. 222, that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys may have asked a question that suggested it was true." (CALCRIM No. 222, as given to the jury in this case.)

Also, the court instructed the jury from CALCRIM No. 200 as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. . . . [¶] You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

2. The Closing Arguments

As the prosecutor commenced her closing argument, she told the jury: "During jury selection, I told you that I'm a Deputy District Attorney, a prosecutor for Sacramento County. As a prosecutor, it is my job to prosecute crimes against our community. [¶] The crimes of pimping, pandering, human trafficking and statutory rape are not only crimes committed against the unfortunate juvenile victims, but rather, they are crimes committed against our community. [¶] That principle holds true especially if you are a 14- or a 15-year-old girl from an immigrant family. When crimes are committed against the weakest and most vulnerable victims of our community, it offends our peace and it offends our dignity. It begs for justice not only for [C.T.] and for [S.T.], but for every single one of us in our community." She continued: "All of you got a glimpse into a segment of our community that many of you would never have witnessed but for being

Jurors in this case. [¶] You got a front row seat to a bitter reality for some children in our community." As she proceeded in her closing argument, the prosecutor stated, "What you saw in this courtroom is the true, real-life reality. It's gritty, it's cold, and it's dark. You probably could not identify with [S.T.]'s situation. She's nothing like you." The prosecutor went on to explain, "[N]o one is beneath the law. What that means, you don't have to be beautiful. You don't have to be smart. You don't have to be articulate. You don't have to have a mom that loves you to deserve equal justice under the law." The prosecutor further reiterated, "Pimping, pandering, human trafficking and statutory rape are sex crimes, and they're committed against our community, and they offend the dignity and peace and spirit of the human soul." The prosecutor then followed that statement with, "I ask you to consider and treat [S.T.] and [C.T.] with the same dignity and empathy that they deserve because they are human beings."

During a subsequent portion of her closing argument, after discussing S.T.'s testimony at length, the prosecutor stated: "I just want to bring up one little -- little point here. [¶] It is very difficult to talk about sex in public. [¶] . . . [¶] Just think about this. [¶] In your day-to-day life, how often are you discussing at length, in detail sex? [¶] When I went to a training course one time for this continuing education, we have to do this for our Bar -- to keep our Bar card. During the training course -- it was a sexual assault, prosecution training course -- and the instructor -- it was a small group, but -- probably about 30 of us. [¶] We're all at the little tables, and the instructor says okay. Right before lunch he says, you know, we're going to take a break. We're going to have lunch. [¶] When we come back, I want you to be prepared to discuss the following: [¶] I'm going to choose one of you to sit at this chair at the front of the room, and I want you to be -- to be prepared to discuss your last sexual experience with the entire class. [¶] I'm going to ask you when it was. I'm going to ask you where it was. I'm going to ask you who it was with. I'm going to ask you what you did. I'm going to ask you all of the sexual stuff that happened during that. I'm going to ask you all the details. [¶] So be

prepared to discuss that, and I'll be picking one of you. [¶] . . . [¶] I come back after lunch, about ten absent people didn't come back. [¶] And the instructor said to us, he's like how did that make you feel? [¶] . . . [¶] He's, like, I'm not going to call one of you by the way. I wanted you -- I wanted to know what that made you feel like, because that is what the victim of a sexual offense will go through when she comes into the courtroom and she's questioned at length for perhaps a day, direct examination, cross-examination, redirect on all the specific details of that incident. [¶] It's not an easy thing to do, Ladies and Gentlemen, let alone a young girl who, as you know, is not a very articulate person and not articulate about these *[sic]* sexual stuff. . . . [¶] This wasn't easy, and at any point in time [S.T.] could have pulled the plug and said okay. She didn't. And I think that's something, when you judge credibility, you should consider." The defense did not object to these comments.

After discussing the elements of the human trafficking counts involving S.T. and C.T., the prosecutor stated: "Consider everything in this case. You know, it's almost like a puzzle. You've got certain pieces here and certain pieces there, and when you kind of put the edges of that puzzle together -- that's usually how I do a puzzle. I'm not sure about you -- you do the edges first, you put all the same colors together, and then ultimately you complete that puzzle. [¶] Sometimes you're missing a piece. [¶] You ever do that, when you're putting a puzzle together and you're, like, darn it. I'm missing that one piece right there. But you still know what the puzzle -- the picture in the puzzle is, whether it's like an Eiffel Tower or -- [¶] Last summer we were in Maui, and we -- there is a bunch of flip flops that we had. We were missing the toe part of one of the flip flops. We still knew they were flip flops. [¶] Now we're missing [C.T.], but we sure have a clear picture of what that game was about even without her.¹⁶¹ [¶] Ladies and

¹⁶¹ Defendant omitted reference to this critical sentence in his appellate briefing.

