

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 VI) – PRESENTED SEPARATELY UNDER S. CT.
R. 14.1(i)**

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argument. [¶] But I wanted to make sure that there was a clear record on that case.” (Italics added.) Having declined to actually object to the prosecutor’s remarks or request any sort of admonition, defendant forfeited this claim on appeal.⁸ (*Linton, supra*, 56 Cal.4th at p. 1205.) In any event, and to resolve defendant’s claim that his trial counsel was constitutionally ineffective for failing to object to the alleged instances of prosecutorial misconduct,⁹ we conclude the comments were not prejudicial.

In *Katzenberger*, the prosecutor displayed a PowerPoint presentation in closing argument which began with a blue screen, and, as the presentation continued, six puzzle pieces appeared on the screen sequentially. (*Katzenberger, supra*, 178 Cal.App.4th at p. 1264.) The image of the Statue of Liberty displayed in the presentation was “immediately and easily recognizable” (*Ibid.*) When six of the eight pieces of the puzzle were displayed, over defense counsel’s objection “[t]he prosecutor went on to tell the jury that [w]e know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that’s a picture of the Statue of Liberty, we don’t need all the pieces of the [sic] it. And ladies and gentlemen, if we fill in the other two pieces [at this point the prosecutor apparently clicks the computer mouse again, which triggers the program to add the upper left-hand rectangle that includes the image of the torch in the statue’s right hand and the central rectangle that completes the entire

⁸ Defendant asserts that objection would have been futile because the court made comments indicating that it did not believe the argument here was as problematic as that in *Katzenberger*. We disagree. Indeed, it appears from defense counsel’s comment that the trial court invited defense counsel to object in chambers when it asked if defense counsel had a problem with the prosecutor’s closing argument. If defense counsel thought the comments were objectionable, he could have registered a formal objection supported by a discussion of *Katzenberger* and other cases and requested an admonition and appropriate curative instructions. Because we cannot assume that an objection and admonition would have been futile, defendant has forfeited this claim of misconduct. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 201.)

⁹ More specifically discussed in part II of the Discussion, *post*.

image of the statue], we see that it is, in fact, the [S]tatue of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.' The prosecutor argued such standard was met by the evidence." (*Id.* at p. 1265.)

In concluding that the prosecutor committed misconduct, this court stated: "The Statue of Liberty is almost immediately recognizable in the prosecution's PowerPoint presentation. Indeed, some jurors might guess the picture is of the Statue of Liberty when the first or second piece is displayed. We have viewed the PowerPoint at issue and we believe most jurors would recognize the image well before the initial six pieces are in place. *The presentation, with the prosecutor's accompanying argument, leaves the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.*" (*Katzenberger, supra*, 178 Cal.App.4th at pp. 1266-1267, *italics added.*) Additionally, the *Katzenberger* court took issue with the quantitative aspect of the display. This court stated that "the puzzle of the Statue of Liberty is composed of eight pieces. When the sixth puzzle piece of the slide show was in place, leaving two missing pieces, the prosecutor told the jury, 'this picture is beyond a reasonable doubt,' inappropriately suggesting a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Id.* at pp. 1267-1268.) This court concluded: "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. The prosecutor committed misconduct." (*Id.* at p. 1268.) However, the *Katzenberger* court then went on to conclude that the prosecutor's misconduct was not prejudicial. (*Id.* at p. 1269.)

Similarly, in *People v. Otero* (2012) 210 Cal.App.4th 865 (*Otero*), on which defendant also relies, the prosecutor displayed a PowerPoint slide of a map containing the

"readily recognized outline of California" next to the outline of Nevada. (*Id.* at pp. 869, 873.) The map showed, among other things, a star with the word "'Sac'" where Sacramento would be, "'San Francisco'" and "'San Diego'" inside the outline of California, although they were in incorrect locations. "'Los Angeles'" in the southern part of the state, and the word "'Ocean'" to the left of the state where the Pacific Ocean would be. (*Id.* at pp. 872-873.) At the bottom of the map appeared the statement: "'Even with incomplete and incorrect information, no reasonable doubt that this is California.'" (*Id.* at p. 869.) The prosecutor, having told the jury that she wanted to provide an example of reasonable doubt, stated, "'Is there any doubt in your mind, ladies and gentlemen, that that state is California? Okay. Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angeles isn't at the southern. Okay. But my point to you in this—'" At that point, defense counsel objected and the trial court ordered the PowerPoint slide be taken down. After discussion outside the presence of the jury, the trial court told the jury to disregard the map as well as the prosecutor's argument and to follow the definition of reasonable doubt it had provided. (*Id.* at p. 870.)

The Court of Appeal, relying on, *inter alia*, *Katzenberger*, concluded that the prosecutor committed misconduct. (*Otero, supra*, 210 Cal.App.4th at p. 873.) The court stated: "The use of a diagram such as the one used in this case is simply not an accurate analogy to a prosecutor's burden to prove beyond a reasonable doubt each and every element of a charged offense. Here the diagram was identifiable using but one of eight pieces of information supplied by the diagram (12.5 percent of the information supplied) and unlike the puzzle in *Katzenberger*, where all pieces contained accurate information, here the diagram contained inaccurate information, making the error more egregious. Not only is the standard of proof reduced to substantially below the condemned percentage in *Katzenberger*, but the jury was informed that reasonable doubt may be reached on such slight proof even when some of the evidence is demonstrably false."

(*Otero*, at p. 873.) However, the *Otero* court found the misconduct to be harmless in light of the trial court's instructions, including the curative instruction. (*Ibid.*)

Assuming the prosecutor's use of the puzzle analogy here (orally comparing the case to a puzzle with an unknown number of pieces depicting an image of the Eiffel Tower at the same time the words "reasonable doubt" are displayed) constituted the same sort of misconduct as was found in *Katzenberger* and *Otero*, we conclude that any such misconduct was not prejudicial.

Defendant asserts that the misconduct requires reversal under any standard. The People counter that defendant's federal constitutional right to a fair trial was not violated, and therefore the federal "harmless beyond a reasonable doubt" error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*), is inapplicable. Instead, the People assert that we must determine whether any error was prejudicial under the state standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

We conclude that the alleged misconduct was not prejudicial under either standard. (See *Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269.) There was ample evidence of defendant's guilt of two counts of pimping a minor under 16 years of age (§ 266h, subd. (b)(2)), one count of pandering a minor under 16 years of age (§ 266i, subd. (b)(2)), and two counts of human trafficking a minor (§ 236.1, subd. (c)(1)).

S.T. testified that, at some point during the time period between October and December 2011, defendant had a conversation with her 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. Although S.T. initially refused, after considering the matter for some time, S.T. "decided to do it." She felt that she could no longer let C.T. do everything for her, and that she needed to contribute.

S.T. never obtained her own customers or made the arrangements to meet them. It was defendant who made the arrangements. S.T. described how that worked. Defendant would receive a phone call, leave the room, return, and tell S.T. and C.T. that they had work. Defendant would either then drive S.T. and/or C.T. to the motel, or he would have Tyrone or Stephen do so. Once at the motel, S.T. would accompany the client to a motel room where she would engage in vaginal or anal intercourse with the client. S.T. would use condoms furnished by defendant, Tyrone, or Stephen. Defendant would be waiting outside when they were done. Generally, S.T. would receive \$40 for each occurrence. She would give defendant \$20 for gas and for "respect." But when the customer paid defendant, defendant gave S.T. \$40.

S.T.'s testimony was corroborated by the testimony of Officer Winchester, who pulled over a vehicle driven by Stephen, in which C.T. was a passenger. Winchester discovered several emergency contraceptive pills, 20 to 30 condoms, and other items of that nature in C.T.'s purse. When Winchester looked at Stephen's phone, which had rang continuously during the stop, he observed that there were a number of missed calls from an individual with defendant's name. Additionally, Winchester saw a text message on the phone from that individual, which stated, "grab the girl and dip. Nigga." This event was consistent with S.T.'s testimony that defendant was working with Tyrone and Stephen. Winchester showed C.T. a photograph of defendant and she identified him.

Additionally, although defendant's family members testified they saw no girls visiting defendant in the home where he lived, S.T.'s description of the location of defendant's bedroom within the home was consistent with the how Saetern described the home. Furthermore, from the evidence of the layout of the house, sleeping arrangements and stipulated fact that defendant stayed out late at night, it can be reasonably inferred that defendant was able to smuggle the girls in while the other occupants of the house slept upstairs.

Moreover, defense counsel in closing emphasized at length the beyond a reasonable doubt burden of proof, and the trial court accurately instructed the jury with CALCRIM No. 220. Also, using CALCRIM No. 200, the trial court accurately instructed the jury to disregard anything the attorneys might say that conflicts with the court's instructions.

As this court stated in *Katzenberger*, “ ‘[A]rguments of counsel “generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.” [Citation.]’ [Citation.] ‘When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former. For “[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” ’ (*Katzenberger, supra*, 178 Cal.App.4th at p. 1268.)

Furthermore, unlike the circumstances in *Katzenberger* and *Otero*, where the prosecutors directly and expressly related their analogies and visual presentations to the reasonable doubt instruction, here, the prosecutor did not display a puzzle or a clearly recognizable depiction. Nor did she verbally reference the reasonable doubt standard discussing the puzzle analogy, although admittedly, the words “reasonable doubt” were displayed on the screen during her comments. Rather the focus of the prosecutor’s comments was C.T.’s absence as a witness at trial as the missing puzzle piece. Specifically, the prosecutor said, “Now we’re missing [C.T.], but we sure have a clear picture of what that game was about even without her.” Rather than the reasonable doubt instruction, these remarks related more directly to the instruction that tells the jury neither side is required to call all witnesses who may have information (CALCRIM No. 300), or the instruction that the testimony of one witness can prove any fact. (CALCRIM

No. 301.) In any event, unlike in *Katzenberger* and *Otero*, the prosecutor's remarks did not expressly relate to the reasonable doubt instruction; nor did they impact the jury's understanding thereof or otherwise diminish the burden of proof.

We conclude, beyond a reasonable doubt, that the jury would have found defendant guilty in the absence of the prosecutor's remarks in closing argument. (*Katzenberger, supra*, 178 Cal.App.4th at p. 1269; see generally *Chapman, supra*, 386 U.S. at p. 24.) Thus, we conclude that any misconduct based on this portion of the argument was not prejudicial.

2. Referring to Matters Outside the Record/Improper Vouching

Defendant asserts that the prosecutor also committed misconduct by referring to matters outside the record in order to demonstrate S.T.'s veracity. Specifically, defendant contends that the prosecutor's description in her closing argument of her experience at a continuing legal education program concerning how difficult it may be to speak publicly about sexual experiences improperly suggested to the jury that the prosecutor had an experience in common with S.T., constituted a form of vouching for S.T.'s veracity, and encouraged the jurors to view the matter from S.T.'s perspective.

Defense counsel made no objection to these remarks during the prosecutor's closing argument. Consequently, defendant has forfeited this contention. (*Linton, supra*, 56 Cal.4th at p. 1205.)

In any event, " "[a] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." [Citation.] "A prosecutor may 'vigorously argue his [or her] case and is not limited to "Chesterfieldian politeness"' [citation]" [Citation.] Nevertheless, '[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise

bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his (or her)] office behind a witness by offering the impression that [he (or she)] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief." [his (or her)] comments cannot be characterized as improper vouching.' " (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

We disagree with defendant's characterization of the prosecutor's remarks as addressing facts not in evidence and vouching for S.T.'s veracity or credibility. Rather, we consider these remarks to be illustrative of the difficulty a witness in S.T.'s circumstances could have in testifying about sensitive and potentially embarrassing matters. In light of the wide latitude afforded advocates during argument, we are of the opinion that, here, the prosecutor did not substantively raise facts beyond the evidence, but rather the argument illustrated something that is a matter of common knowledge and experience, specifically that it would be awkward and difficult to discuss sensitive matters of a sexual nature before a room of strangers. (See *Ward*, *supra*, 36 Cal.4th at p. 215; see also *People v. Loker* (2008) 44 Cal.4th 691, 742 [in discussing the subject of a book, prosecutor did not refer to facts beyond the evidence, but to a viewpoint that was a matter of common experience].) In telling the story about the embarrassment a person can feel when asked to tell strangers about the details of an intimate sexual act, the prosecutor was doing nothing more than giving a permissible illustration of human nature drawn from common knowledge and experience. (See *People v. Hill* (1998) 17 Cal.4th 800, 819.) Thus, contrary to defendant's contention, the prosecutor was not improperly vouching for S.T.'s veracity or credibility. Moreover, the record demonstrates that the prosecutor did not appeal to the jurors to find defendant guilty based on sympathy or

placing themselves in S.T.'s position. (See generally *People v. Arias* (1996) 13 Cal.4th 92, 160.)

In any event, even if we determined that the prosecutor committed misconduct through the description of her experience in a continuing legal education program, we would conclude that such misconduct was harmless. This misconduct did not implicate defendant's constitutional right to a fair trial or render his trial fundamentally unfair. Accordingly, the state standard set forth in *Watson*, *supra*, 46 Cal.2d 818 applies. Under *Watson*, we determine whether it is reasonably probable that, but for the error, the jury would have reached a result more favorable to defendant. (*Id.* at pp. 835-836.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 956.)

Based on the evidence discussed *ante*, we conclude that it is not reasonably probable that the jury would have reached a result more favorable to defendant if the prosecutor had not made the argument about which defendant belatedly complains. (*Watson*, *supra*, 46 Cal.2d at pp. 835-836.) Furthermore, as we have noted, the trial court explicitly instructed the jury: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." (CALCRIM No. 222, as given to the jury in this case.) Additionally, the trial court instructed the jury that it was not to "let bias, sympathy, prejudice, or public opinion influence your decision." (CALCRIM No. 200, as given to the jury in this case.) We presume that the jury followed the instructions given by the trial court. (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269.) Any misconduct by the

prosecutor in describing her experience in the continuing legal education class did not prejudice defendant.

