In the Supreme Court of the State of California

In re **DAVID KEITH ROGERS,** **Petitioner.**	**CAPITAL CASE** Case No. S084292

Appellate District, , Case No. SC033477 A
Kern County Superior Court Case No. S005502
The Honorable Louis P. Etcheverry, Judge

EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS

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SUMMARY OF THE CASE

In March 1988, a jury convicted petitioner David Keith Rogers of the first-degree murder of 15-year-old Tracie Clark and the second-degree murder of Janine Benintende, both with the use of a gun, and found a multiple-murder special circumstance true. Rogers was sentenced to death.

In 2006, on automatic direct appeal, this Court affirmed Rogers's convictions and sentences. (*People v. Rogers* (2006) 39 Cal.4th 826.) The Supreme Court of the United States denied certiorari. (*Rogers v. California* (2007) 550 U.S. 920.)

In December 1999, Rogers filed the instant Petition for Writ of Habeas Corpus (the "Petition") in this Court. In 2008, this Court ordered respondent to show cause why the relief prayed for should not be granted on some of the grounds alleged in the Petition, specifically:

> 1) newly discovered evidence and the use of false evidence, as alleged in claim III;
>
> 2) the prosecution's failure to disclose exculpatory evidence, as alleged in claim IV;
>
> 3) ineffective assistance of counsel, as alleged in subclaims (G), (K), (L), (M), (N), and (O) (to the extent Rogers alleges a failure to request CALJIC No. 2.92) of claim V;
>
> 4) cumulative penalty phase prejudice arising from facts alleged in claim V identified in paragraph 3) above, as alleged in subclaim (Q) of claim V; and
>
> 5) cumulative penalty phase prejudice arising from the facts alleged in claims and subclaims identified in paragraphs 1) through 4) above, as alleged in claim VI.

On November 13, 2008, the People filed its Return to the Order to Show Cause. On July 15, 2009, after considering the pleadings by the parties, this Court appointed a referee to take evidence and make findings of fact on the following questions regarding this case:

(1) Did Tambri Butler testify falsely (either inadvertently or otherwise) at the penalty phase of petitioner's trial regarding the identity of the person who assaulted her in January or February 1986?

(2) Did Tambri Butler testify falsely at the penalty phase of petitioner's trial regarding any other matter, including: 1) whether she had seen petitioner on television before she identified him as her attacker; and 2) whether she had been promised leniency for her testimony and/or was aware that would be released early after she testified?

(3) Is there newly discovered, credible evidence indicating that petitioner did not assault Tambri Butler in 1986, including evidence that another person committed the assault? If so, what is the evidence?

(4) What information did law enforcement agencies involved in petitioner's prosecution possess before, during and after petitioner's trial regarding Michael Ratzlaff's attacks on prostitutes other than Tambri Butler? When did law enforcement come into possession of the information? Were the individual law enforcement officers who possessed the information involved in petitioner's prosecution? Was the prosecution in petitioner's case aware, or should it have been aware, of the information? Did the prosecution disclose such information to petitioner's defense counsel?

(5) What crime was Tambri Butler serving time for a the time she testified at petitioner's trial? Did the prosecution disclose information about Tambri Butler's criminal history to the defense? If so, what information did it disclose?

(6) Was Tambri Butler's promised leniency in exchange for her testimony against petitioner? Did Tambri Butler request early release in exchange for her testimony? Was Tambri Butler aware at the time she testified that she would be released early in exchange for her testimony? Was Tambri Butler threatened by law enforcement agents or given false information about the killing of Tracie Clark before she testified? Was the prosecution aware, or should it have been aware, of any promises or threats made to Tambri Butler or Butler's request or expectation of early release? If so, did it disclose such information to the defense?

(7) What actions did petitioner's trial counsel, Eugene Lorenz, take to investigate the 1986 assault on Tambri Butler, including: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What were the results of that investigation? Was that investigation conducted in manner to be expected of a reasonably competent attorney acting as a diligent advocate? If not, in what respects was it inadequate?

(8) If trial counsel's investigation was inadequate, what additional evidence would an adequate investigation have disclosed? How credible what that evidence? What investigative steps would have led to that additional evidence?

(9) After conducting an adequate investigation of the assault on Butler, would a reasonably competent attorney acting as a diligent advocate have introduced additional evidence regarding: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What, if any, rebuttal evidence would have been available to the prosecution?

(10) Did trial counsel have tactical or other reasons for failing to challenge the admissibility of Butler's testimony? If so, what were those reasons? After conducting an adequate investigation into the 1986 assault, would reasonably competent counsel have moved to exclude Butler's testimony?

(11) Did trial counsel have tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony? If so, what was/were the reason(s)? What impeaching or rebuttal evidence was available to counsel upon reasonable investigation? Would a reasonably competent attorney acting as diligent advocate have impeached or rebutted Butler's testimony? If so, in what manner?

(12) Did trial counsel have tactical or other reasons for failing to present expert testimony on eyewitness identifications? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have presented

expert testimony on eyewitness identifications? What would such an expert witness have said?

(13) Did trial counsel have tactical or other reasons for failing to request CALJIC No. 2.92? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have requested CALJIC No. 2.92?

(14) Did trial counsel have tactical or other reasons for failing to address Butler's testimony in closing argument at the penalty phase? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have addressed Butler's testimony in closing argument at the penalty phase? If so, in what manner?

In November and December 2009, the referee conducted an evidentiary hearing on the questions presented in the reference order. After the reference hearing, the parties submitted pleadings offering their respective proposed findings of facts as to the reference order questions. The referee submitted the Report of Proceedings: Findings of Facts Pursuant to Appointment As Referee (the "Report") to this Court on July 21, 2015. This Court subsequently invited the parties to submit exceptions to the Report's findings and to file simultaneous briefs on the merits. The People submit the following exceptions to the referee's findings and brief on the merits.[1]

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[1] The People will abbreviate the pertinent documents as follows:

"POBR" – "Petitioner's Opening Brief To Referee Following Reference Hearing"

"PRBR" – "Petitioner's Reply Brief To Referee Following Reference Hearing"

"RBR" – "Respondent's Brief Following Reference Hearing"

"RT" – reporter's transcript in the automatic appeal in petitioner's case

"CT" –clerk's transcript in the automatic appeal in petitioner's case

(continued...)

STATEMENT OF TRIAL FACTS[2]

Defendant, a Kern County Sheriff's deputy, murdered 20–year–old Janine Benintende in January 1986 and 15–year–old Tracie Clark on February 8, 1987. Both of the women had been working as prostitutes on Union Avenue in Bakersfield when they were killed. Both bodies were found in the Arvin–Edison Canal. Both had been shot multiple times with bullets from a .38–caliber weapon. Bullets recovered from the women's bodies, tire tracks and shoe prints at the scene of the Clark murder, and an eyewitness account connected defendant to the murders. Upon his arrest, and after waiving his rights to an attorney and to silence, defendant confessed to the Clark murder, but not the Benintende murder. At trial, the defense claimed defendant suffered from a mental illness resulting from extensive physical and sexual abuse as a child and, as a result, did not form the mental state or states required for the charged crimes.

(...continued)

"Pet." – the habeas corpus petition

"Pet. Exhs. at p. ___" – exhibits to the habeas corpus petition (since the pages are not numbered, they will be cited by counting from the cover of the same volume, so that the page number cited will be the page number displayed when viewing a scan of the volume)

"RH RT" – reporter's transcript of the reference hearing

"RH Exhs." – exhibits at the reference hearing

The reporter's transcripts of the conditional examinations of Dealia Winebrenner and Joyce "Jo" Rogers will be cited respectively, as "DW RT" and "JR RT."

Citations to multivolume documents will be preceded by the volume number.

References to the "hearing" will be to the reference hearing unless the context dictates otherwise.

[2] The People adopt the factual statement from this Court's 2006 decision affirming the convictions and sentences on direct appeal. (*People v. Rogers* (2006) 39 Cal.4th 826.)

At the penalty phase, the prosecution presented evidence of two additional incidents involving defendant and prostitutes. The defense presented further evidence of defendant's background and mental state.

A. Guilt phase

1. The prosecution's case

a. The killing of Janine Benintende

In January 1986, 20–year–old Janine Benintende resided in Los Angeles. Benintende had been using heroin and working as a prostitute. That month, Benintende began associating with Frank Bybee. Around January 22, 1986, Benintende appeared nervous and told her mother she needed to leave Los Angeles for a few days. She left with Bybee and went to Bakersfield.

About 7:30 or 8:00 p.m. on the day of their arrival in Bakersfield, Benintende went to Union Avenue intending to work as a prostitute. She was wearing pants, boots, and a white rabbit fur jacket. Bybee never saw Benintende again.

On February 21, 1986, a farmer noticed a body floating in the Arvin–Edison Canal near Rock Pile Road. Kern County Sheriff's Homicide Detective Mike Lage was called to the scene. He searched the area for footprints or other evidence but found nothing significant. Three days later, Dr. John E. Holloway, a forensic pathologist for the Kern County Coroner's Office, examined the body, which by that time had undergone extensive decomposition. Among the items worn by the deceased were a white rabbit fur jacket and jeans. Dr. Holloway concluded the person had been shot once near the sternum and twice in the back. There was only one entry wound in the back, just below the left shoulder blade, where both bullets apparently had entered. The gunshot wounds were the cause of death. Two bullets were retrieved from the body. The body was identified as Benintende through fingerprint analysis.

Detective Lage contacted Benintende's relatives and friends as well as the Los Angeles Police Department, but was unable to come up with any suspects in her murder.

b. The killing of Tracie Clark

Connie Zambrano worked as a prostitute on Union Avenue in Bakersfield. In the early morning hours of February 8, 1987, Zambrano saw a girl, whom she had not seen before, enter a beige Ford pickup truck with a brown camper shell and dark bubble windows. The girl appeared to point to a motel, but the truck instead proceeded straight before stopping for a few minutes on a side street, then heading out of town. Zambrano recognized the truck and its driver, whom she had seen and spoken to many times on Union Avenue. Zambrano once had a "date" with him; he had paid her $20 for sex. At trial, Zambrano identified the driver as defendant.

On the afternoon of February 8, 1987, two farmers were shooting squirrels when they saw a "half-naked" woman's body submerged in a few feet of water in the Arvin–Edison Canal a short distance from the Hermosa Road bridge. Summoned to the scene, sheriff's investigators saw the body facedown in the water about 50 feet south of the bridge. Searching the scene, the investigators found tire tracks and shoe prints in the dirt shoulder of the eastbound lane (on the south side) of Hermosa Road, east of the canal. A Lifestyle Contour condom and condom wrapper were on the ground in that area. There was a pool of blood in the center of the eastbound lane of the road east of the bridge. A bloody shoe print was in the road near the pool. Spots of blood led from that pool across the road to an area near a telephone pole in the dirt shoulder of the westbound lane (on the north side) of Hermosa Road. There was a "disturbance impression" in the dirt embankment east of the telephone pole. A trail of smeared blood led from the pool of blood west to the center of the bridge over the canal. There were blood spots on the bridge, on the cement curb of the canal, and on the rail of the canal.

A pathologist for the Kern County Coroner's Office examined the body and found a number of gunshot wounds. Two shots had entered the front of the chest near the right breast, penetrating the lungs. One bullet had passed through the body, while the second had lodged near the center of the back. A third shot had grazed the right side of the chest. A fourth shot, which had been fired at fairly close range, had entered the right side of the chest, passed through several organs, and lodged in the left

side of the body. A fifth shot had grazed the right side of the abdomen near the waistline without entering the body cavity. A sixth shot had entered the back near the midline and lodged near the right collarbone. There also were abrasions on the buttocks that were consistent with the body being dragged after death. The pathologist concluded the victim bled to death from the multiple gunshot wounds and probably died before her body was placed in the water.

c. The investigation and defendant's confession

In an attempt to identify the body found in the canal, detectives showed photographs of it to sheriff's deputies. Sheriff's Deputy Martin Williamson showed a photograph to defendant, who said he did not recognize the person.

The following day, Deputy Williamson and Detective John Soliz, the lead investigator on the case, went to Union Avenue to learn whether any of the prostitutes there could identify the body depicted in the photos. Connie Zambrano told Detective Soliz she recognized the victim as the girl she had seen entering the truck the night before. Another prostitute identified the victim as Tracie Clark.

That same day, criminalists compared the three bullets recovered from Clark's body with the two bullets recovered from Benintende's body the year before. The bullets matched: all were .38–caliber semi-copper-clad hollow-point bullets, all were of the same type as sheriff's-department-issue ammunition that was available to all deputies, and all had been fired from the same weapon. The ammunition also was sold commercially.

Detective Lage and Detective William Nikkel went to defendant's house that day and compared the tires on his truck with photos of the tire tracks found at the Clark murder scene. Finding the tires and tracks matched, the detectives drove Zambrano past defendant's house, where she identified defendant's truck as the truck she had seen Clark enter. She also picked defendant's photograph out of a photo lineup consisting of photos of six sheriff's deputies. At that time, she did not know defendant was a deputy sheriff.

Kern County District Attorney's Office investigator Tam Hodgson obtained warrants for defendant's arrest and the search

of his house. Officers arrested defendant soon thereafter. Defendant's shoes appeared to match photos of the shoe prints at the scene. Once in custody, defendant agreed to be interviewed. Investigator Hodgson and Detectives Soliz and Lage questioned defendant on February 13 and 14, 1987. At the outset of the first interview, defendant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, then admitted shooting Clark and described the following events.

According to defendant, he picked up Clark near the El Don Motel at the corner of South Union Avenue and Belle Terrace in the early morning hours. Defendant was driving a Ford pickup truck with a brown-and-white camper shell, which he had purchased toward the end of the previous year. Clark appeared to him to be a "Mexican female," about 20 to 30 years old and about 140 to 150 pounds. She asked whether he wanted a "date"; he said "I don't know." Clark entered the truck, and defendant drove about one block East on Belle Terrace, then stopped. They agreed on a price of $30 for oral sex. Defendant wanted to go out in the "country" rather than to Clark's motel, and she agreed.