Gentlemen, I'm confident when you go back and deliberate, you'll have no other choice but to find the defendant guilty of every single crime charged. [¶] Thank you." Again, the defense did not object to these comments.

Later, after the prosecutor finished her initial closing argument and the jurors were excused for the day, defense counsel noted that the trial court had asked in chambers whether defense counsel had a problem with the prosecutor's closing argument. Counsel recognized that the prosecutor's Eiffel Tower puzzle analogy was reminiscent of the prosecutor's argument in this court's opinion in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*). In *Katzenberger*, the prosecutor used a visual display of a puzzle being assembled to reveal an image of the Statue of Liberty. (*Id.* at pp. 1266-1267.) The display in *Katzenberger* also employed a quantitative component in that, once six pieces of the eight-piece puzzle were displayed, the prosecutor informed the jury: "'this picture is beyond a reasonable doubt.' . . ." (*Id.* at p. 1268.) This court concluded that the prosecutor committed misconduct because the "prosecutor's use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt." (*Ibid.*) Here, defense counsel summarized his recollection of the issue discussed in *Katzenberger*, stating that he was "bring[ing] that to the Court's attention because should there be an appeal in this case, an appellate attorney and the Appellate Court will certainly look at that. And it will be an argument made by the appellate attorney for the defense that somehow lowers the burden of proof, and *that is not the way I take the argument*. [¶] But I wanted to make sure that there was a clear record on that case." (Italics added.)

The trial court stated that it had the same thought, but the prosecutor's argument here was different. The court further stated that, had the court thought the prosecutor was reducing the burden of proof, the court would have intervened.

For her part, the prosecutor said she did not display an image of the Eiffel Tower on the PowerPoint slides. She said, "The only words that were on the Power[Point] were reasonable doubt."⁷

During his closing argument, defense counsel emphasized the burden of proof. He stated: "Now, in criminal cases, the Prosecution has a heavy, heavy burden of proving the charges beyond a reasonable doubt. It's the highest standard allowed by law. [¶] And it's such a high standard that the District Attorney gets to make a rebuttal argument. the arguments I've made now, and that's only fair because she has that extremely high burden of proof. [¶] Many times I hear District Attorney[¶]s say well, you know, people get convicted everyday [sic] in this courthouse using that standard. to which my response is, you know, juries everyday [sic] acquit people in this courthouse using that same standard. It cuts both ways. [¶] Now, you might be saying to yourself what is this reasonable doubt that I keep hearing about? [¶] As the Court has instructed you, proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] . . . [¶] This is the highest standard allowed by law, and it's not a standard you use everyday [sic] in your daily lives."

C. Standard of Review

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the

⁷ The record does not contain a paper copy of the PowerPoint slides used by the prosecutor during closing argument. Other than the prosecutor's statement, no other evidence appears in the record as to what was displayed to the jury at the time the prosecutor made the comments to which defendant now objects.

use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " [Citation.] *To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.* [Citation.]' [Citation.] A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm." (*People v. Linton* (2013) 56 Cal.4th 1146, 1205 (*Linton*), italics added.)

D. Analysis

1. Puzzle Analogy - Reducing the Burden of Proof

Defendant asserts that the prosecutor's use of the puzzle analogy diminished the burden of proof by equating proof beyond a reasonable doubt to a matter used in trivial everyday decision-making. Defendant asserts that this misconduct was prejudicial under either the federal or state standard.

Initially, the People assert that defendant forfeited this claim. In this regard, the People assert that, while defense counsel at trial called attention to the matter, he did not, in fact, assert that the prosecutor's remarks constituted misconduct, and he did not request any admonition in reference to these remarks. We agree.

As we have noted, counsel did not object to the prosecutor's remarks, and did not request any admonition or curative instruction. Rather, he simply referred to *Katzenberger*, stating that he was "bring[ing] that to the Court's attention because should there be an appeal in this case, an appellate attorney and the Appellate Court will certainly look at that. And it will be an argument made by the appellate attorney for the defense that somehow lowers the burden of proof, and *that is not the way I take the*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY KHONG,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

**On Petition for A Writ of *Certiorari* to The United States Court of Appeals for
the Ninth Circuit**

PROOF OF SERVICE

I, David A. Schlesinger, declare that on March 22, 2023, as required by Supreme Court Rule 29, I served Petitioner Tony Khong's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name, address, telephone, and email address of counsel for Respondent is as follows:

David Andrew Eldredge, Esq.
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Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944225
Sacramento, CA 94244-2550
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David.Eldridge@doj.gov

Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Tony Khong, by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

Tony Khong
#G-32579
CRC - California Rehabilitation Center (Norco)
P.O. Box 3535
Norco, CA 92860

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 22, 2023



DAVID A. SCHLESINGER
Declarant