3. Appeals to the Jurors' Passions

Defendant asserts that the prosecutor committed misconduct in appealing to the passions of the jurors during her closing argument. In this regard, defendant observes that the prosecutor repeatedly invoked the notion that the crimes committed here were not merely committed against the two victims, but against the community itself. According to defendant, the prosecutor's repeated references to the crimes having been committed against the community "urged the jurors to convict this defendant in order to protect community values."

Defense counsel made no objection to these remarks in the prosecutor's closing argument. Consequently, defendant has forfeited this contention as well. (*Linton, supra*, 56 Cal.4th at p. 1205.)

"It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response."'" (*Linton, supra*, 56 Cal.4th at p. 1210.) Defendant is correct that a prosecutor may not urge jurors to convict a criminal defendant in order to protect community values. "'The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.'" (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149, quoting *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441, fn. omitted.)

While the prosecutor's comments to which defendant objects here may have veered close to the line, the challenged remarks served the valid purpose of emphasizing the jury's responsibility to see that justice is served despite these particular victims' standing in society as runaways who engaged in acts of prostitution. In other words, the remarks emphasized that these victims should be treated like every other victim in the eyes of the law. As the prosecutor noted, "no 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." Moreover, the prosecutor made no mention of defendant's guilt when she made these remarks, so there was no express suggestion that the jury should convict defendant to protect the community. The comments did not amount to misconduct.

Even were we to conclude that these remarks constituted misconduct, defendant did not sustain any prejudice. Based on the evidence presented, it is not reasonably probable that, had the prosecutor not referred to the crimes committed against the community on a number of occasions, the jury would have reached a result more favorable to defendant. (*Watson, supra*, 46 Cal.2d at pp. 835-836.) Additionally, the trial court instructed the jury that it was not to "let bias, sympathy, prejudice, or public opinion influence your decision." (CALCRIM No. 200, as given to the jury in this case.) Again, we presume that the jury followed the instructions given by the trial court. (*Katzenberger, supra*, 178 Cal.App.4th at p. 1269.) Defendant was not prejudiced by this alleged misconduct.

4. Cumulative Effect of Alleged Prosecutorial Misconduct

Defendant also asserts that the cumulative effect of the prosecutorial misconduct resulted in a significant impact on the jury's verdict, and that reversal is required. (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1378.) We disagree. We have reviewed all of defendant's claims and find no cumulative prejudicial error warranting reversal. (*People v. Tully* (2012) 54 Cal.4th 952, 1048.)

II. Ineffective Assistance of Counsel

Acknowledging that his trial attorney did not object to most or all of the alleged instances of prosecutorial misconduct, did not request any admonishments, and did not request any curative instructions, defendant asserts that he was denied his constitutional right to the effective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674, 693-694, 696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*)).

"'Surmounting *Strickland*'s high bar is never an easy task.' " (*Harrington v. Richter* (2011) 562 U.S. 86, ____ [178 L.Ed.2d 624, 642] (*Richter*), quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 371 [176 L.Ed.2d 284, 297].)

In parts I.D.2. and I.D.3. of the Discussion, *ante*, we have concluded that the instances raised by defendant did not constitute prosecutorial misconduct. Counsel cannot be faulted for abstaining from futile or meritless objections. (*People v. Price* (1991) 1 Cal.4th 324, 386-387; see also *People v. Stratton* (1988) 205 Cal.App.3d 87, 97.) Accordingly, in connection with these contentions, we conclude that counsel's performance did not fall below an objective standard of reasonableness.

Even assuming the prosecutor's closing arguments constituted misconduct as asserted by defendant, and further assuming trial counsel was deficient for failing to object, there is no basis for reversal because defendant has not established prejudice by showing it is reasonably probable that he would otherwise have obtained a more favorable result.

To establish prejudice, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Richter, supra*, 178 L.Ed.2d at p. 642.) To show prejudice, defendant must show a reasonable probability that he would

have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

We have concluded, *ante*, that, even assuming the prosecutor committed misconduct as alleged by defendant, he was not prejudiced as a result of these instances of misconduct, individually or cumulatively. For the same reasons we discussed in concluding that any instance of prosecutorial misconduct did not result in prejudice to defendant, in connection with his contention that he was denied the effective assistance of counsel, we also conclude that defendant has not shown a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

III. Sentencing

A. Imposition of an Upper Term Sentence

1. Additional Background

After counsel made their arguments at the sentencing hearing, the trial court remarked about how childlike S.T. looked in a photograph introduced into evidence that was taken of her when she was first interviewed by the police. "And I'm looking in the face of somebody who could have been ten, innocent, child-like face, dressed in Hello Kitty pajama bottoms. That's what I will take from this case, that photograph: [¶] And if you're not moved by that photograph, nothing will move you, because you look in the face of a child. She was a child, 14 years of age. She can't volunteer. She can't consent. [¶] My goodness. In the testimony, she didn't know what it meant when somebody asked her if she had vaginal sex. [¶] What does that mean? [¶] What is that? [¶] She didn't know. She's a kid. She's a child, and *she was incredibly vulnerable in this case.*" (Italics added.) The trial court went on to say, "[S]he was certainly let down by her mother, making her *one of the most vulnerable victims that I've seen in this courtroom, save one that I remember with crystal clarity.* [¶] And then along came a spider, and the

spider was Mr. Khong who decided he would take advantage of an opportunity, and take advantage he did. [¶] And by taking these children and pimping and pandering and human transporting them, it's hard to imagine that someone can so turn off their emotions and carry on in that manner. [¶] And yes, you're sniffing today, Mr. Khong. You have -- you have Kleenex because your -- your eyes well up, but they didn't seem to when you took these girls and you did what you did in the manner that calls for a punishment of the appropriate type." (Italics added.)

After finding that defendant was not eligible for probation, the trial court stated its reasons for imposing the upper term. "I find that the circumstances in aggravation here were that *these victims were particularly vulnerable for the reasons I just stated. Both were runaways in need of money.* [¶] I'm following the MATTERS that are outlined in the probation report, but they are certainly in keeping with my findings as I listened to this trial. [¶] The defendant induced others to participate in the commission of the crime or got on a cell phone, talked in Vietnamese to [the customers], and then the [customers] would show up magically at the hotel where he would then drive or have someone else drive the children to be raped by these men, to be -- to have intercourse with these men. [¶] The manner in which the crimes were carried out certainly had planning and sophistication and professionalism. He knew exactly what he was doing and exactly how to do it. It worked with clockwork precision really, which is devastating. [¶] And these little girls, the one here doesn't even know what it means to have vaginal sex, is being put into the room with these men and treated as they did. [¶] Tony Khong's prior convictions as an adult and his sustained petitions in juvenile delinquency proceedings are numerous and are of increasing seriousness, the most recent felony of which was a residential burglary. And we heard the facts and circumstances that were presented by [the prosecutor], very serious. And for that, he served a prior prison term -- not very long -- got out just a couple of years ago. [¶] He was on parole and informal probation when these crimes were committed, and his prior performance on parole and probation, of

course, were dismal, and his prior performance on juvenile probation was also unsatisfactory." The court then noted two circumstances in mitigation: positive letters from various people and, although defendant was 25 years old, the court noted that "he's particularly youthful." The court then said, "But I think if anyone's earned the upper term, it is this defendant." After imposing the upper term doubled, the court added, "The upper term is certainly appropriate in this case because the defendant was on parole when the crimes were committed, the crimes against children were committed and because of his prior experience as a criminal, both as a juvenile and as an adult.".

2. Analysis

Defendant asserts that the trial court abused its discretion in imposing the upper term sentence on count seven, resulting in an aggregate term of 20 years imprisonment. Defendant contends that the facts of this case were not particularly aggravating, and emphasizes that he was not found to have used violence or to have kidnapped the minor victims. Defendant further asserts that the trial court impermissibly used the victims' youth as an aggravating factor. According to defendant, the trial court should have imposed the middle term of six years, doubled to 12 years, resulting in an aggregate sentence of 16 years.

"We review the trial court's exercise of discretion at sentencing for abuse. [Citations.] We are required to presume the trial court acted to achieve legitimate sentencing objectives. [Citation.] A 'decision will not be reversed merely because reasonable people might disagree. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.]' [Citation.] We may displace the trial court's decision only if there is a clear showing the sentence was arbitrary or irrational. [Citation.] A trial court abuses its discretion if it relies upon circumstances that are not relevant to, or that otherwise constitute an improper basis for, the sentencing decision." (*People v. Shenouda* (2015) 240 Cal.App.4th 358, 368-369.)

We conclude that defendant has failed to establish the existence of any grounds by which he could satisfy his burden of demonstrating that the trial court abused its discretion and that its sentencing decision was arbitrary or irrational. Defendant appears to specifically contend the trial court abused its discretion in sentencing him because it improperly relied on the victims' youth as an aggravating factor, whereas their status as minors was an element of the charged offenses. However, as can be seen by the trial court's remarks, the trial court concluded the victims here were "particularly vulnerable" because they were runaways, homeless and in need of money. Defendant does not challenge the finding of particular vulnerability, nor could he. "'[P]articular vulnerability' is determined in light of the 'total milieu in which the commission of the crime occurred.'" (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693-1694, disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) A victim's young age together with other circumstances can establish "'particular vulnerability'" as an aggravating factor. (*Dancer*, at p. 1694.) Here, the other circumstances relied upon by the court made the victims particularly vulnerable.

In any event, the presence of just one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 815.) Here, the trial court expressly relied upon the seven circumstances in aggravation listed in the probation report.¹⁰ Thus, even if the court erred in using mere

¹⁰ The probation report listed the following aggravating circumstances from California Rules of Court, rule 4.421: "(a)(3) The victims were particularly vulnerable. Both victims were runaways in need of money. [¶] (a)(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (a)(8) The manner in which the crime was carried out indicates planning, sophistication or professionalism. [¶] (b)(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (b)(3) The defendant has served a prior prison term. [¶] (b)(4) The defendant was on parole and

age as an aggravating factor, defendant has not demonstrated prejudice because the trial court appropriately relied on other aggravating factors not challenged by defendant.

B. Section 654

As the People have noted, the trial court's pronouncement of sentence for counts one, two, and four does not comply with section 654. We exercise our authority to correct that error.

Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) At sentencing, with regard to counts one, two, and four, the trial court stated: "I think / *will not sentence*. I'm going to stay those pursuant to 654 rather than to sentence." (Italics added.) The trial court's failure to impose a sentence on counts one, two, and four was unauthorized.

It is well settled that when a court determines that a conviction is subject to section 654, it must *impose* a sentence and then stay the *execution* of the duplicative sentence, the stay to become permanent upon defendant's service of the portion of the sentence not stayed. (*People v. Duff* (2010) 50 Cal.4th 787, 796 (*Duff*)); *People v. Alford* (2010) 180 Cal.App.4th 1463, 1469 (*Alford*); *People v. Salazar* (1987) 194 Cal.App.3d 634, 640; *People v. Niles* (1964) 227 Cal.App.2d 749, 755-756.) "This procedure ensures that the defendant will not receive 'a windfall of freedom from penal sanction' if the conviction on which the sentence has not been stayed is overturned." (*Salazar*, at p. 640.) The trial court thus imposed an unauthorized sentence by failing first to impose a sentence on counts one, two, and four and then stay execution of those sentences. (*People v.*

informal probation when the crimes were committed. [¶] (b)(5) The defendant's prior performance on juvenile probation was unsatisfactory."

Crabtree (2009) 169 Cal.App.4th 1293, 1327; see *Alford*, at p. 1472.) As noted by the People, because this constituted an unauthorized sentence, it may be corrected at any time. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13 [it is well established that the appellate court can correct a legal error resulting in an unauthorized sentence, including a misapplication of § 654, at any time].)

Here, as in *Alford*, we see no reason to remand for resentencing, but will instead exercise our authority to modify the judgment. (§ 1260; *Alford*, *supra*, 180 Cal.App.4th at p. 1473 [rather than remand for a new sentencing hearing, appellate court imposed the sentence the trial court would have "undoubtedly" imposed].) The trial court made clear its intention to sentence defendant to the upper term on the base term. After recounting the numerous aggravating circumstances involved in this case, the trial court specifically stated, "I think if anyone's earned the upper term, it is this defendant." Accordingly, it is clear that the trial court would have imposed the upper term of eight years on counts one and two, pimping a minor under 16 years of age (§ 266h, subd. (b)(2)), and the upper term of eight years on count four, pandering a minor under 16 years of age (§ 266i, subd. (b)(2)).

Accordingly, on counts one, two, and four, we impose the upper term sentences of eight years, and stay execution of those sentences, the stay to become permanent on the completion of the sentences as to counts seven and eight. (See *Duff*, *supra*, 50 Cal.4th at p. 796.)

DISPOSITION

The judgment is modified to: (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, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

RAYE, P. J.

HULL, J.

EXHIBIT "B"

Ex-Los Rios, San Mateo police officer booked on sex assault charges

HIGHLIGHTS

Noah W. Winchester was arrested on sexual assault charges

He served with Sacramento, Los Rios Community College District police departments

He was an officer for Los Rios from 2009 through January 2015

BY BILL LINDBLOF

billdelof@sacbee.com

A former Sacramento-area police officer who has been under investigation for a series of alleged sexual assaults while on duty in Sacramento and San Mateo counties in recent years was arrested Thursday.

Noah W. Winchester, who has served as an officer with the Sacramento Police Department, the Los Rios Community College District police and, most recently, the San Mateo Police Department, was arrested on a series of felony sexual assault-related charges by the San Mateo County District Attorney's Office.

He was arrested on 22 counts of kidnapping, rape and related charges. The allegations against Winchester, 31, of Stockton involve his time as an officer at Los Rios and with the San Mateo department, officials said.

Winchester was placed on leave in October from the San Mateo Police Department and subsequently resigned from that post.

Los Rios spokesman Mitchel Benson said Winchester worked as an officer for Los Rios from Jan. 1, 2009, through Jan. 16, 2015, and left for the San Mateo job because it offered a significant increase in pay. He was assigned to American River College the last two years with Los Rios, but was moved around throughout the district before that, Benson said.