Defendant said he drove for about 15 to 20 minutes. On the way, Clark told defendant her name was Anna and that she was from Cuba or Puerto Rico. She also began complaining about how far out of town they were going. Defendant parked at a spot on the south side of Hermosa Road where there was "nobody around." He then lay down on the seat of the truck's cab, and Clark kneeled over him and began to perform fellatio on him. Defendant could hear coins or keys rattling in her pockets. Clark had brought a condom, which was lying in the truck. Defendant's pants were around his ankles.

After awhile, according to defendant, Clark stopped and demanded to be paid $50 instead of $30 because they had gone so far out of town and the liaison was taking so much of her time. When defendant refused, Clark became angry and started swinging at him. He told her to "knock this shit off." Instead of complying, she began yelling and kicking him. Defendant was afraid Clark might scratch his face with her long fingernails. With his left hand, defendant (who was right-handed) reached under the front seat and retrieved a .38–caliber revolver he had stored there. He pulled back the hammer and pointed the gun at

Clark, hoping it would "make her quit," but it did not. Instead, she continued to swing at him and kick him. The gun went off, wounding Clark.

According to defendant, Clark then fell back against the truck door, screaming. Defendant started the truck and began driving, telling her he would get her back to town. When she continued to scream, defendant stopped the truck, unlatched the passenger side door, and pushed her out with his feet. She ran around in front of the headlights, "screaming and hollering." Defendant noticed blood on the right side of her rib cage. He put on his pants, got out of the truck, and told her he would take her to town and get her a cab to go to the hospital. But she started "going crazy" again and said she was going to "report" him. Defendant "panicked" and shot her again, this time with the gun in his right hand.

Defendant said Clark then ran up the road. Defendant realized if she turned him in, he would be arrested and go to jail. As Clark leaned against an embankment facing him, defendant shot her four more times, "empt[ying] the gun." Defendant shot her because she could not testify against him if she were dead, and "that was the bottom line." Clark ran into the road, then fell down.

Defendant said he then drove away but came back shortly. He determined Clark no longer was breathing, and then dragged her body by the ankles to a nearby bridge and pushed it over the cement railing into the canal. He then drove home, dropping the shell casings on the way. Once home, he threw the gun into a black bag in the back of his truck, watched television, and went to bed. The following day, he drove back to the scene. "It didn't look good." There was blood in the road.

Defendant said he had purchased the murder weapon, a short-barreled .38–caliber revolver, about six years earlier from a man at the Four Queens bar on Edison Highway. He had fired it only once before. During the interview, one of the investigators asked defendant about the Benintende killing. Defendant at first repeatedly denied having shot anyone other than Clark, but later said he could not remember.

A search of defendant's home turned up ammunition of the same type issued by the sheriff's department to its deputies and

used in the killings, as well as several expended .38–caliber shell casings. Investigators thoroughly examined defendant's beige pick-up truck but found no bloodstains. In the camper they found a black canvas bag with several guns in it, including a .38–caliber Colt Detective Special. Criminalist Gregory Laskowski test fired that weapon and compared the resulting bullets to those retrieved from the bodies of Clark and Benintende. The bullets had matching characteristics, leading him to conclude the bullets that killed both Clark and Benintende had been fired from that gun. After comparing crime scene photographs with the tires on defendant's truck and defendant's shoes, Laskowski concluded those tires and shoes made the tracks depicted in the photos.

Laskowski searched defendant's green Datsun truck for evidence of the Benintende killing but found nothing significant. Although Benintende had been wearing a rabbit fur jacket when she died and there was rabbit fur in the truck, that fur could have come from a pair of gloves in the truck. Laskowski also examined Clark's clothing. Inside the pockets of her blue skirt he found a key, some coins, a $20 bill, and a package of Contour Lifestyle condoms.

Investigator Hodgson determined the murder weapon had been reported stolen several years earlier. Defendant had written the theft report. Hodgson then tracked down the Four Queens bartender from whom defendant said he had purchased the murder weapon. The bartender, Steven Howell, never had sold defendant a gun. The murder weapon had belonged to Ahmed Li Ubadi, the manager of a Stop and Shop Market. He last saw the gun before his store was burglarized in 1982. A deputy sheriff had gone to the store to investigate the burglary. When Mr. Ubadi arrived at the store, the only thing missing was the gun.

d. Other evidence

Katherine Hardie, a prostitute known as "Redbone," saw Benintende on Union Avenue shortly before she disappeared in late January 1986. Some time after August 1986, a man driving a white pickup truck with a camper shell picked up Hardie on Union Avenue. She asked him whether he wanted a "date." The driver would not go where Hardie wanted, and instead tried

to drive her "out to the orchard." When he would not let her out of the truck, Hardie had to jump out.

e. Motion for partial acquittal

At the close of the prosecution's case-in-chief, the trial court granted defendant's motion for partial acquittal on the Benintende count and reduced that charge to second degree murder. Thereafter the court instructed the jury it had "reached a determination that so far as the homicide of Janine Benintende [is] concerned that the jury could reach no greater verdict than murder in the second degree. In other words, so far as that second count is concerned, first degree is no longer a possibility with this jury."

2. The defense case

Defendant testified in his own defense and admitted killing Clark. The defense centered around defendant's claim he did not form the intent required for the charged crimes due to a mental disturbance stemming from the sexual and physical abuse he had suffered as a child. The defense evidence consisted primarily of defendant's testimony and that of three mental health professionals.

Dr. David Bird, a clinical psychologist, began treating defendant for depression in February 1987 after defendant's arrest for the Clark murder. Over the course of a year, Dr. Bird met with defendant approximately 48 times. According to Dr. Bird, defendant suffered from periods of amnesia regarding his childhood. Because memory loss is typical for children who have suffered sexual abuse, Dr. Bird believed there had been a great deal of trauma in defendant's early life.

Dr. Bird described defendant's family history, which he developed by speaking with defendant and through input from his co-therapist, Dr. Joan Franz. According to Dr. Bird, defendant's parents, Juanita and James, both were alcoholics. When defendant was approximately six months of age, his parents divorced. Juanita then married Dub Ellis, another alcoholic. From that point forward, defendant resided in a "house of horrors" of physical and sexual trauma. Juanita would hit defendant and his brother Dale with a belt. Ellis was a "sexual sadist." For example, Ellis would force defendant and

Dale to play a game called "turn and burn" in which the boys, while naked, had to grasp each other either back-to-back or face-to-face. Ellis then hit them with a belt with a silver buckle whenever one boy could turn the other boy toward Ellis. This caused bruises and welts on the boys' buttocks, legs and testicles. Once, after discovering Juanita had dressed defendant in women's panties and clothing, Ellis forced defendant to stay outside, where he was fearful of being seen. Ellis also once threatened to kill defendant by throwing him into a river.

Dr. Bird testified that when defendant was approximately six or seven years of age, a new stepfather, William, appeared. William, a homosexual, sodomized defendant on a nightly basis. Defendant also was sexually abused and sodomized by other men in the house.

Between the ages of 11 and 16 years, Dr. Bird related, defendant was seduced by an older female cousin and by his father's wife, Barbara, an African–American. Defendant began collecting women's underwear. When defendant was 17 or 18 years of age, he attempted to reconcile with his father, but Barbara excluded him from the house when he refused to become sexually involved with her.

According to Dr. Bird, defendant joined the Navy at the age of 19 years and began drinking heavily. He left the Navy two years later. Defendant had two unsuccessful marriages before meeting and marrying his current wife, Joyce. He had two sons by his first wife. At some point, defendant began compulsively associating with prostitutes.

In Dr. Bird's view, defendant had extreme sexual problems due to his background and suffered from a possible multiple personality disorder, fragmentation, and dissociation. On standard psychological tests, defendant scored above average in intelligence but showed suicidal tendencies.

Dr. Joan Franz, a psychotherapist, testified she shared a practice with Dr. Bird and began seeing defendant to treat him for his depression after his arrest for the Clark murder. Over the course of a year, Dr. Franz saw defendant once a week for two to three hours each visit.

Dr. Franz gained information concerning defendant's background from defendant, his brother Dale, other family members, and defendant's investigator. Based upon that information, Dr. Franz opined defendant's family had no moral structure. Emotional abuse, neglect, and abandonment characterized his early family life. Dr. Franz testified that defendant suffered both overt and covert sexual abuse; he was cross-dressed by his mother, abused by older cousins, and sodomized by a man wearing a rubber glove with two of the fingers cut off.

In Dr. Franz's opinion, defendant fit the profile of a survivor of child sexual abuse and an adult victim of trauma. The trauma and abuse defendant suffered as a child led to sexual problems as an adult, including impotence and "acting out" sexually. Dr. Franz also stated defendant had multiple personalities. She believed defendant began associating with prostitutes because he identified with them and also to prove to himself he was heterosexual.

Dr. David Glaser, a psychiatrist, testified he first met defendant in December of 1987. At that time, defendant could not remember what had happened from the time he first shot Clark until he saw her lying in a pool of blood. In order to get at the areas of memory loss, Dr. Glaser administered sodium amytal, a short-acting barbiturate that "disinhibits" the brain and allows a person to access repressed information. In interviews conducted both with and without sodium amytal, defendant recounted "a museum of childhood sexual and physical abusive traumas" beginning from the age of four or five years. Dr. Glaser believed defendant's psychological profile was most consistent with the phenomenon of "dissociative states" in which a person is not fully in control of his or her thoughts, feelings, or behavior. Individuals with dissociative disorders are aware of the occurrence of lost periods of time or memory lapses. Sexual abuse is a predisposing factor for dissociative disorders.

Defendant testified concerning the Clark killing, stating he independently could recall only what occurred up until the time he pushed Clark out of the truck with his feet. After that, his recollection was based upon his viewing of the videotape of the sodium amytal interview. Defendant related the following.

He testified he was driving his pickup truck along Union Avenue about 2:00 a.m. and observed Clark at the corner of Belle Terrace and Union, a location frequented by prostitutes. Defendant had not seen Clark before. She appeared to be between 20 and 30 years of age. He stopped at the corner and opened the passenger door. Clark entered the vehicle and asked whether he wanted a "date," which meant she was looking for a customer. Defendant drove around the corner and stopped. Clark wanted to go to a motel but defendant did not, because he did not want to be "rolled" by a pimp. Clark agreed to go out to the "country" instead. The two decided on $30 for a "half-and-half," which is half oral sex and half sexual intercourse.

Defendant stated he drove for approximately 15 to 20 minutes. When they reached Hermosa Road, defendant stopped and lay down in the front seat of the truck, and Clark began giving him oral sex. Defendant did not have an erection; he "sometimes ha[d] problems with that." When Clark asked what was wrong, defendant told her to "work at it a little more." Clark became angry. Defendant was feeling "sort of embarrassed, sort of crushed." Clark became abusive and waved her arms around. She asked whether he preferred little boys. Defendant said he liked girls and women, and maybe she was not doing her job right. Clark called him "queer" and "faggot." Defendant opened the passenger door and pushed her out with his feet. Clark was walking toward him pointing her finger at him, and he felt threatened, so he pointed a gun at her, pulled the trigger, and shot her. A second or two later, he shot her five more times. Defendant was thinking only of protecting himself. He feared her and her reporting him. There was no argument concerning money.

Defendant testified that after he shot Clark, she said "Oh God." Then she walked into the middle of the road, lay down, and died. Defendant drove down the road and then came back to see whether she was alive. Finding her dead, he dragged her body to the canal and placed it in the water. Defendant drove home and threw the gun into the back of his truck. A t home, he wandered around the house and watched some television, feeling confused. Later that same day, he returned to the scene of the killing to try to figure out what had happened. He saw a pool of blood in the road, blood spots, tracks, and a body in the canal. At that point he knew he had killed Clark.

Defendant said he went to work the next few days and did not tell anyone about the killing. He was arrested the following Friday afternoon. After waiving his *Miranda* rights, he gave a statement concerning the Clark killing. He provided the authorities with "enough" information to ensure he would be convicted and executed. Some of the things he told them—for example, that he possibly discussed calling a taxicab after he first shot Clark—were not true. Defendant was depressed and suicidal at the time.

In Dr. Glaser's opinion, at the time of the killing defendant "was overwhelmed with numerous affective states specifically stemming from his sexual dysfunction and specifically the volley of expletives that followed such dysfunction from Miss Clark," and "the actual shooting and killing was an impulsive heat of passion event" that occurred without planning. In this emotional state, defendant was incapable of premeditating and deliberating or of coldly weighing the consequences of killing Clark. Further, defendant's confession was "part of his larger scheme to essentially either commit suicide at his own hand or commit legal suicide by insuring his demise by, as he puts it, coming up with the perfect first degree murder conviction story."

Dr. Bird agreed the killing of Clark was an impulsive, emotional act of passion and fear. It was a sexual incident and had nothing to do with money. There was no planning or deliberation, just a reaction to a "rush of happenings," including being called names by a woman who looked like his stepmother Barbara. There was no "thoughtful advance planning or anticipation of doing what he did," no reasoning or thinking, and no weighing of consequences.

In Dr. Franz's opinion as well, defendant killed Clark in a very emotional, anxious state in which he did not have the "skills available" to premeditate and deliberate. Defendant simply reacted to the names Clark was calling him. The killing was "not a weighing or a balancing, but simply a defense mechanism to protect himself," an emotional act. "It was basically, you would call it survival."

3. The prosecution's rebuttal

The only evidence presented by the prosecution in rebuttal was testimony that in February of 1983, defendant briefly had been terminated from his position at the sheriff's department as the result of a complaint by a prostitute, but subsequently had been reinstated.

B. Penalty phase

1. The prosecution's case in aggravation

Ellen Martinez, the prostitute whose complaint against defendant was the subject of the prosecution's guilt phase rebuttal, testified regarding the events in early 1983 that led to the complaint. Martinez testified that defendant at that time, while on duty, had stopped her while she was having sex with a customer in a cemetery outside Bakersfield. The customer was allowed to leave, but defendant placed Martinez in his patrol car and told her he was going to take her "downtown." When Martinez could not locate her underwear, defendant went to look for it in the cemetery, but was unsuccessful. Defendant then told Martinez to undress, and took photographs of her breasts and vaginal area. Afterwards, defendant dropped Martinez off near her motel room.

Tambri Butler, also a Union Avenue prostitute, testified defendant assaulted her in February 1986. According to Butler, defendant picked her up in a white pickup truck, forced her to perform various sex acts by shocking her with a "stinger" gun and firing an automatic weapon across the bridge of her nose, and then pushed her out of the truck and tried to run her over.