"We are just learning this afternoon of these shocking charges regarding former Los Rios Police Officer Noah Winchester, and we are appalled to think they could be true," Benson said in a written statement. "We will continue to cooperate with all law enforcement agencies pursuing this case."

adiply

Benson said the Los Rios district will have a report filed by Aug. 29, 2018, regarding the allegations. "If the allegations are proven to be true, the investigation will outline what steps if any Los Rios could take to help the district avoid a similar tragedy in the future," he said.

Winchester first became involved with law enforcement as an officer with the Sacramento Police Department, although his career there was short-lived.

Department spokesman Sgt. Bryce Heinlein said Winchester was employed from December 2006 through October 2007, when "he was released from employment."

Heinlein said he could not elaborate on why Winchester left, but said it occurred before he had completed his probation.

Winchester then moved on to the Los Rios department. During Winchester's time at Los Rios, Sacramento police began a sexual assault investigation of him but no charges were filed.

Heinlein said that probe began in 2013 and Los Rios officials were notified of it at the time.

A second probe of Winchester involving a sexual assault allegation also was conducted by the Sacramento County Sheriff's Department. Sgt. Tony Turnbull said in an email that the probe involved a 2013 incident that was not reported to authorities until 2015, after Winchester had left Los Rios.

Winchester joined the San Mateo department in early 2015 as a "lateral police officer."

San Mateo Police Department officials first became aware of criminal allegations against Winchester on Oct. 20. The allegations related to an incident that occurred the previous night.

"Based on the severity of the allegations we immediately placed Winchester on indefinite leave before his next work shift, and turned the criminal portion of the investigation over to the San Mateo County District Attorney's Office," San Mateo police said in a news release.

San Mateo police opened an administrative investigation into Winchester's conduct as it related to department policy and procedures.

Additional alleged acts were uncovered during the district attorney's investigation in both San Mateo and Sacramento counties, some dating back to 2013.

Bill Lindelof: 916-321-1079, @Lindelofnews

(X)

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SERIAL RAPIST COP ARRESTED FOR RAPING, KIDNAPPING 5 WOMEN ON DUTY

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<http://www.ntws.us/serial-rapist-cop-arrested-for-raping-kidnapping-5-women-on-duty/>

1/5

EXHIBIT "C"

Authorities: 2 investigations pending in Sacramento of Noah Winchester while an officer with Los By Sam Stanton

sstanton@sacbee.com

A former Sacramento-area police officer is under investigation for a series of alleged sexual assaults while on duty in Sacramento and San Mateo counties in recent years, officials confirmed Friday.

No charges have been filed, but authorities confirmed they are investigating allegations against Noah W. Winchester, who has served as an officer with the Sacramento Police Department, the Los Rios Community College District police and most recently, the San Mateo Police Department. The allegations against Winchester involve his time as an officer at Los Rios and with the San Mateo Department officials said and the investigations are currently underway.

Winchester was placed on leave in October from the San Mateo Police Department and subsequently resigned from that post. He could not be reached for comment Friday. Calls to a cellphone listed in his name went directly to voicemail and messages left there were not returned. San Mateo Police Chief Susan E. Manheimer announced earlier this month that her department was investigating "serious and grave allegations" related to "sexual impropriety by an officer." Manheimer said in a statement that the officer was immediately placed on indefinite leave and had his police powers suspended while the San Mateo County district attorney investigated the case. That investigation is continuing and Manheimer said the officer resigned before it was completed.

"Although the DA's criminal investigation is not yet completed, we as an organization recognize that the thought of someone committing criminal acts while wearing an SMPD uniform is deeply troubling and repulsive to this department and its members," Manheimer said in the May 12 announcement. Her statement did not identify the officer, but officials confirmed Friday that Winchester is the subject under investigation and that talks are ongoing about how to handle cases in both San Mateo and Sacramento if charges are filed.

Steve Grippi, chief deputy district attorney for Sacramento District Attorney Anne Marie Schubert, said officials in his office are investigating two allegations of sexual assault against Winchester involving his time as a Los Rios officer. "We do have two potential victims in Sacramento County and there's an ongoing investigation," Grippi said. "It does not appear as though they were students."

Los Rios spokesman Mitchel Benson confirmed that the college district's police officials have been in contact with San Mateo investigators but had no details on the case. He said Winchester worked as an officer for Los Rios from Jan. 1, 2009 through Jan. 16, 2015 and left for the San Mateo job because it offered a significant increase in pay. "Our police department has been in contact with the San Mateo DA's Office," Benson said. "All we know is what they are doing." Benson said Los Rios officials were told by the Sacramento District Attorney's Office on Friday that there were no active investigations of Winchester.

Winchester first became involved with law enforcement as an officer with the Sacramento Police Department, although his career there was short-lived. Department spokesman Sgt. Bryce Heinlein said Winchester was employed from December 2006 through October 2007, when "he was released from employment." Heinlein said he could not elaborate on why Winchester left, but said it occurred before he had completed his probation.

Winchester then moved on to the Los Rios department, where he was profiled in a November 2014 article in the American River College student newspaper, The American River Current. "I will do whatever to keep my students safe," the newspaper quoted Winchester as saying during a ride-along a student reporter took with the officer. During Winchester's time at Los Rios, Sacramento police began a sexual assault investigation of him but no charges were filed. Heinlein said that probe began in 2013 and that Los Rios officials were notified of it at the time.

A second probe of Winchester involving a sexual assault allegation also was conducted by the Sacramento Sheriff's Department. Sgt. Tony Turnbull said in an email that the probe involved a 2013 incident that was not reported to authorities until 2015, after Winchester had left Los Rios. No charges have been filed in that case, either, and both investigations remain open.

Benson said he could not discuss personnel issues involving employees, but said "there are no records of Officer Winchester being placed on leave during his tenure as a Los Rios police officer."

He added that the district investigates all complaints against employees and "would take significant and serious personnel action" if an investigation found wrongdoing.

Sam Stanton: 916-321-1091, @StantonSam

EXHIBIT "D"

Ex-California police officer charged with on-duty sexual assault of five women

Former officer Noah Winchester allegedly targeted 'vulnerable women' as young as 17 while with the San Mateo police in northern California

Sam Levin in San Francisco

Thursday 21 July 2016 19.07 EDT

A former California police officer was charged Thursday with sexually assaulting five women while on duty, including a 17-year-old girl, and prosecutors say he picked "vulnerable" targets in isolated areas.

Noah Winchester, a 31-year-old former officer with the San Mateo police department in northern California, is facing 22 felony counts of rape, sexual assault, kidnapping and other offenses stemming from five alleged attacks since 2013.

"They were all vulnerable young women," said Stephen Wagstaffe, San Mateo district attorney. "He did make his selections of victims who he thought would not come forward."

The disturbing allegations draw parallels to the case of convicted serial rapist Daniel Holtzclaw, a former Oklahoma City police officer, who was sentenced to 263 years in prison for raping and sexually assaulting eight women while on duty.

The Holtzclaw trial became a symbol of police abuse of marginalized women of color after 13 accusers, all black, testified that the policeman had assaulted them.

Winchester's arrest Thursday morning comes at a time of increasingly tense debates about policing in America, following multiple high-profile shootings by officers and the killing of five officers in Dallas, Texas, and three officers in Baton Rouge, Louisiana.

Winchester assaulted his first two victims in Sacramento, the state capital north of San Francisco, where he previously worked as an officer for a community college district, prosecutors said.

One of two alleged attacks that occurred in the summer of 2013 involved a 17-year-old victim near campus, Wagstaffe said.

"He told her to get into his car, and that's when the sexual assault occurred," the prosecutor said in a phone interview.

The three other cases happened in September and October 2015 in San Mateo, just south of San Francisco.

The five victims ranged from ages 17 to 35 and represented multiple races, Wagstaffe said. The most common thread was that the women appeared to be vulnerable or disadvantaged in some way. Some may have been homeless or "living in tough times", he added.

Winchester, who is in jail on \$3m bail and facing a possible life sentence, ^{Case 2:18-cv-00580-KJM-DB Document 147 Filed 08/29/18 Page 72 of 87} he assaulted and did not write up any incident reports on the interactions, according to Wagstaffe. The suspect was allegedly in uniform and alone in all five cases and made a range of statements to the women before he assaulted them.

The attacks happened in different locations, including a motel room and a parking lot, prosecutors alleged.

"He would take the women and move them to another area," Wagstaffe said.

Winchester, who resigned from the San Mateo department in February while the investigation was ongoing, is accused of raping three of the women, attempting to rape a fourth and sexually assaulting the fifth victim.

In multiple cases, the officer touched the women while they were "unlawfully restrained", according to a 19-page complaint.

In an incident in San Mateo, he entered an "inhabited dwelling" where he committed the assault, the charges said.

The complaint further said Winchester committed the assaults by "threatening to use the authority of a public official to incarcerate" his victims. In one assault, he directly threatened to arrest a woman, Wagstaffe said.

In one of the Sacramento assaults, the officer threatened "to commit a crime which would result in death and great bodily injury" to the victim, according to the charges. In that case, which involved "forcible oral copulation", Winchester allegedly used "force, violence, duress, menace, and fear of immediate and unlawful bodily injury to said victim and to another".

In one of the cases not classified as a rape, Winchester stopped the assault after the victim started crying, Wagstaffe said.

The first victim came forward at the end of last year, and a subsequent investigation uncovered other cases. One woman had written about the assault on Facebook, Wagstaffe said.

The prosecutor said it's possible there could be other cases, noting: "We had two in 2013 and nothing until 2015 ... That seems unusual."

The district attorney said that he hoped that if there were other victims, the charges would encourage them to come forward.

An Associated Press investigation last year also uncovered cases of roughly 1,000 officers who lost their badges in a six-year period for rape, sodomy and other sexual assaults in the US – a number that it said was "unquestionably an undercount". California did not offer records to the AP, because it has no statewide system to decertify officers for misconduct, the news agency reported.

San Mateo police said Winchester joined the department in early 2015 and that he was placed on indefinite leave after the department learned of the allegations.

"While we respect the now former officer's right to due process under the law and the presumption that he is innocent until proven guilty, we as a department cannot help but be appalled by the nature of these

allegations," the agency said in a statement. "These allegations disavowed by this department and this city." Case 2:18-cv-00580-KJM-DB Document 14-7 Filed 08/29/18 Page 73 of 97

After a local station ABC7 News published an initial report on Winchester in May, San Mateo police chief Susan Manheimer wrote an open letter, saying: "We as an organization recognize that the thought of someone committing criminal acts while wearing an SMPD uniform is deeply troubling and repulsive to this department and its members."

A student newspaper in Sacramento wrote a profile of Winchester in 2014. The officer told the reporter: "I will do whatever to keep my students safe."

It was not immediately clear if Winchester had retained a lawyer.

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EXHIBIT "E"

1 STEPHEN M. WAGSTAFFE, DISTRICT ATTORNEY
2 County of San Mateo, State of California
3 State Bar No. 78470
4 400 County Center, Third Floor
5 Redwood City, CA 94063
6 By: Alpana D. Samant, Deputy District Attorney
7 Telephone: (650) 363-4636
8 Attorney for Plaintiff

FILED
SAN MATEO COUNTY

JUL 20 2016

Clerk of the Superior Court
By *DEPUTY CLERK*

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

16 SF 008803A

10 THE PEOPLE OF THE STATE OF CALIFORNIA

11 Plaintiff,
12 REPORT NO. CR15102001
13 vs., DA CASE NO. 0733284

14 NOAH WHITE WINCHESTER
15 4949 HEARTHWOOD COURT
16 STOCKTON, CA 95206
17 Defendant.

FELONY COMPLAINT

18 I, the undersigned, say, on information and belief, that in the County of San Mateo, State of
19 California:

20 COUNT 1: PC209(b)(1) (Felony)

21 On or between October 19, 2015 and October 20, 2015, in the County of San Mateo, State of
22 California, the crime of Kidnapping To Commit Another Crime in violation of PC209(b)(1), a
23 Felony, was committed in that NOAH WHITE WINCHESTER did unlawfully kidnap and carry
24 away Sherry C. to commit rape. NOTICE: The above offense is a serious felony within the meaning
25

1 Case 2:18-cv-00580-KJM-DB Document 14-7 Filed 08/29/18 Page 76 of 97
2 of Penal Code Section 1192.7(c). NOTICE: The above offense is a violent felony within the meaning
3 of Penal Code 667.5(c).

4 COUNT 2: PC261(a)(7) (Felony)

5 On or between October 19, 2015 and October 20, 2015, in the County of San Mateo, State of
6 California, the crime of Rape By Threat To Arrest Or Deport in violation of PC261(a)(7), a Felony,
7 was committed in that NOAH WHITE WINCHESTER did unlawfully have and accomplish an act of
8 sexual intercourse with a person, to wit, Sherry C., not his/her spouse, said act being accomplished by
9 the defendant, NOAH WHITE WINCHESTER threatening to use the authority of a public official to
10 incarcerate, arrest, and deport the victim or another, and said victim reasonably believed that the
11 perpetrator was a public official. NOTICE: The above offense is a serious felony within the meaning
12 of Penal Code Section 1192.7(c). NOTICE: Conviction of this offense will require the court to
13 order you to submit to a blood test for evidence of antibodies to the probable causative agent of
14 Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section 1202.1. NOTICE: Being
15 charged with this criminal offense can result in mandatory pre-conviction HIV/AIDS testing and
16 disclosure of the results to a victim and the Chief Medical Officer of the jail or prison facility where
17 you are incarcerated pursuant to Penal Code Section 1524.1 and Health and Safety Code section
18 121055 following a probable cause hearing resulting in a court order.

19 COUNT 3: PC261(a)(7) (Felony)

20 On or between October 19, 2015 and October 20, 2015, in the County of San Mateo, State of
21 California, the crime of Rape By Threat To Arrest Or Deport in violation of PC261(a)(7), a Felony,
22 was committed in that NOAH WHITE WINCHESTER did unlawfully have and accomplish an act of
23 sexual intercourse with a person, to wit, Sherry C., not his/her spouse, said act being accomplished by
24 the defendant, NOAH WHITE WINCHESTER threatening to use the authority of a public official to
25 incarcerate, arrest, and deport the victim or another, and said victim reasonably believed that the

1 perpetrator was a public official. NOTICE: The above offense is a serious felony within the meaning
2 of Penal Code Section 1192.7(c). NOTICE: Conviction of this offense will require the court to
3 order you to submit to a blood test for evidence of antibodies to the probable causative agent of
4 Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section 1202.1. NOTICE: Being
5 charged with this criminal offense can result in mandatory pre-conviction HIV/AIDS testing and
6 disclosure of the results to a victim and the Chief Medical Officer of the jail or prison facility where
7 you are incarcerated pursuant to Penal Code Section 1524.1 and Health and Safety Code section
8 121055 following a probable cause hearing resulting in a court order.

9 COUNT 4: PC460(a) (Felony)

10 On or about September 22, 2015, in the County of San Mateo, State of California, the crime of First
11 Degree Burglary, Person Present in violation of PC460(a), a Felony, was committed in that NOAH
12 WHITE WINCHESTER did enter an inhabited dwelling house and trailer coach and inhabited
13 portion of a building occupied by Alicia A., with the intent to commit larceny and any felony.
14 NOTICE: The above offense is a serious felony within the meaning of Penal Code Section
15 1192.7(c). It is further alleged that the above offense is a violation of Penal Code Section
16 462(a). It is further alleged that the above offense is a violent felony within the meaning of Penal
17 Code 667.5(c) in that another person, other than an accomplice, was present in the residence during
18 the commission of the above offense.

19 COUNT 5: PC664/PC261(a)(7) (Felony)

20
21 On or about September 22, 2015, in the County of San Mateo, State of California, the crime of
22 Attempted Rape By Threat To Arrest Or Detain in violation of PC664/PC261(a)(7), a Felony, was
23 committed in that NOAH WHITE WINCHESTER did unlawfully attempt have and accomplish an
24

1 act of sexual intercourse with a person, to wit, Alicia A., not his/her spouse, said act being
2 accomplished by the defendant, NOAH WHITE WINCHESTER threatening to use the authority of a
3 public official to incarcerate, arrest, and deport the victim or another, and said victim reasonably
4 believed that the perpetrator was a public official. NOTICE: The above offense is a serious felony.
5 within the meaning of Penal Code Section 1192.7(c). NOTICE: Conviction of this offense will
6 require the court to order you to submit to a blood test for evidence of antibodies to the probable
7 causative agent of Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section 1202.1.
8 NOTICE: Being charged with this criminal offense can result in mandatory pre-conviction
9 HIV/AIDS testing and disclosure of the results to a victim and the Chief Medical Officer of the jail or
10 prison facility where you are incarcerated pursuant to Penal Code Section 1524.1 and Health and
11 Safety Code section 121055 following a probable cause hearing resulting in a court order.

12 COUNT 6: PC243.4(a) (Felony)

13 On or about September 15, 2015, in the County of San Mateo, State of California, the crime of
14 Sexual Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH
15 WHITE WINCHESTER did willfully and unlawfully touch an intimate part of Danielle M., to wit:
16 vagina, while said person was unlawfully restrained by said defendant, NOAH WHITE
17 WINCHESTER, and an accomplice, against the will of said person and for the purpose of sexual
18 arousal, sexual gratification, and sexual abuse. NOTICE: Conviction of this offense will require you
19 to register pursuant to Penal Code section 290. Willful failure to register is a crime.

20 COUNT 7: PC243.4(a) (Felony),

21 On or about September 15, 2015, in the County of San Mateo, State of California, the crime of
22 Sexual Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH
23 WHITE WINCHESTER did willfully and unlawfully touch an intimate part of Danielle M., to wit:
24 breasts, while said person was unlawfully restrained by said defendant, NOAH WHITE

1 WINCHESTER, and an accomplice, against the will of said person and for the purpose of sexual
2 arousal, sexual gratification, and sexual abuse. NOTICE: Conviction of this offense will require you
3 to register pursuant to Penal Code section 290. Willful failure to register is a crime.

4 COUNT 8: PC243.4(a) (Felony)

5 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of Sexual
6 Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH WHITE
7 WINCHESTER did willfully and unlawfully touch an intimate part of Ashajane R., to wit: breasts,
8 while said person was unlawfully restrained by said defendant, NOAH WHITE WINCHESTER, and
9 an accomplice, against the will of said person and for the purpose of sexual arousal, sexual
10 gratification, and sexual abuse. NOTICE: Conviction of this offense will require you to register
11 pursuant to Penal Code section 290. Willful failure to register is a crime.

12

13 ENHANCEMENT 1

14 PC784.7(a): Offenses Committed in More Than One Jurisdiction

15 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
16 Penal Code section 784.7(a).

17 COUNT 9: PC243.4(a) (Felony)

18 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of Sexual
19 Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH WHITE
20 WINCHESTER did willfully and unlawfully touch an intimate part of Ashajane R., to wit: vagina,
21 while said person was unlawfully restrained by said defendant, NOAH WHITE WINCHESTER, and
22 an accomplice, against the will of said person and for the purpose of sexual arousal, sexual
23 gratification, and sexual abuse. NOTICE: Conviction of this offense will require you to register
24 pursuant to Penal Code section 290. Willful failure to register is a crime.

25

1
2 ENHANCEMENT 1
3

4
5 PC784.7(a): Offenses Committed in More Than One Jurisdiction
6

7 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
8 Penal Code section 784.7(a).
9

10 COUNT 10: PC289(g) (Felony)
11

12 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of Sexual
13 Penetration by Threat of Use of Authority in violation of PC289(g), a Felony, was committed in that
14 NOAH WHITE WINCHESTER did unlawfully commit an act of sexual penetration, to wit:
15 finger into anus, upon Ashajane R. against her will by threatening to use the authority of a public
16 official to incarcerate, arrest and deport someone and said Ashajane R. had a reasonable belief that
17 the defendant was a public official.
18

19 NOTICE: Conviction of this offense will require the court to order you to submit to a blood test for
20 evidence of antibodies to the probable causative agent of Acquired Immune Deficiency Syndrome
21 (AIDS). Penal Code Section 1202.1.
22

23 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290.
24 Willful failure to register is a crime.
25

26 NOTICE: Being charged with this criminal offense can result in mandatory pre-conviction
27 HIV/AIDS testing and disclosure of the results to a victim and the Chief Medical Officer of the jail or
28 prison facility where you are incarcerated pursuant to Penal Code Section 1524.1 and Health and
29 Safety Code section 121055 following a probable cause hearing resulting in a court order.
30

31 ENHANCEMENT 1
32

33 PC784.7(a): Offenses Committed in More Than One Jurisdiction
34

1 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
2 Penal Code section 784.7(a).

3 COUNT 11: PC209(b)(1) (Felony)

4 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of
5 Kidnapping To Commit Another Crime in violation of PC209(b)(1), a Felony, was committed in that
6 NOAH WHITE WINCHESTER did unlawfully kidnap and carry away Ashajanee R. to commit a
7 violation of 289. NOTICE: The above offense is a serious felony within the meaning of Penal Code
8 Section 1192.7(c). NOTICE: The above offense is a violent felony within the meaning of Penal Code
9 667.5(c).

10

11 ENHANCEMENT 1

12 PC784.7(a); Offenses Committed in More Than One Jurisdiction

13 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
14 Penal Code section 784.7(a).

15 COUNT 12: PC243.4(a) (Felony)

16 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of Sexual
17 Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH WHITE
18 WINCHESTER did willfully and unlawfully touch an intimate part of Ashajanee R., to wit: breasts,
19 while said person was unlawfully restrained by said defendant, NOAH WHITE WINCHESTER, and
20 an accomplice, against the will of said person and for the purpose of sexual arousal, sexual
21 gratification, and sexual abuse. NOTICE: Conviction of this offense will require you to register
22 pursuant to Penal Code section 290. Willful failure to register is a crime.

23

24 ENHANCEMENT 1

1 PC784.7(a): Offenses Committed in More Than One Jurisdiction

2 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
3 Penal Code section 784.7(a).

4 COUNT 13: PC243.4(a) (Felony)

5 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Sexual
6 Battery By Restraint in violation of PC243.4(a), a Felony, was committed in that NOAH WHITE
7 WINCHESTER did willfully and unlawfully touch an intimate part of Ashajane R., to wit:
8 vagina, while said person was unlawfully restrained by said defendant, NOAH WHITE
9 WINCHESTER, and an accomplice, against the will of said person and for the purpose of sexual
10 arousal, sexual gratification, and sexual abuse. NOTICE: Conviction of this offense will require you
11 to register pursuant to Penal Code section 290. Willful failure to register is a crime.

12
13 ENHANCEMENT 1

14 PC784.7(a): Offenses Committed in More Than One Jurisdiction

15 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
16 Penal Code section 784.7(a).

17 COUNT 14: PC289(g) (Felony)

18 On or about August 30, 2013, in the County of Sacramento, State of California, the crime of Sexual
19 Penetration by Threat of Use of Authority in violation of PC289(g), a Felony, was committed in that
20 NOAH WHITE WINCHESTER did unlawfully commit an act of sexual penetration, to wit:
21 finger into anus, upon Ashajane R. against his/her will by threatening to use the authority of a public
22 official to incarcerate, arrest and deport someone and said Ashajane R. had a reasonable belief that
23 the defendant was a public official.

1 NOTICE: Conviction of this offense will require the court to order you to submit to a blood test for
2 evidence of antibodies to the probable causative agent of Acquired Immune Deficiency Syndrome
3 (AIDS). Penal Code Section 1202.1.

4 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290.
5 Willful failure to register is a crime.

6 NOTICE: Being charged with this criminal offense can result in mandatory pre-conviction
7 HIV/AIDS testing and disclosure of the results to a victim and the Chief Medical Officer of the jail or
8 prison facility where you are incarcerated pursuant to Penal Code Section 1524.1 and Health and
9 Safety Code section 121055 following a probable cause hearing resulting in a court order.

10
11 ENHANCEMENT 1

12 PC784.7(a): Offenses Committed in More Than One Jurisdiction

13 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
14 Penal Code section 784.7(a).

15 COUNT 15: PC209(b)(1) (Felony)

16 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Kidnapping
17 To Commit Another Crime in violation of PC209(b)(1), a Felony, was committed in that NOAH
18 WHITE WINCHESTER did unlawfully kidnap and carry away Destiny M. to commit rape.

19 NOTICE: The above offense is a serious felony within the meaning of Penal Code Section 1192.7(c).

20 NOTICE: The above offense is a violent felony within the meaning of Penal Code 667.5(c).

21
22 ENHANCEMENT 1

23 PC784.7(a): Offenses Committed in More Than One Jurisdiction

1 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
2 Penal Code section 784.7(a).

3 COUNT 16: PC422(a) (Felony)

4 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Criminal
5 Threats in violation of PC422(a), a Felony, was committed in that NOAH WHITE WINCHESTER
6 did willfully and unlawfully threaten to commit a crime which would result in death and great bodily
7 injury to Destiny M., with the specific intent that the statement be taken as a threat. It is further
8 alleged that the threatened crime, on its face and under the circumstances in which it was made, was
9 so unequivocal, unconditional, immediate and specific as to convey to Destiny M. a gravity of
10 purpose and an immediate prospect of execution. It is further alleged that the said Destiny M. was
11 reasonably in sustained fear of his/her safety and the safety of his/her immediate family. NOTICE:
12 The above offense is a serious felony within the meaning of Penal Code Section 1192.7(c).

13

14 ENHANCEMENT 1

15 PC784.7(a): Offenses Committed in More Than One Jurisdiction

16 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
17 Penal Code section 784.7(a).

18

19 ENHANCEMENT 2

20 PC667.61(b)/(B): Special Allegation-Sex Crimes - Aggravated Circumstances

21 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
22 NOAH WHITE WINCHESTER, as to Count 16 that the following circumstances apply: Defendant
23 committed the present offense during the commission of a burglary in violation of Penal Code
24 Section 459.

25

1 COUNT 17: PC288A(c)(2)(A) (Felony)

2 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Forceful Oral
3 Copulation in violation of PC288A(c)(2)(A), a Felony, was committed in that NOAH WHITE
4 WINCHESTER did unlawfully participate in an act of oral copulation with Destiny M. and did
5 accomplish said act against said victim's will by force, violence, duress, menace, and fear of
6 immediate and unlawful bodily injury to said victim and to another. NOTICE: Conviction of this
7 offense will require the court to order you to submit to a blood test for evidence of antibodies to the
8 probable causative agent of Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section
9 1202.1. NOTICE: Conviction of this offense will require you to register pursuant to Penal Code
10 section 290. Willful failure to register is a crime. NOTICE: Adjudication as a ward of the court for
11 this offense and a disposition to the California Youth Authority will require you to provide specimens
12 and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and
13 samples is a crime. NOTICE: The above offense is a serious felony within the meaning of Penal
14 Code Section 1192.7(c) and a violent felony within the meaning of Penal Code Section 667.5(c)

15

16 ENHANCEMENT 1

17 PC784.7(a): Offenses Committed in More Than One Jurisdiction

18 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
19 Penal Code section 784.7(a).

20

21 ENHANCEMENT 2

22 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances

23 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
24 NOAH WHITE WINCHESTER, as to Count 17 that the following circumstances apply: Defendant
25

1 Case 2:18-cv-00580-KJM-DB Document 14-7 Filed 08/29/18 Page 86 of 97
2 committed the present offense during the commission of a burglary in violation of Penal Code
3 Section 459.

4 ENHANCEMENT 3

5 PC667.61(a): Special Allegation-Sex Crimes - Aggravated Circumstances

6 It is further alleged, within the meaning of Penal Code sections 667.61(a), as to defendant, NOAH
7 WHITE WINCHESTER, as to Count 17 that the following circumstances apply: Defendant
8 kidnapped the victim of the present offense and the movement of the victim substantially increased
9 the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying
10 offense.