Investigator Hodgson testified a black, Excam brand, .25–caliber automatic pistol, admitted without objection as exhibit 1, was taken from the black bag found in defendant's truck.

2. The defense case in mitigation

Dr. Bird testified concerning the videotape of defendant's interview with Dr. Glaser conducted while defendant was under the influence of sodium amytal. The videotape was played for the jury. On the tape, defendant told the same story of the Clark murder he had told at trial. He also stated, "I hurt for the girl

[Clark] I killed." Dr. Bird reiterated his opinion that defendant was under "extreme emotional distress" when he shot Clark, and that the lifetime of abuse he had suffered made it difficult for him to conform his conduct to the law. In Dr. Bird's opinion, defendant was an emotionally impaired person.

Defendant's wife (Joyce Rogers), step-daughter (Carol Truitt), and brother (Dale Rogers) testified regarding defendant's qualities as a loving husband, father, grandfather, and brother. Seven law enforcement officers, including defendant's former beat partner, testified defendant was a skilled and conscientious deputy sheriff who was able to defuse emotionally charged situations, and described him as a good friend. Several of the officers testified defendant always had appeared normal.

THE LAW GOVERNING HABEAS CORPUS

I. THE SCOPE OF HABEAS CORPUS

In California, the trial is "the main arena for determining the guilt or innocence of an accused defendant and, in a capital case, for determining whether or not the death penalty should appropriately be imposed on the defendant for the offense at issue." (*In re Robbins* (1998) 18 Cal.4th 770, 777.)

The function of habeas corpus is to "correct errors of a fundamental jurisdictional or constitutional type" so as to "provide an avenue of relief to those unjustly incarcerated when the normal method of relief—i.e., direct appeal—is inadequate." (*In re Harris* (1993) 5 Cal.4th 813, 828.)

II. THE PETITIONER'S BURDEN OF PROOF

As this Court has explained: "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them.

Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 . . ., italics in original . . . .)" (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*).) The petitioner bears the burden of proof of the facts on which he relies in support of his claim for relief by a preponderance of the evidence. (*In re Sassounian* (1995) 9 Cal.4th 535, 546-547.)

III. THE ROLE OF THE TRIAL EVIDENCE ON HABEAS CORPUS

Since the trial evidence establishes the facts on which the judgment was based, it follows that the record of that evidence is part of the evidence on habeas corpus, as this Court has established. (*In re Richards* (2012) 55 Cal.4th 948, 968-970; *In re Lawley* (2008) 42 Cal.4th 1231, 1242-1246 (*Lawley*) [relying on trial evidence to rebut the petitioner's hearing evidence]; *In re Roberts* (2003) 29 Cal.4th 726, 743-744 [comparing the trial evidence with the petitioner's hearing evidence]; *People v. Romero* (1994) 8 Cal.4th 728, 739; *People v. Karis* (1988) 46 Cal.3d 612, 653-657; *People v. Babbitt* (1988) 45 Cal.3d 660, 708.)

Moreover, where specific facts were disputed at trial, the resolution of the dispute by the trier of fact is generally given great weight on habeas corpus, even where the same facts are in dispute on habeas corpus and the petitioner has presented new evidence as to those facts. In *In re Roberts, supra,* 29 Cal.4th 726, this Court denied a claim of perjured testimony based on a comparison of new evidence on habeas corpus with the trial evidence. The Court explained, "Because [the witness] has made inconsistent declarations, it is clear that he has lied at some point. It is not clear, however, that it was [the witness]'s trial testimony that was false, rather than his initial recantation." (*Id.* at p. 743.) The Court also stated, "It is not the function of a referee or an appellate court to reweigh credibility determinations made by the jury." (*Id.* at p. 744.)

Under the well-established principles of appellate review, a reviewing court views the evidence in a light most favorable to respondent and presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) "Where two conflicting inferences may be drawn from the evidence, it is the reviewing court's duty to adopt the one supporting the challenged order. [Citation.]" (*Hunt, supra,* at p. 104.) These principles must apply to the factual matters underlying the judgment which are presumed correct on habeas corpus.

IV. REVIEW OF A REFEREE'S FINDINGS

As related to the referee's findings of fact, this Court gives great weight to those findings of fact when they are supported by substantial evidence, because the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying. (*In re Marquez* (1992) 1 Cal.4th 584, 603.) However, the same deference is not accorded to a referee's finding based in part on an assessment of trial testimony, including a finding on the reference hearing testimony of a trial witness who is claimed to have given false testimony at the trial. (*In re Roberts, supra*, 29 Cal.4th at pp. 743-744.) Moreover, the referee's resolution of mixed questions of law and fact is subject to independent review. (*In re Valdez* (2010) 49 Cal.4th 715, 730.)

INTRODUCTION TO ARGUMENT

The Order to Show Cause delved into four majors areas involving the penalty phase: (I) the prosecution's use of allegedly false evidence, namely the testimony of Tambri Butler, during the penalty phase; (II) newly discovered evidence involving Michael Ratzlaff's assaults on other prostitutes in Bakersfield; (III) the prosecution's failure to disclose

information about Ratzlaff's assaults on prostitutes; and (IV) defense counsel Eugene Lorenz's performance during the penalty phase, namely his handling of Butler as a witness. (See Amended Order to Show Cause, filed Dec. 20, 2007.) The Court asked the referee to adduce evidence and make factual findings on 14 questions spanning these claims.

In Argument I, the People will respond to Rogers's claim that Butler testified falsely as to the identity of the person who assaulted her in 1986. (See above, p. 2, Question 1). Argument I will further address the issue of whether Butler testified falsely as to any other matter. (See above, p. 2, Question 2.) As the People will show, there is little or nothing in Butler's penalty phase testimony that is actually false. In fact, the referee found much of Butler's testimony to be true, especially the description of her assailant, although it found that her description did not match Rogers in significant respects. The testimony that the referee found to be false concerned whether Butler had seen Rogers on television after he was arrested. In the People's view, the substance of that testimony was not shown to be false. Moreover, a comparison of the trial testimony with the evidence on habeas corpus showed that any discrepancy was not material on the issue of punishment.

In Argument II, the People will respond to Rogers's claim that the newly discovered evidence of Michael Ratzlaff's assaults on other prostitutes conclusively shows that Rogers did not assault Butler. (See above, p. 2, Question 3.) Much of this "newly discovered" evidence, however, was available to the defense at the time of trial; the evidence therefore cannot be considered newly discovered. As for the evidence that could reasonably be construed as "newly discovered," that evidence does not credibly show that Ratzlaff, and not Rogers, was responsible for the attack on Butler.

In Argument III, the People will respond to Rogers's claim that the prosecution failed to disclose evidence concerning Ratzlaff's attacks on other prostitutes (see above, at p. 2, question 4), evidence about the crimes Butler was in custody for when she testified (see above, at p. 2, question 5), and evidence concerning the prosecution's promise of leniency to Butler for her testimony (see above, at p. 2, question 6). The referee's factual findings as to the evidence the prosecution knew, or should have known, about Ratzlaff's attacks on prostitutes preclude any finding that it violated its discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Furthermore, the evidence fails to show that the prosecution did not disclose Butler's criminal history to the defense. As for any promises of leniency, the referee's factual finding that the prosecution never promised Butler leniency similarly precludes any determination that the prosecution violated *Brady*.

In Argument IV, the People will respond to Rogers's claims that defense counsel Eugene Lorenz provided deficient performance when handling Butler as a witness. The questions on this issue span Lorenz's performance before (see above, at pp. 2-3, questions 7-10), during (see above, at p. 3, question 11-12), and after Butler's testimony (see above, at pp. 3-4, questions 13-14). The record shows that Lorenz acted pursuant to reasonable strategic or tactical decisions about what strategy to follow to avoid his client getting a death sentence. While Rogers disagrees with Lorenz's tactical decisions, and generally argues that his after-the-fact strategy was better, the record fails to show that Lorenz's performance was deficient or that any deficiency rendered the proceeding fundamentally unfair or the result of the trial unreliable.

Accordingly, the People ask that this Court deny Rogers's Petition for Writ of Habeas Corpus and discharge the Order to Show Cause.

ARGUMENT

I. ROGERS FAILS TO SHOW THAT ANY OF BUTLER'S TESTIMONY WAS FALSE IN SUBSTANCE OR THAT ANY INACCURATE TESTIMONY WAS SUBSTANTIALLY MATERIAL TO THE ISSUE OF PUNISHMENT

A. Introduction and Summary of Argument

This Court directed the People to show cause regarding "1) newly discovered evidence and use of false evidence, as alleged in claim III." (Amended Order to Show Cause, filed December 20, 2007.) After the People filed its Return, the Court issued a reference order which asked whether Tambri Butler had testified falsely "at the penalty phase of petitioner's trial regarding the identity of the person who assaulted her" or "regarding any other matter including: . . . whether she had seen petitioner on television before she identified him as her attacker; and . . . whether she had been promised leniency for her testimony and/or was aware that she would be released early after she testified?" (Questions 1 and 2, quoted in full above, at p. 2.)

In this Argument, the People will first address Question 1 as to whether penalty phase witness Tambri Butler had testified falsely regarding the identity of the person who had assaulted her. The theory underlying Rogers's false evidence, new evidence, and other claims on habeas corpus has consistently been that now-dead convicted rapist Michael Ratzlaff was Butler's assailant. The referee found that Butler had testified falsely as to the identity of the attacker. The referee relied in significant part on discrepancies between Butler's description and Rogers. Consistent with Rogers's theory on habeas corpus, the referee apparently concluded that Butler had been mistaken in her identification, although she had been sincere. In the People's view, Butler's later apparent recantation—which

she has subsequently and consistently repudiated—does not support a finding of mistaken identification.

Importantly, the initial characteristics given by Butler to the investigators were exaggerated by the defense investigator many years after sentencing to greatly increase or create apparent discrepancies. When Butler's initial description of her attacker is considered, any discrepancies between the description and Rogers were either matters of degree, concerned characteristics about which truthful witnesses are often mistaken, or concerned characteristics which were subject to alteration by Rogers and thus do not undermine Butler's description of these characteristics. Most importantly, Butler initially identified Rogers when she saw him working in jail based on recognizing Roger's face, voice, and body movements, and not on the physical descriptors which were the subjects of possible discrepancies. Simply put, the referee's factual findings did not establish that Butler's identification testimony was "actually " and "objectively" "false," as is required for relief. (See *In re Richards*, *supra*, 55 Cal.4th at p. 966 & fn. 5.)

The People will next address Question 2 as to whether Butler had testified falsely as to any other matter. The other testimony the referee found to be false concerned whether she had seen Rogers on television after he was arrested; whether she was aware she would be released early; and her description of the reason why she was in custody.

The People take exception to the referee's finding that Butler had been aware she would be released early after she testified. The only statement cited by the referee had been made in a telephone call to an investigator expressing anger and frustration at her living circumstances and having to testify at the reference hearing which, she thought, could subject her to arrest and incarceration. (Report at p. 9.) Subsequent statements by Butler show that it was only jail folklore which led Butler to

believe she would somehow be released early if she testified. Other statements and testimony show that any such belief varied from time to time and there is no positive evidence that it existed when she was ordered from her cell and taken to court to testify. The referee's findings variously refer to Butler's opinion as being that she "could," "would," or "may be" released early. (Report at pp. 9, 15.) Neither the findings nor the new evidence disproves Butler's trial testimony that, at the time she testified, she did not "expect any help," and in fact she did not hope for early release, but wanted to do her time because she was not "totally cleaned up." (22 RT 5781, 5804.)

In addition, there is no evidence that any decision to seek Butler's release was made before the judgment of death was actually imposed over a month after Butler testified. The referee's findings contain nothing to undermine the hearing evidence that the decision to release her was only made after the death verdict was returned and was made for her safety rather than as consideration for her testimony. Butler could not have been "*aware* that she *would be* released early" (Question 2, italics added) because there was neither an explicit nor an implicit arrangement, or even evidence of any plan, for an early release at the time she testified. In short, there was no future reality of an early release of which Butler could have been aware.

The People will not dispute the referee's conclusion that Butler saw Rogers on the jail television before her interview with investigators in which she described the sexual assault and said that Rogers was the attacker. (Report at p. 8.) However, whether she had seen Rogers on television was not material because Butler has consistently described recognizing Rogers as her assailant during the first half of 1986, within a few months after the assault. This means that she could recognize Rogers by sight before his arrest on February 13, 1987, which resulted in television news stories

before Butler's February 18 interview with investigators. The referee does not dispute that Butler had seen Rogers in the jail before his arrest and did not specifically discount Butler's hearing testimony that she only glanced at the first news story she saw and then immediately became upset and afraid. (See Report at p. 8 ["they flashed his face"].) Thus, the difference between Butler's trial testimony and the facts as found by the referee are not significant to her testimony at trial.

The same is true as to the crime for which Butler was in custody when she testified. The question she was asked was a general one, which she properly answered with a general description of her conduct rather than a precise specification of the crime for which she was sentenced. Moreover, her description conformed better to the reality of her offense than the name of the offense or the code section under which she was convicted. In any event, Butler admitted to the jury at trial that she remained a prostitute and drug addict despite having suffered multiple convictions and served multiple terms in jail for prostitution and drug offenses. Thus Butler's testimony was not false in substance and further information about her conviction would not have been significant.

The People will then explain that, since any discrepancies were minor and Butler was subject to impeachment on a number of other points, both minor and more significant, any false testimony by Butler could not have affected the assessment by the jury or the trial judge of the accuracy of her identification or her credibility.

Finally, the People will argue that, under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836; see *In re Richards* (2016) 63 Cal.4th 291, 312-313, and based on the provision now in section 13 of article I of the California Constitution, it is not reasonably probable that the death penalty would not have been imposed if Butler had not testified.

B. The Showing Required for Relief Based on False Evidence

Penal Code section 1473, subdivision (b), provides in pertinent part:

> A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration.

(Cal. Pen. Code, § 1473, subd. (b).)