11 COUNT 18: PC288A(k) (Felony)

12 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Oral
13 Copulation Under Color Of Authority in violation of PC288A(k), a Felony, was committed in that
14 NOAH WHITE WINCHESTER did unlawfully commit an act of oral copulation upon Destiny M.
15 against his/her will by threatening to use the authority of a public official to incarcerate, arrest and
16 deport someone and said Destiny M. had a reasonable belief that the defendant, NOAH WHITE
17 WINCHESTER was a public official. NOTICE: Conviction of this offense will require the court to
18 order you to submit to a blood test for evidence of antibodies to the probable causative agent of
19 Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section 1202.1. NOTICE: Conviction
20 of this offense will require you to register pursuant to Penal Code section 290. Willful failure to
21 register is a crime. NOTICE: Being charged with this criminal offense can result in mandatory pre-
22 conviction HIV/AIDS testing and disclosure of the results to a victim and the Chief Medical Officer
23 of the jail or prison facility where you are incarcerated pursuant to Penal Code Section 1524.1 and
24 Health and Safety Code section 121055 following a probable cause hearing resulting in a court order.

1
2 ENHANCEMENT 1
3

4 PC784.7(a): Offenses Committed in More Than One Jurisdiction
5

6 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
7

8 Penal Code section 784.7(a).
9

10 ENHANCEMENT 2
11

12 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances
13

14 It is further alleged, within the meaning of Penal Code section 667.61(b)and (e), as to defendant,
15 NOAH WHITE WINCHESTER, as to Count 18 that the following circumstances apply: Defendant
16 committed the present offense during the commission of a burglary in violation of Penal Code
17 Section 459.
18

19 COUNT 19: PC261(a)(2) (Felony)
20

21 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Forcible
22 Rape in violation of PC261(a)(2), a Felony, was committed in that NOAH WHITE WINCHESTER
23 did unlawfully have and accomplish an act of sexual intercourse with a person, to wit, Destiny M.,
24 not his/her spouse, against said person's will, by means of force, violence, duress, menace and fear of
25 immediate and unlawful bodily injury on said person and another. NOTICE: Conviction of this
offense will require the court to order you to submit to a blood test for evidence of antibodies to the
probable causative agent of Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section
1202.1. NOTICE is hereby given that adjudication as a ward of the Court for this offense and a
disposition to the California Youth Authority will require you to register pursuant to Section 290 of
the Penal Code. Willful failure to register is a felony. NOTICE: Conviction of this offense will
require you to register pursuant to Penal Code section 290. Willful failure to register is a crime.
13
25

1 NOTICE: Adjudication as a ward of the court for this offense and a disposition to the California
2 Youth Authority will require you to provide specimens and samples pursuant to Penal Code section
3 296. Willful refusal to provide the specimens and samples is a crime. NOTICE: The above offense is
4 a serious felony within the meaning of Penal Code Section 1192.7(c) and a violent felony within the
5 meaning of Penal Code Section 667.5(c)

6
7 ENHANCEMENT 1

8 PC784.7(a): Offenses Committed in More Than One Jurisdiction

9 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
10 Penal Code section 784.7(a).

11
12 ENHANCEMENT 2

13 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances

14 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
15 NOAH WHITE WINCHESTER, as to Count 19 that the following circumstances apply: Defendant
16 committed the present offense during the commission of a burglary in violation of Penal Code
17 Section 459.

18
19 ENHANCEMENT 3

20 PC667.61(a): Special Allegation-Sex Crimes - Aggravated Circumstances

21 It is further alleged, within the meaning of Penal Code sections 667.61(a), as to defendant, NOAH
22 WHITE WINCHESTER, as to Count 19 that the following circumstances apply: Defendant
23 kidnapped the victim of the present offense and the movement of the victim substantially increased

1 the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying
2 offense.

3 COUNT 20: PC261(a)(7) (Felony)

4 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Rape By
5 Threat To Arrest Or Deport in violation of PC261(a)(7), a Felony, was committed in that NOAH
6 WHITE WINCHESTER did unlawfully have and accomplish an act of sexual intercourse with a
7 person, to wit, Destiny M., not his/her spouse, said act being accomplished by the defendant, NOAH
8 WHITE WINCHESTER threatening to use the authority of a public official to incarcerate, arrest, and
9 deport the victim or another, and said victim reasonably believed that the perpetrator was a public
10 official. NOTICE: The above offense is a serious felony within the meaning of Penal Code Section
11 1192.7(c). NOTICE: Conviction of this offense will require the court to order you to submit to a
12 blood test for evidence of antibodies to the probable causative agent of Acquired Immune Deficiency
13 Syndrome (AIDS). Penal Code Section 1202.1. NOTICE: Being charged with this criminal offense
14 can result in mandatory pre-conviction HIV/AIDS testing and disclosure of the results to a victim and
15 the Chief Medical Officer of the jail or prison facility where you are incarcerated pursuant to Penal
16 Code Section 1524.1 and Health and Safety Code section 121055 following a probable cause hearing
17 resulting in a court order.

18
19 ENHANCEMENT 1

20 PC784.7(a); Offenses Committed in More Than One Jurisdiction

21 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
22 Penal Code section 784.7(a).

23
24 ENHANCEMENT 2

1 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances

2 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
3 NOAH WHITE WINCHESTER, as to Count 20 that the following circumstances apply: Defendant
4 committed the present offense during the commission of a burglary in violation of Penal Code
5 Section 459.

6 COUNT 21: PC288A(c)(2)(A) (Felony)

7 On or about July 2, 2013, in the County of San Mateo, State of California, the crime of Forcible Oral
8 Copulation in violation of PC288A(c)(2)(A), a Felony, was committed in that NOAH WHITE
9 WINCHESTER did unlawfully participate in an act of oral copulation with Destiny M. and did
10 accomplish said act against said victim's will by force, violence, duress, menace, and fear of
11 immediate and unlawful bodily injury to said victim and to another. NOTICE: Conviction of this
12 offense will require the court to order you to submit to a blood test for evidence of antibodies to the
13 probable causative agent of Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section
14 1202.1. NOTICE: Conviction of this offense will require you to register pursuant to Penal Code
15 section 290. Willful failure to register is a crime. NOTICE: Adjudication as a ward of the court for
16 this offense and a disposition to the California Youth Authority will require you to provide specimens
17 and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and
18 samples is a crime. NOTICE: The above offense is a serious felony within the meaning of Penal
19 Code Section 1192.7(c) and a violent felony within the meaning of Penal Code Section 667.5(c)

20

21 ENHANCEMENT 1

22 PC784.7(a): Offenses Committed in More Than One Jurisdiction

23 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
24 Penal Code section 784.7(a).

1
2 ENHANCEMENT 2
3

4 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances
5

6 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
7 NOAH WHITE WINCHESTER, as to Count 21 that the following circumstances apply: Defendant
8 committed the present offense during the commission of a burglary in violation of Penal Code
9 Section 459.

10
11 ENHANCEMENT 3
12

13 PC667.61(a): Special Allegation-Sex Crimes - Aggravated Circumstances
14

15 It is further alleged, within the meaning of Penal Code sections 667.61(a), as to defendant, NOAH
16 WHITE WINCHESTER, as to Count 21 that the following circumstances apply: Defendant
17 kidnapped the victim of the present offense and the movement of the victim substantially increased
18 the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying
19 offense.

20 COUNT 22: PC288A(k) (Felony)

21 On or about July 2, 2013, in the County of Sacramento, State of California, the crime of Oral
22 Copulation Under Color Of Authority in violation of PC288A(k), a Felony, was committed in that
23 NOAH WHITE WINCHESTER did unlawfully commit an act of oral copulation upon Destiny M.
24 against his/her will by threatening to use the authority of a public official to incarcerate, arrest and
25 deport someone and said Destiny M. had a reasonable belief that the defendant, NOAH WHITE
WINCHESTER was a public official. NOTICE: Conviction of this offense will require the court to
order you to submit to a blood test for evidence of antibodies to the probable causative agent of
Acquired Immune Deficiency Syndrome (AIDS). Penal Code Section 1202.1. NOTICE: Conviction

1 Case 2:18-cv-00580-KJM-DB Document 14-7 Filed 08/29/18 Page 92 of 97
2 of this offense will require you to register pursuant to Penal Code section 290. Willful failure to
3 register is a crime. NOTICE: Being charged with this criminal offense can result in mandatory pre-
4 conviction HIV/AIDS testing and disclosure of the results to a victim and the Chief Medical Officer
5 of the jail or prison facility where you are incarcerated pursuant to Penal Code Section 1524.1 and
6 Health and Safety Code section 121055 following a probable cause hearing resulting in a court order.

7 ENHANCEMENT 1

8 PC784.7(a): Offenses Committed in More Than One Jurisdiction

9 It is further alleged that San Mateo County has jurisdiction in the above count pursuant to
10 Penal Code section 784.7(a).

11 ENHANCEMENT 2

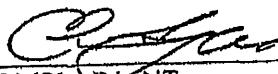
12 PC667.61(b)/(E): Special Allegation-Sex Crimes - Aggravated Circumstances

13 It is further alleged, within the meaning of Penal Code section 667.61(b) and (e), as to defendant,
14 NOAH WHITE WINCHESTER, as to Count 22 that the following circumstances apply: Defendant
15 committed the present offense during the commission of a burglary in violation of Penal Code
16 Section 459.

17 Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that
18 defendant(s) and his or her attorney provide to the People the discovery required by Penal Code
19 Section 1054.3. This is a continuing request pursuant to the provisions of Penal Code Section 1054.7.

20 I declare under penalty of perjury that the foregoing is true and correct except for those things
21 stated on information and belief and those I believe to be true.

22 Executed on July 13, 2016, at San Mateo County, California.


Complainant

ADS/ads

EXHIBIT "F"

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:
ALLISON DUNHAM DDA

JOSEPH FARINA CAC

VS. Case No.: 12F05779

TONY KHONG,
Defendant.

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

BY: C. LEWIS, Alles
Deputy Clerk

Page 1 of 2

21-5779JTDAY8

: 00275

DEPARTMENT: 37

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

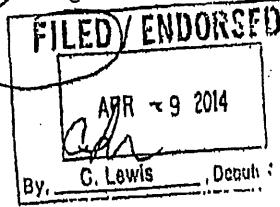
BY: C. LEWIS,
Deputy Clerk

Page 2 of 2

21-5779JTDAY8

00276

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

Change

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

No longer need official Winchester's
testimony. - D. S.

Dated: 4/9/14

#4

Seat Number of Foreperson

Time Received 1628

not
689

CRIMXTRA

00277

FILED

MAR 16 2018

Page 2

AO 241
(Rev. 01/15)CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEPUTY CLERK

PETITION UNDER 28 U.S.C. § 2241 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Eastern District California	
Name (under which you were convicted): Tony Khong CDC# G32579	Docket or Case No.:	
Place of Confinement: Pleasant Valley State Prison Coalinga, CA 93210	Prisoner No.:	G32579
Petitioner (include the name under which you were convicted) Tony Khong	Respondent (authorized person having custody of petitioner) v. Scott Frauenheim	
The Attorney General of the State of:		

2:18CV0580 DB(HC)

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Superior Court of Sacramento County720 Ninth St.Sacramento, CA 95814(b) Criminal docket or case number (if you know): 12F05779

2. (a) Date of the judgment of conviction (if you know): 4/10/2014

(b) Date of sentencing: 5/16/2014

3. Length of sentence: 20 Yrs.

4. In this case, were you convicted on more than one count or of more than one crime? Yes No

5. Identify all crimes of which you were convicted and sentenced in this case: PC 266h(b)(2), pimping
a minor under 16; PC 266i(b)(2), pandering a minor under 16,
PC 236.1(c)(1), Human trafficking of a minor. A strike prior also.

6. (a) What was your plea? (Check one)

<input checked="" type="checkbox"/> (1)	Not guilty	<input type="checkbox"/> (3)	Nolo contendere (no contest)
<input type="checkbox"/> (2)	Guilty	<input type="checkbox"/> (4)	Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeal Third district

(b) Docket or case number (if you know): C076416

(c) Result: Denied

(d) Date of result (if you know): 6/18/16

(e) Citation to the case (if you know): _____

(f) Grounds raised: Prosecutorial misconduct

I.A.C.

Abuse of descretion by trial court

(g) Did you seek further review by a higher state court? Yes No

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Sacramento Superior Court

(2) Docket or case number (if you know): 17HC 00140

(3) Date of filing (if you know): 4/4/17

(4) Nature of the proceeding: Petition for Writ of Habeas Corpus

(5) Grounds raised: Brady Violation

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Court of Appeal Third District
(2) Docket or case number (if you know): CO85202
(3) Date of filing (if you know): 8/01/17
(4) Nature of the proceeding: Petition for Writ of Habeas Corpus
(5) Grounds raised: Brady Violation

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: Denied
(8) Date of result (if you know): 10/05/17

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: California Supreme Court
(2) Docket or case number (if you know): S245717
(3) Date of filing (if you know): _____
(4) Nature of the proceeding: Petition for Writ of Habeas Corpus
(5) Grounds raised: Brady Violation

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: Denied

(8) Date of result (if you know): 2/14/18

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Exhausted all claims in state courts

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Brady Violation

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

Prosecution with held information about one of their witness's being under investigation for rape, who was also a police officer. He was the arresting officer in the case and testified.
See (Exhibit A) p.g. 2

(b) If you did not exhaust your state remedies on Ground One, explain why: Exhausted all claims in State courts.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Newly discovered evidence by petitioner after appeal was exhausted.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Writ of Habeas Corpus

Name and location of the court where the motion or petition was filed: Sacramento superior

Court, Sacramento CA

Docket or case number (if you know): 17HC00140

Date of the court's decision: 6/1/17

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal Third District

Docket or case number (if you know): CQ85202

Date of the court's decision: 10/05/17

Result (attach a copy of the court's opinion or order, if available): Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

GROUND TWO:

N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) **Direct Appeal of Ground Two:**

- (1) If you appealed from the judgment of conviction, did you raise this issue? Yes No
(2) If you did not raise this issue in your direct appeal, explain why: N/A
- _____

(d) **Post-Conviction Proceedings:**

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

ER1322

Result (attach a copy of the court's opinion or order, if available): **N/A**

N/A

(3) Did you receive a hearing on your motion or petition? Yes No

Yes

∴ No

(4) Did you appeal from the denial of your motion or petition? Yes No

Yes

■ No.

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

Yes

1 No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : **N/A**

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why: N/A

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Exhausted all claims in state courts

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Joseph Farina

(b) At arraignment and plea: Same

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: James Warden

(f) In any post-conviction proceeding: Petition for Writ of Habeas Corpus

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Newly discovered evidence by petitioner after exhaustion of appeal.

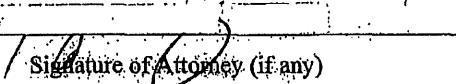
* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

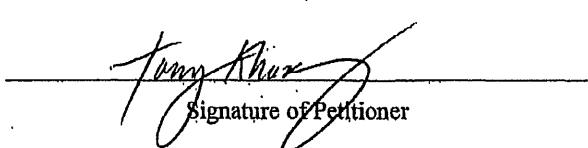
Therefore, petitioner asks that the Court grant the following relief: Grant Habeas, remand, reverse and any other proper relief that this Honorable court sees fit.

or any other relief to which petitioner may be entitled.


Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 3/12/18 (month, date, year).

Executed (signed) on 3/12/18 (date).


Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

EXHIBIT "A"



SERIAL RAPIST COP ARRESTED FOR RAPING, KIDNAPPING 5 WOMEN ON DUTY



<http://www.nwst.us/serial-rapist-cop-arrested-for-raping-kidnapping-5-women-on-duty>

1/5

Authorities: 2 investigations pending in Sacramento of Noah Winchester while an officer with Los By Sam Stanton

sstanton@sacbee.com

A former Sacramento-area police officer is under investigation for a series of alleged sexual assaults while on duty in Sacramento and San Mateo counties in recent years, officials confirmed Friday.

No charges have been filed, but authorities confirmed they are investigating allegations against Noah W. Winchester, who has served as an officer with the Sacramento Police Department, the Los Rios Community College District police and most recently, the San Mateo Police Department. The allegations against Winchester involve his time as an officer at Los Rios and with the San Mateo Department officials said and the investigations are currently underway.

Winchester was placed on leave in October from the San Mateo Police Department and subsequently resigned from that post. He could not be reached for comment Friday. Calls to a cellphone listed in his name went directly to voicemail and messages left there were not returned. San Mateo Police Chief Susan E. Manheimer announced earlier this month that her department was investigating "serious and grave allegations" related to "sexual impropriety by an officer." Manheimer said in a statement that the officer was immediately placed on indefinite leave and had his police powers suspended while the San Mateo County district attorney investigated the case. That investigation is continuing and Manheimer said the officer resigned before it was completed.

"Although the DA's criminal investigation is not yet completed, we as an organization recognize that the thought of someone committing criminal acts while wearing an SMPD uniform is deeply troubling and repulsive to this department and its members," Manheimer said in the May 12 announcement. Her statement did not identify the officer, but officials confirmed Friday that Winchester is the subject under investigation and that talks are ongoing about how to handle cases in both San Mateo and Sacramento if charges are filed.

Steve Grippi, chief deputy district attorney for Sacramento District Attorney Anne Marie Schubert, said officials in his office are investigating two allegations of sexual assault against Winchester involving his time as a Los Rios officer. "We do have two potential victims in Sacramento County and there's an ongoing investigation," Grippi said. "It does not appear as though they were students."

Los Rios spokesman Mitchel Benson confirmed that the college district's police officials have been in contact with San Mateo investigators but had no details on the case. He said Winchester worked as an officer for Los Rios from Jan. 1, 2009 through Jan. 16, 2015 and left for the San Mateo job because it offered a significant increase in pay. "Our police department has been in contact with the San Mateo DA's Office," Benson said. "All we know is what they are doing." Benson said Los Rios officials were told by the Sacramento District Attorney's Office on Friday that there were no active investigations of Winchester.

Winchester first became involved with law enforcement as an officer with the Sacramento Police Department, although his career there was short-lived. Department spokesman Sgt. Bryce Heinlein said Winchester was employed from December 2006 through October 2007, when "he was released from employment." Heinlein said he could not elaborate on why Winchester left, but said it occurred before he had completed his probation.

Winchester then moved on to the Los Rios department, where he was profiled in a November 2014 article in the American River College student newspaper, The American River Current. "I will do whatever to keep my students safe," the newspaper quoted Winchester as saying during a ride-along a student reporter took with the officer. During Winchester's time at Los Rios, Sacramento police began a sexual assault investigation of him but no charges were filed. Heinlein said that probe began in 2013 and that Los Rios officials were notified of it at the time.

A second probe of Winchester involving a sexual assault allegation also was conducted by the Sacramento Sheriff's Department. Sgt. Tony Turnbull said in an email that the probe involved a 2013 incident that was not reported to authorities until 2015, after Winchester had left Los Rios. No charges have been filed in that case, either, and both investigations remain open.

Benson said he could not discuss personnel issues involving employees, but said "there are no records of Officer Winchester being placed on leave during his tenure as a Los Rios police officer."

He added that the district investigates all complaints against employees and "would take significant and serious personnel action" if an investigation found wrongdoing.

Sam Stanton: 916-321-1091, @StantonSam

PROOF OF SERVICE BY MAIL
BY PERSON IN PRIVATE CUSTODY

(Fed. R. Civ. P. 5; 28 U.S.C. § 1746)

I, Tony Khong, declare: I am over 18 years of age and a party to this action. I am a resident of Pleasant Valley State Prison (P.V.S.P.), in the city of Coalinga, in the state of California. My prison address is: Tony Khong,
G32579, P.O. Box 8500, Coalinga, CA 93210.

on 3/12/2010, I served the attached, Petition For

Federal Habeas Corpus

on the parties herein by placing true and correct copies thereof, enclosed in an envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named prison in which I am presently confined. The envelope(s) was/were addressed as follows:

Clerk of the Court

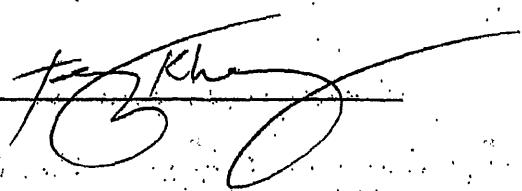
United State District of California

Eastern District of California

501 "I" Street

Sacramento, Ca 95814

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 3/12/2010, Signed: 

(FULL NAME, IN PRO PER/PRO SE)

1 XAVIER BECERRA, State Bar No. 118517
2 Attorney General of California
3 TAMI M. KRENZIN, State Bar No. 183925
4 Supervising Deputy Attorney General
5 BRIAN R. MEANS, State Bar No. 158368
6 Deputy Attorney General
7 1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7742
Fax: (916) 324-2960
E-mail: Brian.Means@doj.ca.gov
Attorneys for Respondent

20 Pursuant to the order of this Court, Respondent, Scott Frauenheim, Warden, answers the
21 petition for writ of habeas corpus as follows:

I.

23 Petitioner Tony Khong is lawfully confined by Respondent pursuant to a valid judgment of
24 the Superior Court of the State of California, County of Sacramento, Case No. 12F05779.

II.

26 Petitioner was convicted of two counts of pimping a minor under 16 years of age (Cal.
27 Penal Code § 266h(b)(2) (counts one & two)), one count of pandering a minor under 16 years of
28 age (Cal. Penal Code § 266i(b)(2) (count four)), and two counts of human trafficking a minor.

1 (Cal. Penal Code § 236.1(c)(1) (counts seven & eight)). The trial court sentenced Petitioner to an
2 aggregate determinate term of 20 years.

3 III.

4 Petitioner appealed his conviction to the California Court of Appeal, Third Appellate
5 District. (Lod. Docs. 1-2.) The Court of Appeal issued its decision on June 8, 2016, modifying the
6 judgment to: (1) impose upper term sentences of eight years on counts one and two, pimping a
7 minor under 16 years of age (Cal. Penal Code § 266h(b)(2)), and staying execution of those
8 sentences pursuant to California Penal Code § 654; and (2) imposing an upper term of eight years
9 on count four, pandering a minor under 16 years of age (Cal. Pen. Code § 266i(b)(2)), and staying
10 execution of that sentence pursuant to California Penal Code § 654. As so modified, the judgment
11 was affirmed. (Ex. 1.) Petitioner did not seek review in the California Supreme Court.

12 IV.

13 On April 10, 2017, Petitioner filed a petition for writ of habeas corpus in the California
14 Superior Court. (Lod. Doc. 3.) The petition was denied on the merits in a reasoned decision on
15 June 6, 2017. (Ex. 2.)

16 V.

17 On July 28, 2017, Petitioner filed a petition for writ of habeas corpus with the California
18 Court of Appeal. (Lod. Doc. 4.) Respondent filed an Informal Response on September 15, 2017.
19 (Lod. Doc. 5.) Petitioner filed a reply brief on October 2, 2017. (Lod. Doc. 6.) The petition was
20 summarily denied on October 5, 2017. (Ex. 3.)

21 VI.

22 Petitioner filed a petition for writ of habeas corpus with the California Supreme Court on
23 November 29, 2017. (Lod. Doc. 7.) On February 14, 2018, the petition was denied with a citation
24 to *People v. Duvall*, 9 Cal. 4th 464, 474 (1995) (petition for writ of habeas corpus must include
25 copies of reasonably available documentary evidence). (Ex. 4.)

26 VII.

27 Respondent alleges that Petitioner is not entitled to relief on the merits of his federal claim.
28

IX.

The relevant state court record consists of the following (in addition to the lodged pleadings):

4 | Reporter's Transcripts:

5 || Vol. 1 of 3 (pages 1-300);

6 Vol. 2 of 3 (pages 301-600);

7 Vol. 3 of 3 (pages 601-826).

8 Clerk's Transcript on Appeal

9 || Vol. 1 of 2 (pages 1-300);

10 Vol. 2 of 2 (pages 301-427).

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

STATEMENT OF FACTS

The California Court of Appeal's factual summary is set forth below.

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.

Having run away from home, S.T. moved around to "[l]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.

1 At the motel, a man would be waiting out front. They would follow the man to
2 a motel room. Once in the room, they would not discuss with the man how much
3 certain acts would cost. Instead, they would "just automatically do it," meaning either
4 vaginal or anal intercourse. Sometimes S.T. and C.T. would go together, and other
5 times they would go individually. When they went together, one of them would have
6 intercourse with a customer while the other waited outside. S.T. would use condoms
7 provided by defendant, Tyrone, or Stephen. After engaging in intercourse with S.T.,
8 the man would give money either to S.T. or to defendant. Defendant would be
9 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.

10 During this period of time, S.T. was staying at defendant's house and Tyrone's
11 house. When she stayed at defendant's house, she stayed in his room with him. S.T.
12 testified that defendant's bedroom was on the ground floor, "[r]ight next to" the
13 garage. They entered the home through the garage. C.T. would sometimes stay in that
14 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. [FN 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 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.

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

16 Eventually, S.T. stopped participating in prostitution. S.T. was at defendant's
17 house when defendant told her that C.T. and Stephen had been contacted by a police
18 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.

19 Detective Derek Stigerts, assigned to the FBI's Innocence Lost Task Force
20 dealing with juvenile prostitution cases, testified as an expert in juvenile prostitution.
21 Among other things, Stigerts testified that it was uncommon for prostitutes to buy
22 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."

23 Officer Noah Winchester of the Los Rios Police Department, which worked
24 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
25 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
26 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
27 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,
28 indicating that she was 14 years old. Winchester searched C.T.'s purse and

1 discovered several emergency contraceptive pills, 20 to 30 condoms, and other items
2 of that nature. Winchester placed C.T. in the back of his patrol car and returned to
Stephen.

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

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

16 Sergeant Jeff Morris of the Sacramento Police Department testified that, on or
17 around December 19, 2011, he began investigating allegations of pimping, pandering,
18 and human trafficking of minors by defendant. Morris spoke with Winchester about
19 his encounter with Stephen and C.T. Morris obtained a statement from C.T. on
20 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.

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

24 Cathy Barker was employed by the Sacramento County District Attorney's
25 Office, and she was assigned to assist in the investigation of this case. She had met
26 with C.T. three times between March and June 2013. Barker described her subsequent
27 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
28 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.

29 Defendant's Case

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

40 Lani Khong,[FN 4] defendant's sister, testified that she was at the house in
41 which defendant lived three or four times a week during the period between October

1 and December 2011. She never saw defendant bring girls to the residence. Lani had
2 not heard of C.T. or S.T. Lani testified that there was a general restriction in the house
3 that defendant could not have people over because of the children who lived there.

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

6 **Stipulation**

7 The prosecution and the defense stipulated that, if Detective Morris was
8 recalled, “he would testify that on February the 6th of 2012, he contacted Muey
9 Saetern at the . . . residence [where defendant lived], wherein she stated that
10 [defendant] does not work and gets home late at night and leaves the residence in the
11 morning.”

12 **Verdict and Sentencing**

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

22 The trial court found the allegation of defendant’s prior strike conviction of
23 burglary in the first degree to be true. Defendant’s *Romero* motion[FN5] to dismiss
24 the strike conviction was denied.

25 [FN 5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497,
26 529-530.

27 The trial court sentenced defendant to an aggregate term of 20 years calculated
28 as follows: the upper term of eight years on count seven, human trafficking a minor
29 (§ 236.1, subd. (c)(1)), doubled to 16 years for the prior strike conviction, and a two-
30 year consecutive term (one-third the midterm) on count eight, human trafficking a
31 minor (§ 236.1, subd. (c)(1)), doubled to four years for the prior strike conviction.
32 With regard to counts one, two, and four, the court stated: “I think I will not sentence.
33 I’m going to stay those pursuant to 654 rather than to sentence.”

34 (Ex. 1.)

35 **HABEAS STANDARDS**

36 Habeas relief may be granted only on the ground that Petitioner is in custody in violation of
37 the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). “State court
38 judgments of conviction and sentence carry the presumption of finality and legality,” and as a
39 result “[i]t is the petitioner’s burden to prove his custody is in violation of the Constitution, laws
40 or treaties of the United States.” *Snook v. Wood*, 89 F.3d 605, 609 (9th Cir. 1996). This burden

1 of proof must be carried by a preponderance of the evidence. *McKenzie v. McCormick*, 27 F.3d
2 1415, 1419 (9th Cir. 1994); *accord Ben-Sholom v. Ayers*, 674 F.3d 1095, 1099 (9th Cir. 2012).