This Court described the standard for relief based on a claim of false evidence as follows:

> False evidence is 'substantially material or probative' ([Pen. Code, § 1473, subd. (b)(1)]) 'if there is a "reasonable probability" that, had it not been introduced, the result would have been different. [Citation.]' (*In re Sassounian* (1995) 9 Cal.4th 535, 546, 37 Cal.Rptr.2d 446, 887 P.2d 527.) The requisite 'reasonable probability' is a chance great enough, under the totality of the circumstances, to undermine our confidence in the outcome. (*Ibid.*)

(*In re Roberts*, *supra*, 29 Cal.4th at p. 742, cited in *In re Richards*, *supra*, 55 Cal.4th at p. 961.) Specifically, "[t]he falsity of the trial evidence must be proved." (*In re Richards*, *supra*, 55 Cal.4th at p. 966, fn. 5.) If the evidence is in the form of an opinion, it must be "objectively false." (*Id.* at p. 966; cf. *id.* at pp. 962-963, 965-966 ["objectively untrue"].) The analysis focuses on specific items of evidence, including specific statements in testimony, which are alleged to be false. (*Id.* at pp. 963-966; *In re Roberts*, *supra*, 29 Cal.4th at p. 742-744; *In re Wright* (1978) 78 Cal.App.3d 788, 814 ["it is essential to have clearly in mind what the false evidence was"].)

As will be discussed, relief based on false evidence as described in Questions 1 and 2 should be denied.

C. Rogers Fails to Prove That Tambri Butler's Identification of the Person Who Attacked Her in 1986 Was False (Question 1)

On March 23, 1988, during the penalty phase of Rogers's trial, Butler testified that Rogers raped and assaulted her around February 1986. (22 RT 5778-5805.) Her testimony describing the assault and the assailant was consistent with the detailed statement she gave investigators a year earlier identifying Rogers as her assailant shortly after he was arrested for the current charges (4 RH Exhs. 886-936), and with a much briefer statement a few months before that in which she said her assailant was a deputy sheriff working in the jail.

1. Factual and Procedural Background

a. Butler's October 1986 disclosure to Deputy Jeanine Lockhart that, while Butler was in custody from approximately February to May 1986, she recognized a sheriff's deputy as the man who had sexually assaulted her in January 1986

Around the end of January 1986, Tambri Butler was addicted to tar heroin and had been working as a prostitute in Bakersfield since around 1984 (3 RH RT 391-392), when she was sexually assaulted by a customer at a remote location southeast of town.

On February 16, 1986, Butler was arrested for being under the influence of a drug. (Health & Saf. Code, § 11550, hereafter "11550"). (1 RH Exhs. 67-70, 77-81.) On March 7, 1986, Butler appeared in custody and pleaded nolo contendere to that charge and to the same offense committed in 1985. (1 Exhs. 54, 71-72, 76.) She was placed on probation for 36 months in both cases, with conditions including her service of 135 days in jail in the newer case, with credit for 30 days time served, to be

served concurrently with 90 days in jail in the older case. (1 RH Exhs. 54, 61-62, 73.)[3]

Butler was arrested a third time for an 11550 violation on July 19, 1986. (1 RH Exhs. 92-93, 99-105.) She was released on her promise to appear. (1 RH Exhs. 97; 6 RH Exhs. 1602.) She appeared on August 6; a pre-trial hearing was set for September 12, 1986, for which she evidently failed to appear. (1 RH Exhs. 92.)

On September 25, 1986, Butler was arrested for soliciting an act of prostitution in violation of Penal Code section 647, subdivision (b) (hereafter "647(b)") and providing a false identity under Penal Code section 148.9. (1 RH Exhs. 116; 6 RH Exhs. 1604.) On October 23, 1986, Butler pleaded no contest to the outstanding 11550 charge and to the 647(b) charge. (1 RH Exhs. 92, 94-95, 98, 107, 110, 112.) She was placed on probation with conditions including her service of 270 days in jail. (1 RH Exhs. 112, 114; 3 RH Exhs. 656-657, 881-881.) She was released on April 6, 1987. (3 RH Exhs. 656-657; 5 RH RT 919.)

Butler first told police about the assault about a month after her September 25, 1986, arrest when she was in the main jail having a conversation with Deputy Jeanine Lockhart in which Lockhart asked about the dangers from being a prostitute. (22 RT 5807-5808 [Lockhart]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1054-1055 [Butler].) Butler said she had been raped by a sheriff's deputy who worked on a lower floor. (22 RT 5792, 5796-5799 [Butler], 5806-5808 [Lockhart]; 3 RH RT 475-485, 528 [Butler]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1091 [Butler]; cf. 6 RH Exhs. 1672-1673.) Rogers sometimes worked in the jail. (22 RT 5808.) Lockhart gave Butler a copy of the "Behind the Badge" annual with

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[3] The latest date upon which Butler would have been eligible for release was May 17, 1986.

photographs of sheriff's deputies; Butler recognized Rogers's photograph in the book but would not tell Lockhart who had assaulted her because she was afraid. (22 RT 5792-5793, 5796-5797, 5799 [Butler], 5805-5807 [Lockhart]; 3 RH RT 481, 532-533, 552-553; 6 RH RT 1098-1099 [Butler]; 5 RH RT 920 [Lockhart]; 6 RH RT 1140-1141 [Butler]; cf. 6 RH Exhs. 1670, 1673-1674.) Butler told Lockhart she did not see the deputy in the book, but also said she did not want anything done about the assault because the deputy worked in the jail at that time and she was afraid. (22 RT 5806; cf. 6 RH Exhs. 1670-1671.) Lockhart told her supervisor, Senior Deputy Norm Simon, but he told her nothing could be done because Butler had not identified anyone. (22 RT 5810; 5 RH RT 941; see 6 RH Exhs. 1675-1676.)

Later statements by Butler confirmed that she had known who Rogers was when she had spoken to Lockhart. (3 RH Exhs. 714-715 [2001 Texas interview; Exh. 63B] [Supp. RH Exhs. 67-68 (Exh. 128B)] ; cf. 1 RH Exhs. 232 [Ermachild report].)[4] Butler testified at the reference hearing, "I already knew who he was before I got there," apparently meaning before she was arrested and booked into jail in November 1987. (3 RH RT 552-553.) When she recognized him in booking, she saw his name tag that said, "Rogers." (3 RH RT 481; 6 RH RT 1140-1141.) She already knew Rogers by name before the television news story about him was broadcasted. (3 RH RT 532-533.)

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[4] "Tambri was in the jail and she was made a trustee. One time she was standing around talking to four female deputies, one of them Lockhart, and she made a remark about there being bad cops downstairs, referring to Rogers." (1 RH Exhs. 232.) "[Lockhart] already knew that I was referring to an officer and I already knew who the officer was ...." (3 RH Exhs. 715.) "Before that happened. I had already confirmed to her that there was a cop but I had no idea he'd killed anyone – when I told Ms. Lockhart." (3 RH Exhs. 715.)

Butler testified at the reference hearing that she knew Rogers was the man who had assaulted her when she saw him in the booking area laughing and carrying a cup of coffee while walking with his shoulder and back toward her. (3 RH RT 560; 6 RH RT 1140-1141, 1225-1226.)[5] She recognized him based on his height, body build, "the look, the demeanor, the way he spoke to me . . . the way I felt in my opinion that he knew who I was, the way he humiliated me, the way he demeaned me. There is no doubt in my mind." (3 RH RT 560; 6 RH RT 1225.)[6] She did not recall him having a mustache at that time. (6 RH RT 1225.)

Butler testified that, when she told Deputy Lockhart about the assault but refused to identify Rogers and was told nothing could be done, Butler just wanted to "drop it." (6 RH RT 1675-1676.)

b. Butler's statement to investigators on February 18, 1987, after police arrested Rogers

Rogers was arrested on Friday, February 13, 1987 (11 RH RT 2141-2142), five days after Tracie Clark was murdered and four days after prostitute Connie Zambrano identified him as having picked up Clark in his beige truck the night Clark was killed. (17 RT 4595, 4639, 4644-4649.) It

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[5] Rogers's implication that he never laughed, even with other deputies (POBR 186 fn. 198), is not supported by the evidence as well as implausible. Another deputy sheriff testified for Rogers at the penalty phase of his trial that he could "laugh and talk with other officers and other friends." (22 RT 5924.) Photographs show Rogers smiling and enjoying himself in a pool and in a house. (1 Pet. Exhs. at pp. 207-208, 213.) Butler told the investigators that Rogers "laughed" while driving away from Union Avenue and was "snickering" at her when he made her beg for her heroin. (6 RH Exhs. 1658, 1660.)

[6] Butler testified at the reference hearing (and said in the initial declaration) that she saw Rogers during her booking for her arrest on February 16, 1986 (3 RH RT 525-527) and that she also saw him in booking after her arrest on September 25, 1986 (6 RH RT 1053-1055).

had been determined the bullets that had killed Clark and the bullets that had killed Janine Benintende in January 1986 had been fired from the same gun and that the type of ammunition used in both murders was the same as that issued by the Sheriff's department. (18 RT 4716, 4762, 4772, 4852-4858, 4866-4869, 4884; see 4 CT 741, 851.) Benintende had been last seen alive one evening at the end of January 1986 in the Union Avenue area by Katherine Hardie, who was working as a prostitute. (18 RT 4911-4914, 4917-4918.)

Rogers was initially arraigned on two counts of murder with a multiple-murder special circumstance on February 17, 1987. (4 CT 943-944 [complaint] 950 [docket]; see Return 11 [Statement of the Case].) The same day, Deputy Lockhart called District Attorney's Investigator Tam Hodgson, who had obtained arrest and search warrants for Rogers and who was teaching a class Lockhart was taking. (17 RT 4504, 4515-4516; 22 RT 5810; 5 RH RT 940, 945; 11 RH RT 2140-2141.) Lockhart told Hodgson about her conversation with Butler. (5 RH RT 940, 947, 945-476.) "Lockhart wasn't positive that" Rogers was the person who had assaulted and raped Butler, Hodgson testified. "But she thought the connection was so great that she should let [the investigators] know." (11 RH RT 2141 [Hodgson].)

Sheriff's Detectives Mike Lage and John Soliz, and Investigator Hodgson went to the Lerdo minimum security detention facility in Bakersfield around 8:00 a.m. on February 18, 1987. (11 RH RT 2142-2146; 6 RH Exhs. 1637; 3 Pet. Exhs. at p. 297 [report].) Lage had investigated the Benintende murder. (17 RT 4556-4557.) Soliz was investigating the Clark murder and it was agreed that Soliz would take the lead in the Butler interview and write the report. (11 RH RT 2160; see 4 RH Exhs. 1037-1044 [the report].) Soliz approached the interview with the attitude that he did not know what Butler would say; he knew from past experience that

"sometimes witnesses say they have information about a specific case and they actually don't." (9 RH RT 1788.) He showed her a photographic lineup that had been prepared by Lage so that they would know "if we were wasting our time or if we need to sit down and talk to her." (9 RH RT 1725, 1788.)[7]

The tape recorder was turned on after Butler gave the investigators a brief statement about having been sexually assaulted and after she identified Rogers in the lineup as the person who had done it. (9 RH RT 1719-1720, 1788; 11 RH RT 2341-2345 [Hodgson].)

Butler told investigators that, one night around January 1986, she was at the end of Chester Avenue at Union Avenue, across the street from the Knight's Rest Motel, where she was staying with her boyfriend William Wiese, whom Butler referred to as "Peg Leg" or "Peg."[8] (6 RH Exhs. 1637.) A man in a truck drove up to Butler, flashed his tail lights, and motioned with his head. (6 RH Exhs. 1637.) She walked up and asked if he wanted a date. (6 RH Exhs. 1637.) When he said he did, she got into his truck and the man drove away. (6 RH Exhs. 1637, 1651-1653.) Butler had bought heroin and was walking home to use it, but she accepted the "date" because she could use the money. (6 RH Exhs. 1653.) The man was

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[7] The lineup consisted of six photographs from the 1985 issue of the Sheriff's department annual, "Behind the Badge." (9 RH RT 1745, 1788, 1853-1855, 2160; 11 RH RT 2160; see 6 RH Exhs. 1704 [Rogers's photo in the 1985 issue of Behind the Badge, in the Main Jail section; Deputy Lockhart is on the same page].) The lineup was prepared by Detective Lage and initially shown to Connie Zambrano to see if she could identify the person she saw drive away with Tracie Clark the night Clark was murdered. (17 RT 4628-4630; 9 RH RT 1852-1853.)

[8] The Knight's Rest Motel, where Butler and her boyfriend stayed, was at 2340 South Union Avenue near Chester Avenue. (Exhs. JJ, KK.) It was approximately two miles south of Belle Terrace and Union. (3 RH RT 398, 400; 6 RH RT 1686, 6 RH Exhs. 1718, 1720.)

obviously drunk; he said he had been to a few bars. (6 RH Exhs. 1637, 1654-1655.) They had agreed that Butler would orally copulate him for $20. (6 RH Exhs. 1638.)

Butler demanded to be taken to a lighted area south on Union Avenue, but the man refused to go there and instead drove east on White Lane, across Cottonwood Road and down a dirt road in a field. (6 RH Exhs. 1647, 1655-1656; Exhs. JJ, KK.) After about forty-five minutes of oral copulation, Butler told the man it was taking too long and he would have to give her more money or she would have to go home. (6 RH Exhs. 1638.) He gave her an additional $20 for vaginal intercourse. (6 RH Exhs. 1638, 1663.)

The man was still trying to ejaculate after about 45 more minutes. (6 RH Exhs. 1663.) "Up to this point he was just as nice as he could be," Butler said. (6 RH Exhs. 1663.) Butler told the man if it wasn't going to work, he would have to take her home. (6 RH Exhs. 1638, 1663-1665.) The man then slapped her hard and told her she was going to do exactly what he wanted her to do. (6 RH Exhs. 1638, 1664.) Butler refused and said she would get out and walk. (6 RH Exhs. 1638.) The man took a stun gun from the dashboard and shocked her on her neck until she "couldn't scream anymore." (6 RH Exhs. 1638, 1665-1666, 1668.) Butler tried to get away but he was positioned so that he prevented her from doing so. (6 RH Exhs. 1669.) After Butler said she would cooperate, the man had vaginal intercourse with Butler again and made her orally copulate him. (6 RH Exhs. 1638, 1669.)