3 Moreover, cases governed by the Antiterrorism and Effective Death Penalty Act (AEDPA),
4 like this one, are subject to stringent federal standards of review. Under AEDPA, a court may not
5 grant a habeas petition “with respect to any claim that was adjudicated on the merits in State court
6 proceedings,” 28 U.S.C. § 2254(d), unless the state court’s judgment “resulted in a decision that
7 was contrary to, or involved an unreasonable application of, clearly established Federal law, as
8 determined by the Supreme Court of the United States,” § 2254(d)(1), or “was based on an
9 unreasonable determination of the facts in light of the evidence presented in the State court
10 proceeding,” § 2254(d)(2).

11 Under § 2254(d)(1), the relevant Supreme Court precedent includes only the decisions in
12 existence as of the time the state court renders its decision. *Greene v. Fisher*, 565 U.S. 34, 44
13 (2011). Thus, Supreme Court cases decided after the state court’s decision are not clearly
14 established precedent under § 2254(d)(1) for purposes of evaluating whether the state court
15 reasonably applied such precedent.

16 A Supreme Court precedent is not clearly established law under § 2254(d)(1) unless the
17 Court “squarely addresses the issue” in the case before the state court. *Wright v. Van Patten*, 552
18 U.S. 120, 125-26 (2008) (per curiam); *see also Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).
19 “[W]hen a state court may draw a principled distinction between the case before it and Supreme
20 Court caselaw, the law is not clearly established for the state-court case.” *Murdoch v. Castro*, 609
21 F.3d 983, 991 (9th Cir. 2010).

22 To put in another way, a principle is clearly established law “if, and only if, it is so obvious
23 that a clearly established rule applies to a given set of facts that there could be no ‘fairminded’
24 disagreement on the question.” *White v. Woodall*, ____ U.S. ___, 134 S. Ct. 1697, 1706 (2014)
25 (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). “[I]f a habeas court must extend a
26 rationale before it can apply to the facts at hand, then by definition the rationale was not clearly
27 established at the time of the state-court decision.” *Woodall*, 134 S. Ct. at 1706-07 (internal
28 quotation marks omitted); *accord Dunn v. Madison*, ____ U.S. ___, 138 S. Ct. 9, 11-12 (2017)

1 (holding that it was not clearly established that “a prisoner is incompetent to be executed because
2 of a failure to remember his commission of the crime, as distinct from a failure to rationally
3 comprehend the concepts of crime and punishment as applied in his case”).

4 An adjudication is “contrary to” Supreme Court precedent if the state court decision is
5 opposite to that reached by the Supreme Court on a question of law, or if the state court decides
6 the case differently than the Supreme Court has on a set of materially indistinguishable facts.

7 *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

8 An “unreasonable application” of Supreme Court precedent is not one that is merely
9 “incorrect or erroneous,” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Rather, so long as
10 “‘fairminded jurists could disagree’ on the correctness of the state court’s decision,” that decision
11 is not unreasonable. *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652,
12 664 (2004)). A state court summary denial is an “unreasonable application” of Supreme Court
13 precedent only if “there was no reasonable basis,” *id.* at 98, for the decision in light of the
14 “arguments or theories [that] . . . could have supported[] the state court’s decision,” *id.* at 102;
15 *see also Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (“Relief is warranted only if no
16 reasonable jurist could disagree that the state court erred.”) (internal citations and quotations
17 omitted).

18 The Supreme Court has made clear that § 2254(d) sets forth a “highly deferential
19 standard[,] . . . which demands that state-court decisions be given the benefit of the doubt.”
20 *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). “As amended
21 by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of
22 claims already rejected in state proceedings,” but only “preserves authority to issue the writ in
23 cases where there is no possibility fairminded jurists could disagree that the state court’s decision
24 conflicts with this Court’s precedents” and “goes no further.” *Richter*, 562 U.S. at 102. “[E]ven a
25 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.*
26 At bottom, “[i]f this standard is difficult to meet, that is because it was meant to be.” *Id.* at 102.

27

28

1 A ruling by the California Supreme Court must be accepted as including a determination
2 that the claim lacked merit—with the consequence that deference to the ruling is commanded by
3 28 U.S.C. § 2254(d)—unless and until it is affirmatively proven the ruling did not include such a
4 determination. *See Richter*, 562 U.S. at 100 (“Richter has failed to show that the California
5 Supreme Court’s decision did not involve a determination of the merits of his claim. Section
6 2254(d) applies to his petition.”). A petitioner may not evade such constraints by a state court
7 recital that is “ambiguous” as to whether the merits were decided. *Runningeagle v. Ryan*, 686
8 F.3d 758, 769 (9th Cir. 2012).

9 Here, the California Supreme Court denied relief with a citation to “*People v. Duvall*, 9 Cal.
10 4th 464, 474 (1995),” and stated that a petition for writ of habeas corpus must include copies of
11 reasonably available documentary evidence.¹ *Duvall* does not unambiguously refer solely to a
12 basis for denying relief without regard to the underlying merits. While the citation encompasses
13 the procedural deficiency of failing to include copies of reasonably available documentary
14 evidence, it also covers a simple absence—no matter the procedural issue—of substantive
15 grounds for relief. For all a federal court may know (or even can know), the California Supreme
16 Court may have ruled the petition was procedurally deficient, lacked substantive lack of merit, or
17 both. There could be no serious contention that a court cannot decide a case on alternative bases
18 when it says so in a reasoned opinion. *See, e.g., Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).
19 It would be just as illogical to suggest the California Supreme Court was required to pick one
20 alternative or the other—but absolutely not both—merely because the court, instead of writing an
21 opinion, made a more ambiguous recital. *Cf. Carey v. Saffold*, 536 U.S. 214, 225-26 (2002) (a
22 court may elect to reach the merits of complaint despite also finding relief barred for procedural
23 reasons). Moreover, Petitioner’s failure to provide reasonably available documentation
24 affirmatively disproved he was entitled to relief. *See Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th

25 ¹ *Duvall* cites to *People v. Gonzalez*, 51 Cal. 3d 1179, 1260 (1990), which rejected the
26 notion that a petition can establish a triable issue of fact by relying on speculation. Rather the
27 petitioner must “obtain some concrete information on his own before he invokes collateral
28 remedies against a final judgment.” *Gonzalez*, 51 Cal. 3d at 1260. On this point, *Duvall* also
cites to *Karis*, 46 Cal. 3d at 656 (petition’s assertion of a belief or denial does not matter, and
establishes no triable issue of facts, when petition does not “offer proof;” too, the ““proof must be
a demonstrable reality and not a speculative matter””).

1 Cir. 2007) (“When a party has relevant evidence in his control which he fails to produce, that
2 failure gives rise to an inference that the evidence is unfavorable to him.”) (Internal quotation
3 marks omitted); *accord Rockingham Mach.-Lunex Co. v. N.L.R.B.*, 665 F.2d 303, 304 (8th Cir.
4 1981); *see also* Cal. Evid. Code § 412; *People v. Webster*, 54 Cal. 3d 411, 457 (1991) (if
5 declaration omits “significant” information, an adverse “inference arises”).

6 ARGUMENT

7 I. PETITIONER FAILED TO SHOW THAT NO FAIR-MINDED JURIST COULD POSSIBLY 8 AGREE WITH THE CALIFORNIA COURT OF APPEAL’S DETERMINATION THAT 9 PETITIONER’S *BRADY* CLAIM WAS UNMERITORIOUS

10 Petitioner presented his *Brady* claim to the California Superior Court in a petition for writ
11 of habeas corpus. (Lod. Doc. 3.) The petition was denied on the merits in a reasoned decision.
12 (Ex. 2.) Petitioner then brought his *Brady* claim in a habeas petition filed in the California Court
13 of Appeal. (Lod. Doc. 4.) The court summarily denied the petition on the merits. (Ex. 3.)
14 *Richter*, 562 U.S. at 101. Finally, Petitioner filed a habeas petition asserting his *Brady* claim in a
15 habeas petition filed with the California Supreme Court. (Lod. Doc. 7.) The court denied the
16 petition with a citation to *People v. Duvall*, 9 Cal. 4th 464, 474 (1995), stating that a habeas
17 petition must include copies of reasonably available documentary evidence (Ex. 4).²

18 Three essential components or elements of a *Brady* prosecutorial misconduct claim have
19 been identified. First, the evidence at issue must be favorable to the accused, either because it is
20 exculpatory, or because it is impeaching. Second, that evidence must have been suppressed by the
21 state, either willfully or inadvertently. And third, prejudice must have ensued. *Youngblood v.*
22 *West Virginia*, 547 U.S. 867, 870 (2006) (per curiam). Evidence is material only if there is a
23 reasonable probability that, had it been disclosed to the defense, the result would have been

24 _____
25 ² As previously argued, the California Supreme Court’s citation to *Duvall* at page 474
26 should be treated as a merits adjudication of Petitioner’s *Brady* claim. *See, supra*, p. 10. To treat
27 the *Duvall* citation solely as a ruling that the habeas petition was procedurally deficient would
28 mean that the *Brady* claim is unexhausted and subject to dismissal. *Castille v. Peoples*, 489 U.S.
346, 351 (1989) (a claim denied by the state’s highest court as procedurally deficient, either
explicitly or by citation of authority, does not exhaust the claim). Alternatively, this Court could
deny (but not grant) relief of the *Brady* claim. 28 U.S.C. § 2254(b)(2); *Cassett v. Stewart*, 406
F.3d 614, 623-24 (9th Cir. 2005) (“[A] federal court may deny an unexhausted petition on the
merits only when it is perfectly clear that the applicant does not raise even a colorable federal
claim.”).

1 different. *Kyles*, 514 U.S. at 434. “A ‘reasonable probability’ of a different result is accordingly
2 shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of
3 the trial.’” *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). Petitioner failed to
4 meet this test.

5 To begin with, Petitioner did not demonstrate that the prosecution actually or constructively
6 possessed exculpatory information relating to Officer Winchester at the time of Petitioner’s 2014
7 trial. Officer Winchester was not placed on administrative leave from the San Mateo Police
8 Department until October 2015, and was not charged by the San Mateo District Attorney’s Office
9 for sexually assaulting women until July 20, 2016. These events occurred long after Petitioner’s
10 trial and, therefore, do not constitute *Brady* material. *District Attorney’s Office for Third Judicial*
11 *Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009) (reaffirming that *Brady* is a pre-conviction trial right
12 and holding that *Brady* does not apply after conviction). Petitioner relies on a newspaper article
13 discussing a 2013 investigation of Officer Winchester by the Sacramento District Attorney’s
14 Office. (Lod. Doc. 4, Ex. B.) But Petitioner failed to identify any information obtained during
15 that investigation favorable to him. Indeed, Petitioner’s attorney conceded that he was unable to
16 identify any favorable evidence that had been withheld by the prosecution. Petitioner’s counsel
17 stated that although it appeared “the Sacramento District Attorney’s Office was interviewed, at
18 some point, about the allegations concerning Noah Winchester, . . . [d]efense counsel does not
19 know the particulars of when that occurred, what information the Sacramento District Attorney’s
20 Office had, the extent of the information the Sacramento District Attorney’s Office had, [or] the
21 extent of the information available to law enforcement at any relevant time.” (Lod. Doc. 4 at 6).³
22 Undermining Petitioner’s *Brady* claim even further is the fact that the Sacramento District
23 Attorney’s Office concluded there was no basis for bringing charges against Officer Winchester.⁴

24 ³ It is important to recognize that prosecutors in California “do not have unfettered access
25 to personnel files of potential police witnesses and must file a *Pitchess* motion [*Pitchess v.*
26 *Superior Court*, 11 Cal. 3d 531 (1974)] for the discovery of confidential information contained
therein.” *California Criminal Law, Procedure and Practice*, § 11:26 at p. 271 (2018) (citing
People v. Superior Court (Johnson) 61 Cal. 4th 696, 705 (2015)).

27 ⁴ The same article represents that a second probe of Winchester involving a sexual assault
28 allegation was conducted by the Sacramento County Sheriff’s Department concerning an incident
that was not reported to authorities until 2015. Because any information from this second

1 Because Petitioner failed to demonstrate that the Sacramento County District Attorney's Office
2 possessed evidence favorable to him at the time of the 2014 trial, his *Brady* claim fails. *See*
3 *Runningeagle v. Ryan*, 686 F.3d 758, 769 (9th Cir. 2012) ("[T]o state a *Brady* claim, [petitioner]
4 is required to do more than 'merely speculate' about" potentially favorable and material
5 evidence); *Phillips v. Woodford*, 267 F.3d 966, 987 (9th Cir. 2001) ("mere suppositions"
6 regarding materiality and deliberate suppression of evidence are insufficient); *Jensen v.*
7 *Hernandez*, 864 F. Supp. 2d 869, 910-11 (E.D. Cal. 2012) (rejecting claim that failure to turn over
8 dispatch tapes violated *Brady* when "petitioner . . . made no showing in this court that the
9 recordings would have provided evidence favorable to the defense . . . [and petitioner's] claim
10 that the recordings could have exonerated him is based on pure speculation"); *see also United*
11 *States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) ("A *Brady* claim fails if the existence of
12 favorable evidence is merely suspected. That the evidence exists must be established by the
13 defendant.").

14 Moreover, Petitioner failed to satisfy *Brady*'s materiality requirement. First, as previously
15 argued, Petitioner failed to show that the Sacramento County District Attorney's Office possessed
16 evidence favorable to him at the time of the 2014 trial. Absent this evidence, Petitioner cannot
17 demonstrate materiality. *United States v. Davis*, 960 F.2d 820, 827 n.3 (9th Cir. 1992) (stating
18 that because the government did not know of witness's misconduct prior to petitioners'
19 convictions, "it did not improperly suppress information pertaining to [the witness's] illegal
20 conduct in violation of *Brady*").

21 Second, admissibility aside,⁵ evidence that Officer Winchester had been investigated for
22 sexual misconduct was not material for *Brady* purposes. "Evidence impeaching a witness is

23 investigation was not obtained until after Petitioner's 2014 trial, it cannot form the basis for a
24 *Brady* claim. In *Brady*, the Court held that that due process requires a prosecutor to disclose
25 material exculpatory evidence to the defendant before trial, and the Court has since declined to
26 extend that right to the post-conviction context. *Osborne*, 557 U.S. at 68-69. Thus, any due
process right to disclosure of exculpatory evidence discovered after Petitioner's conviction is
barred by the absence of clearly established law. 28 U.S.C. § 2254(d)(1).

27 ⁵The Supreme Court has not clearly established in its precedents whether, in order to
make out a *Brady* violation, the undisclosed evidence must be admissible. *See Wood v.*
28 *Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam) (holding that government's failure to disclose the
results of a polygraph test was not prejudicial because the results were not admissible in

1 ordinarily not ‘material’ because it does not ‘refute an essential element of the government’s
2 case.” *Davis*, 960 F.2d at 825. Only “where the newly discovered impeachment evidence is ‘so
3 powerful’ that, if believed, it could render a witness’ testimony ‘totally incredible,’” and “where
4 that witness’ testimony is the only evidence supporting an essential element of the government’s
5 case,” is the impeachment evidence material. *Id.*; *accord United States v. Bartko*, 728 F.3d 327,
6 339 (4th Cir. 2013) (“In general, evidence whose function is impeachment may be considered to
7 be material where the witness in question supplied the only evidence linking the defendant to the
8 crime.” Likewise, we may find impeaching evidence to be ‘material where the witness supplied
9 the only evidence of an essential element of the offense.’” (quoting *United States v. Avellino*, 136
10 F.3d 249, 256-57 (2nd Cir. 1998)); *see also Smith v. Cain*, 565 U.S. 73, 76 (2012) (evidence
11 impeaching eye witness material where “testimony was the only evidence linking Smith to the
12 crime,” and the eye witness’s “undisclosed statements directly contradict his testimony”); *see*
13 *generally* B. Means, *Postconviction Remedies*, § 36:9 (Thomson Reuters 2018). Here, Petitioner
14 failed to show that evidence Officer Winchester was the subject of an investigation would have
15 been admissible at trial. *See People v. Anderson*, 20 Cal. 3d 647, 650 (1978) (prior arrests
16 inadmissible to impeach a witness); *People v. Medina*, 11 Cal. 4th 694, 769 (1995) (“mere arrests
17 are usually inadmissible, whether as proof of guilt or impeachment”); *People v. Lopez*, 129 Cal.
18 App. 4th 1508, 1523 (2005) (“[I]t is established that evidence of mere arrests is inadmissible
19 because it is more prejudicial than probative”].)

20 Officer Winchester had no personal knowledge of the any of the offenses for which
21 Petitioner was charged or convicted. Officer Winchester simply provided background for the jury
22 to understand how law enforcement discovered Petitioner in the first place. At most, Officer
23 Winchester’s testimony provided some corroboration of some minor details in S.T.’s testimony.
24 His testimony was not significant, much less the only evidence linking Petitioner to the crimes.
25

26 evidence); *Paradis v. Arave*, 240 F.3d 1169, 1178 (9th Cir. 2001); *Shell v. Lewis*, 2012 WL
27 3235798, *7 (N.D. Cal. Aug. 6, 2010). This absence of clearly established law bars Petitioner’s
28 claim. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (if the Supreme Court cases give no clear
answer to the question presented, the state court’s decision cannot be an unreasonable application
of clearly established federal law).

1 To the contrary, it was S.T., Petitioner’s victim, who provided the bulk of the testimony
2 directly linking Petitioner to the sex trafficking offenses for which he was convicted. It was
3 S.T.’s testimony that the jury had to credit in order to convict Petitioner. In contrast, Officer
4 Winchester never even met Petitioner or S.T., knew nothing about the offenses, and provided no
5 direct evidence of Petitioner’s guilt. Moreover, the matters to which Officer Winchester
6 testified—the discovery of C.T. with Stephen Tran and Petitioner’s texts to Stephen—were not
7 essential elements of the government’s case. *Davis*, 960 F.2d at 825. As discussed above, Officer
8 Winchester simply provided an explanation of how law enforcement discovered Petitioner in the
9 first place.

10 In sum, even if evidence impeaching Officer Winchester’s credibility had been presented at
11 trial, the admission of that evidence would not have “put the whole case in such a different light
12 as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. Because a fair-minded jurist
13 could possibly agree with the California Court of Appeal’s decision that Petitioner’s *Brady* claim
14 lacked merit, Petitioner is barred from obtaining federal habeas relief. 28 U.S.C. § 2254(d)(1).

CONCLUSION

16 Petitioner's application for a petition for writ of habeas corpus should be denied.

17 | Dated: August 7, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
TAMI M. KRENZIN
Supervising Deputy Attorney General

s/ Brian R. Means
BRIAN R. MEANS
Deputy Attorney General
Attorneys for Respondent

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Tony Khong G-32579
P.V.S.P. Case# 2:18-cv-00580-KJM-DB Document 16 Filed 10/18/18 Page 1 of 12
P.O. Box 8500
Coalinga, CA. 93210
Pro-Per

FILED

OCT 18 2018

CIRCUIT U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
RECEIVED
DEPUTY CLERK

IN THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY KHONG,
Petitioner,
v.
SCOTT FRAUENHEIM
Respondent.

2:18-cv-00580-KJM-DB
TRAVERSE

Petitioner, Tony Khong, in pro-per, by way of Traverse to Respondent's Answer, alleges as follow:

I

Petitioner admits that he is in custody as stated by Respondent. However, Petitioner contends that his custody is "unlawful" for the reasons set forth herein and in the Petition for Writ of Habeas Corpus and supporting exhibits.

II

Admitted as to the cause of Petitioner's detention:

III, IV, V, VI, IX

Admitted.

X

Petitioner contends that he is entitled relief on the grounds, as set forth in the Petition:

Ground One: Brady Violation

Habeas relief, including but not limited to an evidentiary hearing, should be granted, for the reasons set forth in the Petition and in the Points and Authorities in support of the Traverse.

XI

Admitted that the AEDPA controls the disposition of this case. However, Petitioner contends that the state court denials of his Habeas claims are contrary to, and result from an unreasonable determination of, clearly established law as promulgated by the U.S. Supreme Court; and are the product of an unreasonable determination of the facts.

XII

Petitioner is entitled to relief on the claims set forth in X.

XIII

Acknowledged.

WHEREFORE, Petitioner respectfully requests:

- (1) that an evidentiary hearing be granted on Ground 1
- (2) that the court grant writ of habeas corpus
- (3) Appoint counsel to Petitioner
- (4) all other appropriate relief

Dated: 10/7/18

Respectfully Submitted,


Tony Khong
Pro-Pet

POINTS AND
AUTHORITIES
IN SUPPORT OF
TRAVERSE

PRELIMINARY STATEMENT

Petitioner was charged in Sacramento County Superior Court with two counts of pimping a minor under 16 years of age (§ 266h (b)(2), two counts of pandering a minor under 16 years of age (§ 266i(b)(2), one count of unlawful sexual intercourse with a minor under 16 years of age (§ 261.5(d)), two counts of human trafficking a minor (§ 236.1(c)(1)) and a prison prior enhancement (§ 667(B)-(i) AND §1170.12). The jury reached verdicts that found Petitioner guilty of: two counts of pimping a minor under 16 yrs of age (§266h(b)(2)), one count of pandering a minor under 16 yrs of age (§266i(b)(2)), two counts of human trafficking a minor (§236.1(c)(1)). The jury found petitioner not guilty of one count of pandering a minor under 16 yrs of age (§266i(b)(2)). The jury could not reach a verdict on count five, unlawful sexual intercourse with a minor under 16 yrs of age (§261.1(d)) and trial court declared a mistrial as to that count. On the prosecution's motion, count five was later dismissed in the interest of justice. Prior strike conviction allegation found true by trial court.

Trial court imposed sentence of 20 yrs calculated as follow: upper terms of 8 yrs on count seven, human trafficking a minor (§236.1(c)(1), double to 16 yrs for the strike prior, and two year consecutive term (one-third midterm) on count eight, human trafficking a minor (§236.1(c)(1), doubled to four years for the strike prior. With regards 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".

Brady-Related Violation

On July 31, August 1, 2013, Officer Noah Winchester (hereafter "Winchester"), testified initially about an alleged victim Cindy Thao (hereafter "C.T."), who allegedly made statements to him, (Winchester), as to who was involved with the criminal allegations. C.T. did not testify. Winchester was testifying from his notes and report of the initial contact with C.T. at a traffic stop. Winchester also testified at trial, (for prosecution), as to what C.T. had allegedly reported to him. Trial date was April 1, 2014.

Habeas Petition Allegations

Ground One of the Petition alleges, in sum, that Petitioner's Constitutional rights were violated when the prosecution committed a Brady Violation as to impeachment evidence about one of their witness; who was himself, under investigation for sexual misconduct while on duty as patrol officer, named Noah Winchester. Violating Due Process Federal Rights.

LEGAL ARGUMENT

I.

PETITIONER'S Brady claim is entitled to relief on the federal claim, because the prosecution used a "government witness" who was under investigation at the time of Preliminary Hearing and at the time of Trial.

The state courts unreasonably found the facts, and unreasonably applied U.S. Supreme Court law in denying Petitioner's habeas corpus claims in the state court. Respondent argues that Petition is not entitled to relief on the merits of his federal claim. As demonstrated below, Respondent is wrong.

Respondent correctly points out that, a Brady violation consist of Three components or elements. The Respondent incorrectly states that Brady violations only pertain to evidence that is material. The claim of Brady Petitioner brings forth the three basic elements of a Brady prosecutorial misconduct claim. Petitioner is not arguing the material value of the evidence as it does not apply in this case.

II.

RESPONDENT misapplies U.S. Supreme Court law on Brady Violations. (Brady V. Maryland 1963). Petitioners Brady claim has 3 aspects; (1) That the Government knew or should have known, that their own witness was under investigation, either by their office or a sister office. (2) The Government should have disclosed this evidence to defense. (3) Even if learning about the investigation after Government has an ongoing duty to report such discoveries to defense.

In short, Brady establishes the requirements that are at issue here; First, the requirement of Government attorneys prosecuting a case, have a duty to learn of any evidence favorable to the defendant known to anyone acting on the Governments behalf in the case, including police officers. Second, Impeachment evidence qualifies as Brady material that prosecution must disclose.

Prejudice

Respondent argues that, it was not a Brady Violation because the investigation of Winchester was not material for Brady purposes (ANS to H.P. at 13).

Regarding the law applicable to showing prejudice Brady prosecutorial misconduct, Brady is in itself, prejudice.

On August 13, 2016, Petitioner learns through his counsel and himself that a prosecution witness who testified at trial, Noah Winchester, herein known as: (Winchester), was under investigation through the Sacramento Police Department office, for a series of sexual assaults while on duty, including Rape and Kidnapping. SGT. Bryce Heinlein states (in exhibits "B", p.g. 2/4, of habeas) that the probe began in 2013 and Los Rios officials were notified of it at the time.

Respondents argument is without merit! Respondent themselves, point out there is three components or elements of a Brady prosecutorial misconduct claim. (see Answer-p.g.11, lines 17-20).

Petitioner will now point out to this Honorable court, how all three components/elements were violated in Petitioners case.

First, the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.

As in petitioners case, the evidence at issue is impeaching.

Second, that evidence must have been suppressed by the state, either willfully or inadvertently.

As in petitioners case, the evidence at issue was withheld inadvertently.

Government attorneys prosecuting a case have a duty to learn of any evidence favorable to the defendant known to anyone acting in the Government's behalf in the case, including police officers. (O'Hara V. Brigano, 499, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). (citing Strickler V. Greene, 527 U.S. 263, 292, 119 S.Ct 1936, 144 L. Ed. 2d 286 (1999)). Impeachment evidence qualifies as Brady material that the prosecution must disclose. In Re:(People V. Martinez, 103 cal app 4th 1071, 1080 (2002)). Prosecution has a duty to obtain prosecution witness's criminal history. In Re:(Sealed Case No. 99-3096, 185 F.3d 887, 896 (D.C. Cir. 1999))(Brady violation when U.S. Attorney's Office failed to conduct complete search of federal and local law enforcement agencies for Brady material).

Third, prejudice must have ensued.

As in petitioners case, prejudice did ensue.

Petitioner will now elaborate, addressing every element in the same 1st, 2nd and 3rd orders.

First, the evidence was favorable to the accused because "The courts have identified two categories of "favorable evidence"; (1) exculpatory evidence and (2) impeachment evidence. (Turner V. United States 137 S.Ct, 2017 U.S. Lexis 4041,*18(2017) Brady reaches "evidence... favorable to the accused, either because it is exculpatory, or because it is impeaching") (Strickler V. Green 527 U.S. 263, 281-82(1999) "Impeachment evidence" is "favorable" evidence within the meaning of Brady. (Youngblood V. West Virginia, 547 U.S. 867, 869(2006)

Second, the evidence was suppressed by the state inadvertently. Inadvertence is translated into negligence.

The state has an ethical duty to learn of and disclose of "favorable evidence", regardless of its materiality. (Cone V. Bell, 556 U.S. 449, 470 N.15(2009)

Evidence is "favorable" if it hurts the prosecution or helps the defense" People V. Earp, 20 cal 4th 826,866(1999), People V. Maciel, 57 cal. 4th 482,551(2013). The Government is obliged to disclose pertinent material evidence favorable to the defense, and this applies not only to matters relating to the credibility of Government witness. Giglio V. United States, 405 U.S. 150 [90 S.Ct. 763,31 L.Ed. 2d 104](1972).491 F.2d at 1302

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.
Office of the Attorney General
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944225
Sacramento, CA 94244-2550
(916) 210-7753 (telephone)
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