The man turned Butler over and tried to have anal intercourse with her, but she quickly sat up and said she was not going to do that. (6 RH Exhs. 1638.) The man pulled a small gun from the glove box and held it up to her head. (6 RH Exhs. 1638-1639, 1669-1670.) Butler became angry, said she was not scared of him anymore, and told him to take her home. (6 RH

Exhs. 1639.) The man fired the gun across the bridge of her nose, and the bullet went out the window. (6 RH Exhs. 1639, 1670.) Butler then got back down and let the man have anal intercourse with her. (6 RH Exhs. 1639.) He ejaculated on her back. (6 RH Exhs. 1639, 1679.)[9]

Butler told the investigators:

> I was real scared. I've, I've, I've had a gun to my head before. You know, so, it wasn't (inaudible) thing but this man scared me more than most. I've had a knife pulled on me before. This scared me. His attitude scared me. He was so sure of his self. He was just like he knew there was nothing I could do to hurt him. There was nothing. I, I mean, I said you realize I'm going to get you back like this. You know I'm going to get you back. He said what are you going to do, you're a hooker. . . . What can you do? Call the cops?

(6 RH Exhs. 1646.)

The man went through Butler's pockets while he was driving and found a plastic and foil package of a dark substance, which he immediately recognized as heroin. (6 RH Exhs. 1639, 1657-1658, 1679.) He grinned and said, "how bad do you want it?" (6 RH Exhs. 1658.) He made her beg for it and then threw it in her face. (6 RH Exhs. 1639, 1658.) The man took the money back, but Butler said her pimp would beat her if she didn't come back with some money. (6 RH Exhs. 1639.) The man then threw $20 into her lap. (6 RH Exhs. 1639.) He tried to take her gold watch, but she started crying and said he would have to shoot her. (6 RH Exhs. 1639.) The man apparently felt sorry for her and did not take it. (6 RH Exhs. 1639.)

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[9] At the reference hearing, Butler explained, "He was mortifying me. He's humiliating me. He was talking dirt to me. But I do remember that he wanted to let me know that he could kill me if he wanted to. But other than that, I can't tell you exactly what he said word for word. But he wanted to humiliate me." (3 RH RT 437.)

When they were back on White Lane, the man pushed Butler out of the truck while it was moving. (6 RH Exhs. 1639.) He then stopped and backed up toward Butler, but she rolled off the road and into some bushes. (6 RH Exhs. 1639-1640.) The man's truck hit an obstacle and he "skidded off real quick" with his lights out. (6 RH Exhs. 1639-1640, 1680.)

Butler said the man later "followed [her] around." (6 RH Exhs. 1682.) About two days after the assault, when she was in a car performing oral sex on a customer she had picked up on Union Avenue, she noticed the man who had assaulted her standing near the car watching them. (6 RH Exhs. 1682-1683.) He had a gun in his waistband that looked similar to the one he had used on her. (6 RH Exhs. 1683-1685.) She urgently told the customer to drive away. (6 RH Exhs. 1684-1683.) The man's truck was parked "off in the bushes" behind the customer's car. (6 RH Exhs. 1683.) Two or three days after that, when she was walking, he watched her as he "cruis[ed]" by. (6 RH Exhs. 1683.) "About a week later," Butler was coming out of her motel room on Union Avenue when she saw the man's truck parked across the lot and he was "sitting outside his window [*sic*], like this watching" her. (6 RH Exhs. 1683.) On another occasion, she was walking on Union Avenue when the man made a U-turn to go the way she was going, but Butler crossed the street to the opposite side. (6 RH Exhs. 1683.) The man parked and indicated for her to come to his truck, but she ignored him and "went inside the building." (6 RH Exhs. 1683-1684.) The man also followed Butler back to the Knight's Rest motel where she was staying. (6 RH Exhs. 1686.) On that occasion, she went into her motel room and told Wiese, "that son-of-a-bitch that raped me . . . last month is following me." (6 RH Exhs. 1686.) Wiese jumped in his truck, but by the time he was able to start it and follow the man, he could only see the tail gate of the man's truck. (6 RH Exhs. 1686.) There may have been other occasions on which the man followed her. (6 RH Exhs. 1684.)

Butler told the investigators she had known who the man was "for quite some time." (6 RH Exhs. 1670.) She said, "about a month, month and a half" after the assault, "I seen him [*sic*] when I went to jail on an under the influence charge." (6 RH Exhs. 1682.) She also passed through A Deck two or three times when she went to visit Wiese (6 RH Exhs. 1671, 1677, 1682) and she "kept seeing this cop." (6 RH Exhs. 1671, 1682). She "kept looking" at the officer and told him she knew him from somewhere and that he had a white truck. (6 RH Exhs. 1671.) At first he said she didn't know him, but then said he had arrested her in Arvin for being under the influence while he had been driving a white squad car. (6 RH Exhs. 1671.) However, Butler had never been arrested in Arvin and she told him so. (6 RH Exhs. 1671-1672.) At that point:

> He said something to me. I don't remember. But like I say it was, it was like somebody lifted a sheet and I snapped. I snapped. I knew exactly where I seen [*sic*] him. It was, the uniform kept throwing me off, you know. I, I had seen the man naked so I couldn't figure out what he looked like with clothes on. And ah, when he, he said something to me and I snapped. And I looked at him real hard. He said you see something that you recognize or you know. And I got real smart with him. I said yeah, I see something and I won't soon forget. And he said oh, yeah. And I said, yeah. And I kept staring at him. And he, he'd come back, you know behind the bars to sit down. And I turned all the way around and I looked at him. He said I suggest if you want that visit you turn your ass around and keep your mouth shut. And, uh, I looked at him some more. But he said something else. Tape your fucking mouth shut or something. He got real nasty. (Inaudible).

(6 RH Exhs. 1672; 6 RH RT 1140-1141.) This occurred three weeks after Butler had first seen him in the jail. (6 RH Exhs. 1682.)[10] When Butler

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[10] Butler was arrested on February 16, 1986 (1 RH Exhs. 67-70, 77-81), and on March 7, 1986 she was given a jail sentence from which she was eligible for release on May 17, 1986. (1 Exhs. 54, 71-72, 76.) Butler (continued...)

was asked if there was any doubt about her identification, she said, "No doubt in my mind at all." (6 RH Exhs. 1675-1676.) After giving her statement to investigators, Butler completed her jail term and was released on April 6, 1987. (3 RH Exhs. 656-657; 5 RH RT 919.)

c. Butler's November 29, 1987, arrest and resulting conviction[11]

On November 29, 1987, Butler was arrested for possession of heroin and released two days later. (1 RH Exhs. 128-143; 6 RH Exhs. 1607-1608.) Police reports show that the charges were based on Butler's arrest on November 29, 1987, when she was found in possession of a syringe containing heroin in the company of one person who had recently injected heroin and one person who had not injected heroin. (9 RH RT 1812-1815 [discussion of the facts from the police report].) Butler told police she had injected heroin into herself immediately before she was detained, and she admitted to police that she had furnished heroin to a companion who then also injected heroin. (1 Pet. Exhs. at pp. 158-162, 168-170 [Kern County

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(...continued)
was in custody again from September 25, 1986, until April 6, 1987, on new drug and prostitution convictions. (1 RH Exhs. 92, 94-95, 98, 107, 110-116; 6 RH Exhs. 1604; 3 RH Exhs. 656-657, 881-888; 5 RH RT 919; discussed at Respondent's Brief to the Referee (RBR) 7-8.) During that period of custody, she told Deputy Lockhart about the sexual assault (22 RT 5807-5808, 5792, 5796-5799; 5 RH RT 910, 919-923; 6 RH RT 1054-1055) and was also interviewed by investigators about four months later after Rogers was arrested. Rogers was assigned to the central receiving facility until at least May 31, 1986 (4 RH Exhs. 1071); and was reportedly assigned to jail facilities from August 25, 1983, to January 3, 1987, when he was reassigned to patrol (4 RH Exhs. 1071; 10 RH RT 2021-2023; 11 RH RT 2025-2034, 2079; discussed at RBR 6-7). In addition, it was "very common" that deputies would work overtime shifts in jail, including patrol deputies. (5 RH RT 940; 11 RH RT 2037-2039.)

[11] The People will discuss this case in some detail because it pertains to one of the findings of false testimony.

Superior Court case number 35464]; 9 RH RT 1812-1815 [discussion of the facts from the police report].)

Butler was initially charged in a felony complaint with a violation of Health and Safety Code sections 11350, possession of heroin (hereafter, "11350"), and 11550, being under the influence of heroin. (1 Pet. Exhs. at pp. 155; 1 RH Exhs. 147.) On December 3, 1987, an arrest warrant was requested for the charges in the complaint based on a declaration that the facts stated in the police reports were true. (1 RH Exhs. 144.) An arrest warrant was issued the same day. (1 RH Exhs. 145-146.) Butler appeared in custody on December 18, 1987. (1 RH Exhs. 148-149; 6 RH Exhs. 1609-1610.)

On January 8, 1988, the date set for a preliminary examination, Butler pleaded no contest to a charge of possession of heroin for sale in violation of Health and Safety Code section 11351, in lieu of an amendment to add a violation of section 11352, conditioned on a grant of probation, a maximum jail term of one year, and dismissal of pending probation revocations. (1 Pet. Exhs. at pp. 142-148; 1 RH Exhs. 154-162.)[12] When asked for a "factual basis," Deputy District Attorney Andrew Baird stated, "Yes, your Honor, as this is a lesser included of furnishing, 11352." Defense counsel so stipulated.[13] (1 Pet. Exhs. at p. 147.) On February 8, 1988, the Superior

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[12] In 1987, the pertinent language of section 11351 provided, "every person who possesses for sale or purchases for purposes of sale" a specified controlled substance including heroin "shall be punished by imprisonment in the state prison for two, three, or four years." (Stats. 1985, ch. 1398, § 1.5.)

[13] An inquiry into the "factual basis" of a conditional plea is required by Penal Code section 1192.5. The general functions of a factual basis inquiry are to ensure that the plea is knowing and voluntary—by showing that the defendant understands the nature of the offense—and to provide a summary of the facts of the offense. (*People v. Holmes* (2004) 32 (continued...)

Court placed Butler on probation with conditions including that she serve one year in county jail. (1 Pet. Exhs. 102-106, 123-173; 1 RH Exhs. 165, 167-171 [Kern County Superior Court case number 35464].)

Deputy District Attorney Baird, who prosecuted Butler's case, did not remember the case years later at the reference hearing, but after looking at case documents, he thought he "got a pretty good deal." (9 RH RT 1802-1803, 1807), noting that a corpus delicti would be required to use Butler's admissions. (9 RH RT 1803, 1815.)[14] Baird thought the plea bargain was reasonable. (9 RH RT 1820-1821, 1831-1838.) He did not remember making any deals with Butler regarding Rogers's case and was sure he would have remembered if he had. (9 RH RT 1805.) Baird did not have any information that there was any connection to Rogers's murder case. (9 RH RT 1804-1805.)

Defense attorney Daniel Ybarra did not remember the case either, but after reading the file, he did not note anything out of the ordinary about the plea bargain. (8 RH RT 1564, 1573-1574, 1586-1587, 1593.) Ybarra testified at the reference hearing that that sometimes a prosecutor would tell him his client is working for the police or will be testifying and that the client could not be given "an actual promise," but "after the work is done,"

(...continued)
Cal.4th 432, 438-439, 440-441.) In *Holmes,* the Court found a factual basis sufficient where it showed "that defendant was cognizant that his acts did constitute the offense with which he was charged, notwithstanding defendant's letters to the court contesting his guilt." (*Id.* at p. 443; see *North Carolina v. Alford* (1970) 400 U.S. 25, 32-33, 38 [a defendant may plead guilty while claiming innocence].)

[14] Rogers's attorney witness, Daniel Ybarra, did not think there would be a problem "making a corpus." (8 RH RT 1564.)

"they would take care of it." (8 RH RT 1565.) "Usually" that would mean the case would be dismissed. (8 RH RT 1589-1590.)[15]

d. Butler's penalty phase testimony on March 23, 1988

At the time of Rogers's trial, Butler had been in jail since December 17, 1987. (6 RH Exhs. 1609-1610; see 11 RH RT 2162.) On March 23, 1988, the first day of the penalty phase, she was transported in jail clothes from the Lerdo facility to the courtroom where Rogers's trial was ongoing. (3 RH RT 506; 10 RH RT 1995.) Butler confirmed in her testimony at the reference hearing that her transportation to the courthouse was not voluntary. (3 RH RT 506.)[16] Hodgson had had no contact with Butler since the interview the year before. (11 RH RT 2161-2164.) She was taken to a jury room where the prosecutor, Sara Ryals, briefly interviewed Butler

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[15] Considered as a whole and in context, Ybarra's description indicated that the defendant's attorney would be approached while the case was still pending. (8 RH RT 1564-1567, 1589-1590.) At the very least, Ybarra's testimony did not tend to prove that the scenario he described would occur after his client had been sentenced. He said that the modification of Butler's probation by the District Attorney was an unusual occurrence (8 RH RT 1569), indicating that such a modification was outside the scenario he described.

[16] Butler said she was not forced to testify. (3 RH RT 506.) However, there is no evidence that she was given a choice. She was a sentenced prisoner in the county jail. As her testimony suggested, she was taken to the courtroom by sheriff's deputies as a result of their assertion of their authority as her jailers. She clearly had no choice in taking the witness stand and, if she had refused to testify, she would have been in contempt of court and would have been in violation of her felony probation, with a prison sentence as a possible consequence. In fact Butler testified, "I didn't tell all the details that I needed to tell because I didn't want to testify at all. I just told the basics." (3 RT 538.) It may be observed that the questions the prosecutor asked Butler at the penalty phase only called for "the basics." The People note that most witnesses only answer the questions they are asked and, if they go beyond that, they are admonished.

and, only at that point, decided to call her as a witness. (10 RH RT 1949-1952; 11 RH RT 2162.) When Ryals first spoke to Butler, she had initially appeared uncertain as to why she was there. (10 RH RT 1950). Butler testified the same morning. (22 RT 5778.) At the reference hearing, Ryals observed that Butler was "[v]ery definitely" scared when she testified at the trial. (10 RH RT 1951.)

Butler testified that the first time she saw Rogers was around January 1986, when she was on Union Avenue near Chester Avenue walking back to her motel room after buying some heroin when a truck he was driving stopped. (22 RT 5780-5781 [2 RH Exhs. 363-364, 386].)[17] She got in and told Rogers that she wanted to go to her room, but Rogers did not want to go there. (22 RT 5781 [2 RH Exhs. 364].) Rogers drove down White Lane to a field on the other side of Cottonwood Road. (22 RT 5781 [2 RH Exhs. 364].) Rogers wanted "half and half," for which he would pay $40. (22 RT 5782 [2 RH Exhs. 365].) Butler orally copulated him inside the truck. (22 RT 5782-5783 [2 RH Exhs. 365-366].) Rogers then moved to the middle of the seat, Butler sat on top of him and they had vaginal intercourse, but he did not ejaculate. (22 RT 5783 [2 RH Exhs. 366].) She told him he would either have to finish or give her more money. (22 RT 5783-5784 [2 RH Exhs. 366-367].)

Rogers refused to give Butler more money, and said that they were going to do "some more things." (22 RT 5784 [2 RH Exhs. 367].) He reached onto the dashboard, got an electric shocking device, put it on her neck and activated it. (22 RT 5784 [2 RH Exhs. 367].) It made a crackling noise and sparks. (22 RT 5784 [2 RH Exhs. 367].) The device made red

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[17] Butler's trial testimony (22 RT 5778-5804) is Exhibit 42 on habeas corpus (2 RH Exhs. 361-387).

burn marks and a few blisters on her neck. She had five or six scars at the time of trial. (22 RT 5784-5785 [2 RH Exhs. 367-368].)

Rogers then wanted to have vaginal intercourse, and Butler complied. (22 RT 5789 [2 RH Exhs. 368].) He then wanted to have anal intercourse, but Butler refused. (22 RT 5789 [2 RH Exhs. 368].) Rogers pulled a small black semiautomatic pistol out of the glove compartment and put it to her temple. (22 RT 5785-5786 [2 RH Exhs. 368-369].) Butler told Rogers he was not going to shoot and she laughed at him. (22 RT 5786 [2 RH Exhs. 369].) Rogers then put the gun on the bridge of her nose and fired it out the open window, nicking her nose. (22 RT 5784-5787 [2 RH Exhs. 367-370].) The flash of the gunpowder interfered with her vision for about 30 seconds. (22 RT 5787-5788 [2 RH Exhs. 370-371].) Rogers then had anal intercourse with Butler and then she orally copulated him. (22 RT 5788 [2 RH Exhs. 371].)

When the sex acts were over, they got back in the truck and drove down White Lane. (22 RT 5788 [2 RH Exhs. 371].) Rogers told her to empty her pockets. (22 RT 5788 [2 RH Exhs. 371].) Butler had a piece of plastic wrap containing what looked like "a little tiny, brown piece of mud about the size of half a dime," which was tar heroin. (22 RT 5788-5789 [2 RH Exhs. 371-372].) Rogers knew it was heroin and asked if it belonged to her. (22 RT 5789 [2 RH Exhs. 372].)[18] Rogers made her beg for the heroin. (22 RT 5789 [2 RH Exhs. 372].) He took back the money he had given her. (22 RT 5789 [2 RH Exhs. 372].) When she told him she needed the money, he threw $20 at her. (22 RT 5789-5790 [2 RH Exhs. 372-373].)

When they were back on Union Avenue, Rogers slowed down, opened the door, and pushed her out. (22 RT 5790 [2 RH Exhs. 373].)

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[18] Butler gave the same account in a 2008 interview. (3 RH Exhs. 775, 781-782; cf. 3 RH Exhs. 691 [1998 interview].)

Butler fell into some weeds and bushes off the side of the road. (22 RT 5790 [2 RH Exhs. 373].) Rogers drove down a little farther, slowed down, stopped, and backed up toward her. (22 RT 5790 [2 RH Exhs. 373].) Butler "rolled deeper in the bushes" as he hit something which made a loud bang under the truck and made the tires spin. (22 RT 5790 [2 RH Exhs. 373].) Rogers spun the tires forward and drove away. (22 RT 5791 [2 RH Exhs. 374].) Butler went home to her boyfriend, Wiese, and "fell apart." (22 RT 5801-5802 [2 RH Exhs. 384-385].)

After Butler was arrested in February 1986, she went to visit Wiese three times. (2 RH Exhs. 374, 385.) The first two times, she saw Rogers working on A Deck and knew that she "knew him." (22 RT 5780, 5791 [2 RH Exhs. 363, 374].)[19] She explained, "I didn't know where because the uniform kept throwing me off, but I knew I knew this man and then it dawned on me when I knew him." (22 RT 5791 [2 RH Exhs. 374].) Butler asked Rogers if he had ever arrested her before. (22 RT 5791 [2 RH Exhs. 374].) He said he had arrested her in Arvin, but she had never been arrested in Arvin. (22 RT 5791 [2 RH Exhs. 374].) At that point, she realized how she knew him and said, "you son-of-a-bitch." (22 RT 5791-5792 [2 RH Exhs. 374-375].) Rogers told her that she had better turn around and keep her mouth shut. (22 RT 5792 [2 RH Exhs. 375].)[20]

Butler was released from jail after serving a six-month term. (22 RT 5796 [2 RH Exhs. 379].) She was back in jail when, between September and November 1986, Jeanine Lockhart, a guard at the jail, asked Butler if she was afraid of being hurt or raped while working as a prostitute. (22 RT

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[19] Receiving and booking were on A Deck of the mail jail. (5 RH RT 914.)

[20] In an interview under sodium amytal, Rogers described telling Tracie Clark that, if she could keep her mouth shut, he would give her a ride back to town. (22 RT 5868.)

5792, 5795 [2 RH Exhs. 375, 378].) Butler said she had been raped by a deputy sheriff. (22 RT 5792 [2 RH Exhs. 375].) Lockhart showed Butler a Sheriff's Department annual with photographs. (22 RT 5792-5793, 5797-5799 [2 RH Exhs. 375-376, 380-382].) Butler told her that the person was in it, but she would not say who it was. (22 RT 5792-5793, 5797-5799 [2 RH Exhs. 375-376, 380-382].) Butler testified she did not make a formal report because she was afraid of the man because he was right below her in the jail and she did not think the police would do anything. (22 RT 5793-5802 [RH Exhs. 376-382].)

e. Events following Butler's testimony

The prosecution's penalty phase case concluded the same afternoon that Butler testified. (3 CT 682.) The defense case proceeded the next day, Thursday, March 24, 1988, with the testimony of psychologist David Bird and ten character witnesses, including Rogers's wife and stepdaughter. (3 CT 689; see Return at pp. 74-87.) On Monday, March 28, 1988, counsel made their arguments to the jury, the court gave its instructions, and the jury retired to deliberate. (3 CT 692.) The jury returned a verdict of death the next day. (3 CT 694-695.)

On the morning of Monday, May 2, 1988, the trial court heard and denied Rogers's motion for a new trial and the automatic motion to modify the verdict, and imposed a judgment of death. (3 CT 729.) The same day, before another judge, a hearing commenced at which an oral motion to modify Butler's sentence was made. (1 Pet. Exhs. at p. 135; 5 RH Exhs. 1329) The motion was granted and Butler was ordered released from custody. (*Ibid.*; see 10 RH RT 1986-1987 [Ryals]; 11 RH RT 2174 [Hodgson], 12 RH RT 2406, 2415-2416, 2433-2434 [Hodgson])

Investigator Hodgson testified that he had arranged for probation to be transferred to another state "many times." (12 RH RT 2406.) Hodgson intended to pick Butler up from Lerdo when she was released and then put

her on a bus to go to her mother's house in Texas. (12 RH RT 2406, 2416.) At the reference hearing, Hodgson remembered speaking to Butler either in the courthouse section of the building or in the jail receiving area and telling her to call him when she was released. (12 RH RT 2402-2403, 2433.) Hodgson believed that Butler's probation was terminated at the hearing. (12 RH RT 2403, 2406.) However, the minutes and the release order only stated that the jail term was modified to time served and that the conditions of probation would remain the same. (1 Pet. Exhs. 134-135; 5 RH Exhs. 1328.) Hodgson thought it was possible the clerk had typed in common language for reduction of a sentence to time served rather than for termination of probation. (12 RH RT 2406.)

In "dozens" of other cases Hodgson had made arrangements to "change the sentence" and "amend the probation status in order to facilitate the safety of a witness where you have got legitimate concerns." (12 RH RT 2415.) In the past, he had also had arranged for probation to be transferred to another state. (12 RH RT 2406.) There was

> no reason for a file to fall behind the cabinet. Everything is right on top of the table. If she needs to be out of jail for her safety, the court's responsive to that. It always has been. We are concerned about getting people injured because they have testified. And wherever [*sic*] done a really good job over the years of not having that happen.

(12 RH RT 2415-2416.)

Butler was released the next day, on May 3, 1988. (6 RH Exhs. 1609-1610; 4 RH Exhs. 1171 [custody record].) Hodgson did not receive a call from her. (12 RH RT 2403.) When Butler was told she was being released, she was surprised and frustrated. (3 RH RT 507-508.) She asked a jailer why she was being released. (3 RH RT 539.) She just wanted to "do [her] time" so that the charge might be reduced to a misdemeanor and she would not be on felony probation. (3 RH RT 508; see Pen. Code, § 17, subd.

(b)(3) [reduction while on probation]; see also Pen. Code, § 1203.4 [dismissal of charge upon early termination of probation].) She explained, "I didn't want to come out of jail at all because I knew with felony probation I would be right back in, like a revolving door." (3 RH RT 508.) She also wanted to stay in jail longer because she wasn't "solid[ly]" off of drugs and did not have anywhere to go. (3 RH RT 507-508.) At Rogers's trial, Butler denied she wanted to get out as soon as possible but said she wanted to do her time. (22 RT 5804 [2 RH Exhs. 387].) She said she hoped to "quit doing drugs" and get a job. (22 RT 5804 [2 RH Exhs. 387].) When she was out of jail, she called a rehabilitation center, but had to wait a few days for a bed. (6 RH RT 1149-1150.)

On October 13, 1988, Butler was arrested by Bakersfield police for being under the influence of a controlled substance and was released on her own recognizance. (5 RH Exhs. 1473-1474; 6 RH Exhs. 1611-1612, 1624-1625.) On October 28, 1988, after failing to appear two days earlier, she pleaded guilty to a violation of section 11550 in the new case. (5 RH Exhs. 1474; 6 RH Exhs. 1625-1629 [Kern County Superior Court case number BM392655B].) On November 17, 1988, she was granted probation and ordered to serve 180 days in jail, but execution of the jail term was stayed until December 1, 1988. (1 Pet. Exhs. 108; 5 RH Exhs. 1630.) She failed to appear and on June 23, 1989, probation was revoked and a bench warrant was issued for a violation of probation. (1 Pet. Exhs. 107, 117; 6 RH Exhs. 1631, 1633.)

On November 16, 1988, Butler denied being in violation of her felony probation, a hearing was set for December 7, 1988, and she was released on her agreement to appear. (1 Pet. Exhs. 125-126 [West Kern Municipal District case number 376424].) A bench warrant was issued for her failure to appear on December 7, 1988. (1 Pet. Exhs. 123, 125.)

Butler testified at the reference hearing that, after she was released from jail (apparently after her November 17, 1988, appearance on the new 11550 charge), Investigator Hodgson "found" her on Union Avenue and told her some officers might be unhappy she had testified against Rogers and she should not be on the street any more. (3 RH RT 540-541.)[21] Butler had heard on the street that Rogers had killed a number of other women in addition to the two charged victims. (3 RH RT 536; 6 RH RT 1119-1120, 1131- 1132.)

Hodgson testified that on May 2, 1988, the day Butler's jail term was modified, he told her "she needed to get out of town, she needed to leave the state, there were unknowns here that [he] could not control and she needed to go away" because "it was not safe for [her] here." (12 RH RT 2434.) In the declaration attached to the Petition, Hodgson said he had warned her she "might wind up in a ditch, dead." (1 RH Exhs. 223, 258.) Hodgson testified he would not use that phrase, but had told Butler in the courthouse building on the day of the release hearing that she was not safe and should leave. (12 RH RT 2434.) "[D]ead in a ditch," was her impression of what could happen to her. (12 RH RT 2411-2412, 2433-2434.)

Two days after Butler failed to appear on the probation violation, she left California. (3 RH RT 508-509.) She went to Idaho where she met a man named Gordon, got "cleaned up," stopped using heroin, and stopped being a prostitute. (3 RH RT 510.) At that point, she had been "strung out" on drugs for 13 years, which made her "foggy" and interfered with her

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[21] Hodgson testified he wished he had had the "kind of time" to be able to look for Butler on the street. (12 RH RT 2416.) He did not know Butler had been arrested again until 1998, when he was asked to provide assistance by the Attorney General's Office. (12 RH RT 2412, 2415.)

ability to remember. (3 RH RT 546; 6 RH RT 1043, 1144-1145.)[22] She married Gordon in 1992 and they moved to Oregon the same year. (3 RH RT 510.) Butler saw a lot of therapists, but her identification of Rogers as her attacker never bothered her. (3 RH RT 510-511.) However, she testified, "I always thought and I always was very upset that it was my finger that put this man on death row. And . . . really, . . . I didn't want to kill anyone. It bothered me." (6 RH RT 1135; cf. 3 RH RT 509.)

f. The declaration used to support the habeas petition

Nearly 10 years after Butler testified at Rogers's penalty phase, defense investigator Melody Ermachild appeared unannounced at Butler's house in Oregon, telling her that she had identified the wrong person as her attacker. The claim of a false identification in the Petition relied heavily on the declarations signed by Butler for the defense investigator and which expressed doubt about Butler's identification of Rogers as the person who had sexually assaulted her in 1986. (1 Pet. 32-55, 60-61; POBR 183, 188-189; see POBR 182 [referring to Butler's contradiction of many parts of her declarations]; see also POBR 31-44 [discussion of the declarations in Statement of Facts].)

Butler testified at the reference hearing that when she left Bakersfield, she was "scared to be on the street" because she "felt like" she had put a Kern County deputy sheriff "on death row." (3 RH RT 509.) She added, "And I was afraid that he had buddies. And if I got in trouble again, I

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[22] Butler believed her recollection was better at the time of the reference hearing than it had been when she was using heroin. (6 RH RT 1087.) She explained, "As I got further and further away from my drugs, my mind got clearer. Even today I am clearer now than I was then [when she spoke to the officers at Lerdo in 1987." (6 RH RT 1144-1145.) The heroin she took also distorted her perception of time. (6 RH RT 1043-1044, 1231.)

would be taken out in the bushes, this time [I] wouldn't make it out of bushes. I ran. I ran hard." (3 RH RT 509.) On cross-examination, Butler testified that after she had left, she never thought she would have to come back to California. (6 RH RT 1152.) She said, "I knew if I ever came back, I might get hurt." (6 RH RT 1152.)[23]

She was subject to bench warrants, including one for failing to appear to serve 180 days in jail as a condition of probation (6 RH Exhs. 1631, 1633; 1 Pet. Exhs. 107, 117) and one for a violation of probation for a felony for which she could have been sentenced to the upper term of four years in state prison. (Health & Saf. Code, § 11351, as amended by Stats. 1985, ch. 1398, § 1.5.)

Butler met a man named Gordon after she had permanently left California and they moved to Oregon in 1992. (3 RH RT 508-510; 6 RH RT 1152.) Butler had no reason to think anyone working for Rogers knew where she was. Reports of her arrests in Kern County showed either local addresses or a Texas address. (1 Pet. Exhs. 75, 99-100, 120, 158.)

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[23] The next question suggested that her "case wasn't a concern" and Butler agreed. (6 RH RT 1152.) However, she testified that she was not concerned because she did not think she "would ever have to come back to California." (6 RH RT 1152.) Moreover, it appears that her concern about being sent to jail or prison was less than that of being hurt or killed; she had served extended jail sentences before. Still, it is unlikely she had no concern at all about being sent to jail or prison. Butler had told Hodgson in 1998, "[D]o you want to know what I'm really scared about? I left the state on felony probation." (3 RH Exhs. 703-704.) She said she had been stopped before several years later and had had no trouble due to the probation. "It's like I dropped out . . . the earth." (3 RH Exhs. 704.) Hodgson explained to her that a warrant for a violation of probation would be "dropped from" the computer system after three years. (3 RH Exhs. 704; 12 RT 2417, 2421-2422.) Butler testified she was concerned about coming back to testify at the reference hearing due to her felony probation. (6 RH RT 1230.)

Thus, Butler was surprised when a private investigator working for Rogers, Melody Ermachild, appeared at her house in LaPine, Oregon with no prior notice on Sunday, May 31, 1998. (3 RH RT 512, 578-579.) Butler initially met Ermachild outside. (1 RH RT 99.) After Ermachild said who she was, Butler told her, according to Ermachild, "she said, I don't want to be involved in this any more. Please get off my property basically." (1 RH RT 99-100.)

Ermachild told Butler she "was a very hard person to find" and asked if she was known by a number of aliases. (3 RH RT 512-513.) When Butler heard her aliases, she initially reverted to her "old street attitude," but also thought, "oh, my God, this is someone from my past." (3 RH RT 512-514.)[24]

Ermachild said she was working for Rogers and his family so that he could be in the general prison population. (3 RH RT 514.) Butler told Ermachild what Rogers had done to her, she was sure Rogers was her assailant; and said that she was "done with it." (3 RH RT 516; cf. 1 EH Exhs. 228 [Ermachild report].) Ermachild had "bunch of documents." (3 RH RT 516.)[25] Ermachild told Butler that she, Butler, "may have" misidentified Rogers. (3 RH RT 517.)[26] She told Butler that Rogers had never had a mustache, a white pickup, or a stun gun; but that another man

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[24] Ermachild reported that Butler's "first reaction to our visit was hostility and fear. Butler said it frightened her to have her past come back unexpectedly." (1 RH Exhs. 223.)

[25] During the interview, Ermachild brought out records of *Butler*'s prior criminal cases. (1 RH Exhs. 233 [report].)

[26] Ermachild told Dealia Winebrenner, an uncharged Ratzlaff victim, that petitioner was "innocent" and that Rogers had been confused with Ratzlaff. (DW RT 54.) Butler told Hodgson in 1998 that Ermachild told her petitioner could not have been the man who assaulted her. (2 RH Exhs. 672, 680-681, 684-685.)

did who looked so similar to Rogers that Butler could have mistaken him for the other man, Michael Ratzlaff. (3 RH RT 517; 6 RH RT 1175.)[27] Ermachild also described to Butler an attack by Ratzlaff on another prostitute, Lavonda Imperatrice, which Ermachild said was a "remarkably similar." (3 RH RT 542-543; 5 RH RT 1199-1200, 1234.)[28] She told Butler that Ratzlaff liked to degrade and humiliate women—a characteristic of the assault on Butler. (5 RH RT 1234; see 3 RH RT 437; 6 RH RT 1234.)[29] Ermachild also told Butler that Rogers's family was destitute and that one member had an illness. (3 RH RT 520.) Ermachild showed Butler photographs of Ratzlaff, many taken around 1980, as a young and healthy-looking man. (3 RH RT 520; 7 RH RT 1259-1261; 5 RH Exhs. 1344-1347

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[27] When Butler saw Ratzlaff's photo, she "didn't think" he and Rogers looked a lot alike. (3 RH RT 517, 558; 6 RH RT 1153-1154.) The two men bear little facial resemblance. (Compare 5 RH Exhs. 1344-1345 [photos of Ratzlaff] with 6 RH Exhs. 1587 [Exhibit HH, including a "mug shot" of petitioner].) In addition, the other person was "taller, thicker in stature," darker, and had "much more hair." (3 RH RT 520-521.) Butler was "adamant with Ms. Ermachild" that Rogers was the person who had attacked her. (3 RH RT 526-527.) Ermachild's report states, "at the time, she was sure he was the one who attacked her," apparently referring to when she recognized Rogers in jail. (1 RH Exhs. 232.)

[28] Ermachild did not tell Butler that Ratzlaff had stunned one victim in the vaginal area, severely beat some of them, or that he had strangled some of them, which would have presented a far different picture of Ratzlaff's attacks. (6 RH RT 1235.) Ermachild also did not tell Butler that a small semi-automatic pistol, fitting Butler's description of the one used on her, was found in petitioner's truck when he was arrested. (6 RH RT 1236; see 3 RH Exhs. 1638-1639, 1669-1670, 1684-1685; 22 RT 5787-5788 [a part of the gun came back and nicked her nose, indicating it was a semi-automatic].) In addition, Ratzlaff's assaults showed out-of-control rage and brutality, rather than the cool, controlling demeanor and callous humiliation involved in the assault on Butler.

[29] As will be discussed, those assertions were false. Ratzlaff flew into uncontrolled rages and inflicted serious harm, but the nature of the attacks did not show intent to degrade or humiliate the victims.

[Exhibit C].) Butler told Ermachild that Ratzlaff, as shown in the photographs, did not resemble her attacker—Ratzlaff had darker skin and "much more hair" on the top of his head. (3 RH RT 521; 6 RH RT 1153-1154.) Ermachild also showed Butler photographs of Rogers as an "older, feebler man" who looked more stable. (6 RH RT 1162-1163.) The photographs were never presented in evidence.

Ermachild wrote a declaration by hand that she read to Butler, but Butler was not "fully listening." (3 RH RT 521-523.) Butler read the declaration to herself, but only "[h]alf-heartedly." (3 RH RT 521-522.) Butler testified she just wanted to get Ermachild out of her house. (3 RH RT 522; 1 RH Exhs. 243-251 [Exh. 17].) Butler did not change her mind about the identity of her attacker, but continued to believe that her attacker was Rogers. (3 RH RT 522.)

Sometime later, Ermachild mailed a typewritten declaration to Butler. (1 RH Exhs. 252-259 [Exh. 18].) Butler was "disgusted and irritated and annoyed" at the way Ermachild had modified Butler's words "to be the way she wants it to be." (3 RH RT 544-545.) About halfway through, Butler told her husband what she thought. "My husband said, just sign it and send it back and be done with it. And I never thought I would hear from anybody again." (3 RH RT 545.) Butler just wanted the issue to be out of her life. (3 RH RT 545.)

Based on the factual assertions made by Ermachild during their extended discussion, Butler started "second-guessing" her identification of Rogers, so she discussed the factors in her identification with her husband. (3 RH RT 517, 534, 559; 6 RH RT 1158, 1162-1163, 1170, 1181, 1225, 1233.) After speaking to her husband, Butler decided that her identification had been correct. (6 RH RT 1157, 1233-1234.) She never actually doubted that the identification was correct. (3 RH RT 558; 6 RH RT 1155.)

g. Butler's repudiations of the declaration

About five months after Ermachild appeared at her door, Butler telephoned the Kern County District Attorney's Office, and the call was returned by Investigator Hodgson on October 27, 1998. She said she questioned—but did not disavow—her previous identification of Rogers based on things Ermachild had told her. (6 RH RT 1168-1169; 3 RH Exhs. 682-700.)[30] During the phone call, Hodgson reassured her that there was no California warrant for her arrest for a probation violation. (3 RH Exhs. 704.) He also told her that a perjury charge would require intentionally false testimony. (3 RH Exhs. 699-700.) Butler said she had been "very sure" of her identification at the time she testified and described her recognition of Rogers in jail and in the courtroom, which she said was "double confirmation," noting, "I didn't forget the face." (3 RH Exhs. 700.)

Hodgson met with Butler in Texas on April 12, 2001. (3 RH Exhs. 709.) Butler confirmed her identification of Rogers and said it was not possible that her assailant was six feet, three inches tall (as Ratzlaff was).

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[30] Butler also said Rogers had shown her a photograph she later recognized as his wife Jo Rogers, whom Butler knew as an employee of Bruce's Truck Stop, who maintained a "hot list" of prostitutes who stole from customers. (3 RH Exhs. 691-695.) Although the People do not believe there is a reason to question that statement, Rogers has suggested that, at least as to recollections by Butler which arose so long after the events, Butler was not sure what had actually happened. (PRBR 185-187.) The People suggest that confusing times and locations is far more common than remembering something that did not happen at all. Based on that theory, it could be suggested that Butler saw Jo Rogers or her image on television at some time in connection with the case and realized she had had contact with her at Bruce's Truck Stop. Jo Rogers denied knowing Butler. (JR RT 75.) In light of the implication that Jo at least tolerated prostitution at the truck stop and Jo's interest in the outcome of the case against her husband, Jo's testimony is less credible than Butler's. Moreover, Jo testified falsely at a conditional examination that Rogers had absolutely no chest hair. (JR RT 8-9; compare 6 RH RT 1581.)

(3 RH Exhs. 709-711, 745-755.) Hodgson reassured Butler that she could retract anything she had said previously, but Butler responded that she was absolutely certain Rogers was the person who assaulted her. (3 RH Exhs. 745-755.)

Hodgson called Butler on August 4, 2008. (3 RH Exhs. 767.) She again repudiated her declarations to the extent they said she had incorrectly identified Rogers. (3 RH Exhs. 809-810.) She confirmed that Rogers was the person who assaulted her. (3 RH Exhs. 794-795.) Butler expressed uncertainty about her memory of some details. (3 RH Exhs. 800.) However, when discussing the sexual assault, she said that her assailant showed her a photograph of his family to show that he was "not a cop," and that she recognized the woman as someone who had worked at Bruce's Truck Stop. (3 RH Exhs. 783-786.) She said that during sodomy she was standing outside the truck with her assailant behind her and held his chin on her shoulder. (3 RH Exhs. 772-774.) She thought her assailant was shorter than she was and that Ratzlaff's height was substantially greater than that of her assailant. (3 RH Exhs. 792-794, 802.) She described seeing her assailant later in the prostitution area of Bakersfield (3 RH Exhs. 787-788) and recognizing him when he was working as a deputy in the main jail (3 RH Exhs. 788, 794, 803-806).

When Hodgson asked if Butler had told anyone about recognizing her assailant, she reminded him that she had told Deputy Lockhart, who had let her look at a Sheriff's department annual. (3 RT Exhs. 806.)

Hodgson also called Butler on October 17, 2008, when Butler went over her declarations and said much of them were false. (3 RH Exhs. 814-

843.) Considering Ratzlaff's height, Butler said she knew "without a doubt" she "had the right man." (3 RH Exhs. 845-847.)[31]

Hodgson called Butler again on October 11, 2011. (3 RH Exhs. 855.) Butler confirmed that she recognized Rogers in jail based on his appearance and saw that his name tag read "Rogers." (3 RH Exhs. 943-944.)

At the reference hearing in late 2011, Butler specifically repudiated a number of statements in both the handwritten declaration and the typed declaration, including the following. Butler did not tell Ermachild that her assailant had a "thick bushy mustache that hung over his lower lip." (3 RH RT 523-524; see 1 RH Exhs. 244 at ¶ 2.) The declaration also incorrectly stated that she first thought she recognized her assailant in the Lerdo jail; she had first seen him in the "downtown" jail and "knew he was the one that attacked" her—and told that to Ermachild. (3 RH RT 524-527, 550-551; see 1 RH Exhs. 244-245 (¶4), 254 (¶6).) Lockhart did not open the book with photos of deputies when she brought it to Butler and did not leave it with Butler. (3 RH RT 528; see 1 RH Exhs. 245 (¶5).) She was not looking for a man with a mustache in the book. (3 RH RT 529; see 1 RH Exhs. 246 (¶5).) There was more than one white pickup involved in attacks on prostitutes that they discussed. (3 RH RT 529-530; see 1 RH Exhs. 246 (¶6).) Butler saw very little of the television news report on Rogers, but "more or less heard the story." (3 RH RT 532-533, 551-552; 6 RH RT 1006-1008, 1018; see 1 Exhs. 246-247 (¶7), 248 (¶13), 256 (¶12).)

It is not true that the prostitutes in the jail knew that testifying against Rogers was a "sure and fast way out of jail." (3 RH RT 533; see 1 RH Exhs. 246-247 (¶8).) Other people "assumed" that would happen but

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[31] This means that Butler's only doubt about her identification was caused by the inaccurate or incomplete information given to her by Ermachild.

Butler did not. (3 RH RT 1027.) She did not want to get out early because she knew she was not clean and, based on her past, she would do 18 months in prison if she were released on probation early. (6 RH RT 1030-1033.)

She was certain her photo identification with investigators was not influenced by the television report. (3 RH RT 534; see 1 Exhs. 247 (¶9).) The investigators did not tell her there were certain things about her story she should not say. (3 RH RT 537-538, 555-556; 6 RH RT1024; see 1 Exhs. 248-249 (¶¶13-14), 257 (¶16).) It was not true that she had worried about whether her identification of Rogers was accurate. (3 RH RT 557; see 1 Exhs. 258 (¶21).)

Butler testified it was true that the assailant had a mustache when he later parked his white truck near her motel. (3 RH RT 524-525; 1 RH Exhs. 244 (¶3).) It was also true that she did not want to testify and did not want early release. (3 RH RT 533-535; 1 RH RT 246-247 (¶8).) It was true that she was convinced to testify by messages ("kites") she received from other jail prisoners, but not by the investigators. (3 RH RT 536-537; 6 RH RT 1066; 1 RH RT 248 (¶11).) Her assault was not jail gossip, but she did tell her boyfriend. (3 RH RT 536-537; 6 RH RT 1136-1138.) It is true that Butler asked why she was being released from jail several months early. (3 RH RT 556; 1 RH RT 257 (¶18).)

Everything about Ratzlaff to which the declarations referred was told to Butler by Ermachild; it is not true that Butler was not certain Ratzlaff is not the man who attacked her in 1986 or she was concerned Rogers is not the man who attacked her. (3 RH RT 558, 560; 6 RH RT 1158-1160; see 1 Pet. Exhs. 258-259 at ¶ 23.) Butler was completely certain that Rogers is the person who attacked her. (3 RH RT 558-560.)

2. The referee's findings that Butler's identification of Rogers in her penalty phase testimony was false is not supported by positive credible evidence and is incorrect

The referee found that Butler's declarations constituted "recantations." (Report at p. 6.) Even if the declarations constituted a recantation, Butler repudiated it in her sworn testimony at the evidentiary hearing. (See *In re Roberts, supra,* 29 Cal.4th at p. 742 ["We will not disturb the jury's verdict based upon a recantation that must be viewed with suspicion and was subsequently disavowed"].) Moreover, the referee's finding that Butler's identification was false is not supported by his explanation, which failed to correctly apply the controlling law, or the evidence. Under the correct standards, Rogers has failed to carry his burden of affirmatively proving that Butler's identification was false. As a result, Rogers fails to meet the legal threshold required to question the jury's assessment of Butler's credibility.

Based on the circumstances under which they were obtained and prepared, the declarations are highly suspicious. As this Court recognized in *Roberts*,

> It has long been recognized that "the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion." (*In re Weber* (1974) 11 Cal.3d 703, 722, 114 Cal.Rptr. 429, 523 P.2d 229; see also *People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481, 263 Cal.Rptr. 316; *People v. McGaughran* (1961) 197 Cal.App.2d 6, 17, 17 Cal.Rptr. 121 ["It has been repeatedly held that where a witness who has testified at a trial makes an affidavit that such testimony is false, little credence ordinarily can be placed in the affidavit. . . ."].)

(*In re Roberts, supra,* 29 Cal.4th at p. 742.)

a. The "Recantations" in the declarations are insufficient

The referee's conclusion that Butler recanted her trial identification is wholly or largely based on an interpretation of the written declarations, primarily the typed declaration filed with the Petition. (Report at p. 6.) Since the referee was in no better position to read the declarations than this Court, the referee's conclusion is not entitled to deference. (*In re Roberts, supra,* 29 Cal.4th at p. 742.) Even if deference were given, the declarations are insufficient to repudiate or undermine Butler's trial testimony.

When the declarations are considered as a whole, in context, and with Butler's other statements and testimony in context, the declarations have no credibility in themselves. In addition, the declarations and surrounding circumstances provide an explanation for any later changes in Butler's recollections. Significantly, the point at which Butler's statements changed from her initial statement to investigators and her testimony, and became inconsistent and contrary to the known facts, was when defense investigator Ermachild appeared at the door of her home in Oregon.

In his Petition, Rogers had stressed a statement which appears in the third sentence of Paragraph 1 of the typed declaration filed with the Petition—but was not in the handwritten declaration, "*I now believe my identification of Rogers was wrong.*" (Pet. 43, italics in the petition, quoting 1 Pet. Exhs. at p. 257; Pet. 60; cf. POBR 184 ["recanted recantations"].) Although it appears that neither he nor the referee rely on that paragraph now, the People believe it is useful to discuss Paragraph 1 in the context of other pertinent paragraphs.

Paragraph 1 reads:

> 1. My maiden name is Tambri Butler and in March, 1988; I was a witness in the penalty phase of the death penalty trial of David Keith Rogers in March, 1988 in Kern County, CA. At that trial, I testified that David Rogers raped and assaulted me in

early 1986. I now believe my identification of Rogers was wrong.

(1 RH Exhs. 253.)[32]

Significantly, the second and third sentences do not appear in either version of the handwritten declaration, which makes it uncertain as to whether Butler knew these sentences were in the declaration she signed. (1 RH Exhs. 218-225, 244-251.)[33]

Moreover, it is obvious that all of paragraph 1 was only a summary and an introduction to the rest of the declaration, rather than a separate set of factual assertions, which are contained in the other paragraphs. As a result, the last sentence is qualified and explained by other paragraphs, including those on the following subjects: (¶3) a stun gun; (¶4) a mustache; (¶4) a white pickup truck; (¶5) the appearances of the assailant where Butler was working as a prostitute in the days and weeks after the assault; (¶6) Butler's observations of Rogers in the jail; (¶22) information about Michael Ratzlaff, who used a stun gun, had a mustache, drove a white pickup, and had assaulted another prostitute; and (¶23) Butler's concern

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[32] Although the declarations are hearsay, they are admissible—along with the oral discussions between Ermachild and Butler—for the purpose of assessing the meaning and credibility of the portions of the declarations which have been offered as statements inconsistent with Butler's trial testimony or reference hearing, and as to whether they were actually Butler's statements. (Evid. Code, § 356; see *People v. Breaux* (1991) 1 Cal.4th 281, 302.)

[33] At the reference hearing, Butler was never examined about these sentences, although counsel for the People examined her about the first handwritten declaration. (3 RH RT 522-544.) Rogers's brief does not quote the third sentence in summarizing the declaration (POBR 95, 188, fn. 200; cf. POBR 35, 59), perhaps recognizing that this sentence cannot validly be attributed to Butler.

about Ratzlaff. The last sentence of paragraph 1 is also explained and qualified by Paragraph 21, which reads:

> 21. I have often worried over the years that I might have testified against the wrong man. I've always questioned how accurate my identification of Rogers was, though when I saw him in the courtroom I felt sure he was the man who attacked me. For years, I've told my husband that I am now uncertain and it weighs on my mind.

(1 RH Exhs. 258.) This paragraph expresses uncertainty about the prior identification, rather than a positive belief that the identification was wrong. In context, Paragraph 21, and not Paragraph 1, is the specific paragraph purporting to describe Butler's current feelings.

Paragraph 23 states that Butler had seen photos of Ratzlaff, that he "resembles the man in the white truck and I cannot be certain he was not the man who attacked me in 1986. I am now more concerned than ever that I wrongly identified David Rogers as the man who attacked me." (1 RH Exhs. 258-259.) Paragraph 23 of the typed declaration appeared in substantially the same form in both versions of the handwritten declaration. (1 RH Exhs. 224 [undated handwritten declaration, ¶ 18] 250 [November 14, 1999, handwritten declaration, ¶ 18], 258 [November 14, 1999, typed declaration, ¶ 21]; 6 RH RT 1160.)

The referee correctly did not rely on the third sentence of Paragraph 1 of the typed declaration as an independent factual statement. In referring to "sworn recantations," he only cited the pages that, as pertinent, included Paragraphs 21, 22, and 23. (Report at p. 6, citing 1 RH Exhs. 258-259.) However, Paragraphs 21, 22, and 23 only express a newly-acquired uncertainty or concern, which is insufficient to show that Butler's prior testimony was false. (See *In re Richards, supra,* 55 Cal. 4th at pp. 965-966 [new expert opinion questioning trial opinion].) As the declarations state, that uncertainty was based on statements by Ermachild to the effect that

Rogers could not possibly have been the man who attacked Butler. (Cf. 1 RH Exhs. 224, 250, 258.) Paragraph 22 regarding an alternative assailant is only based on hearsay from defense investigator Ermachild. (3 RH RT 558, 560; 6 RH RT 1158-1160). As a result, the declarations are not a recantation of trial testimony. On the contrary, the declarations confirm Butler's trial testimony by stating that she believed the officer she saw in booking and confronted in early 1986 was her assailant. (1 RH RT 218-219, 244-245, 254-255.)

b. Butler's declarations obtained by defense investigator ermachild are not credible

The declarations drafted by Ermachild were internally inconsistent with regard to Butler's confidence in her identification (see above, pp. 58-61) and important statements were added to the typed declaration without Butler's approval. (See 3 RH RT 537-538) and important statements were added to the typed declaration without Butler's approval. (See below at p. 63, et seq.)

As also discussed, the declarations said Butler recognized Rogers *in booking* in the *Lerdo* jail (1 RH Exhs. 218, 254), when she had testified that she recognized him in the *main* jail (22 RT 5780, 5791, 5802). Butler consistently told Lockhart, the investigators, and Hodgson she had seen Rogers in the mail jail (6 RH Exhs. 1671-1673; 3 RH Exhs. 675-676; 786-787-790, 805-807, 824-825, 861; 4 RH Exhs 937-938), and testified at the reference hearing that she saw Rogers in the mail jail (3 RH RT 469-470; 6 RH RT 1100-1101). Placing the recognition in Lerdo during booking would create a multiple inconsistency: in the location of Butler's recognition, the apparent fact that Lerdo had no booking facility, and possibly based on whether Rogers worked in the Lerdo jail at the pertinent times.

In addition, the circumstances under which the declarations were obtained tend to show that Butler signed them as a matter of expediency and to avoid possible retaliation from Rogers's friends. Further doubt is cast on the declarations by inconsistencies between statements in the declarations and accepted or established facts and statements which were added or exaggerated.

Butler could reasonably construe Ermachild's visit as pressure to tell a particular story by an agent of a multiple murderer who had forcibly sexually assaulted her, fired a gun in front of her face, threatened her not to tell anyone, tried to drive a pickup over her, and who still had friends and strong supporters in the Kern County law enforcement community. The mere fact that Rogers's investigator had her address, despite her attempts to leave the state and disappear consistent with Hodgson's advice to her (1 RH RT 540, 12 RH RT 2403), meant that she felt she was in danger from Rogers's friends if she did not say what Ermachild wanted her to say.[34]

In a 1998 telephone call to the District Attorney's Office and again at the reference hearing, Butler clearly associated Ermachild with Rogers. (3 RH Exhs. 695-696; 6 RH RT 1168.) In addition, as far as Butler knew, Ermachild could call the police and have her arrested on the warrant for violating felony probation. Under the circumstances, it would be reasonable if Butler would make vague and equivocal statements that

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[34] The safety concerns were not limited to Butler. In his early reports, Detective Lage did not name Connie Zambrano [who saw Tracie Clark get into Rogers's beige Ford pickup], but referred to her as "Witness 'X.'" (6 RH Exhs. 1559, 1563.) The District Attorney's Office sent Zambrano to Arizona after she testified at the preliminary examination and brought her back to testify at the trial. (17 RT 4653.) At the time of the trial, Katherine Hardie [who last saw Janine Benintende alive and who jumped out of Rogers's beige Ford pickup] was still working as a prostitute but lived in Long Beach, well outside of the Bakersfield area. (18 RT 4911-4913.)

would satisfy Ermachild but not say anything that expressly contradicted her trial testimony. Butler largely succeeded, especially considering that she apparently did not know the statement, "I now believe my identification of Rogers was wrong" (1 RH Exhs. 253) had been added to the typed declaration.

The referee made no mention of any of these circumstances and did not explain why the declaration might be more credible than Butler's trial testimony. The referee's possible conclusion crediting the declaration over the trial testimony is not entitled to deference. (*In re Roberts, supra,* 29 Cal.4th at p. 742.) The most reasonable conclusion is that the declarations have no credibility. (See *In re Lawley, supra,* 42 Cal.4th at pp. 1242-1246 [unreliable recantation].)

c. Butler's reference hearing testimony repudiated the declarations; questions about her credibility decades after the trial do not undermine the credibility of her trial testimony

In addressing Question 1, the referee first noted Butler's "sworn recantations" (Report at p. 6). As described above, Butler repudiated any possible recantation starting within a few months after dealing with Ermachild on the declaration and culminating in Butler's testimony at the reference hearing, and there are many reasons not to credit the declarations as Butler's genuine statements or opinions. In *In re Cox* (2003) 30 Cal.4th 974, 998-999, this Court viewed a retraction of sworn testimony with special suspicion where the witness affirmed her trial testimony in a declaration after the order to show cause had been issued and she contradicted several assertions in the recantation in her testimony at the reference hearing. The witness had affirmed her recantation at the reference hearing. (*Id.* at pp. 985-986.) The Court noted, "the circumstances surrounding her recantation were suspect" (*id.* at pp. 998-

999) apparently including the tactics of the defense investigator tying custody of her children to recanting (*id.* at pp. 999).

The referee apparently rejected some of Butler's reference hearing testimony, noting "inconsistent stories changed numerous times" and specifically noting Butler's hearing testimony regarding her observation of dark shapes on her assailant's back in February 1986 and molestations in jail by Rogers between her report to Deputy Lockhart in October 1986 and her release from jail in April 1987. (Report at p. 7.) After noting Butler's "recantations," the referee stated, "None of the descriptors given by Ms. Butler of her assailant fit the petitioner." (Report at p. 6), a point which the People will address in the next subdivision.

After discussing the descriptors, the referee stated, "The Court finds Ms. Butler not credible. The 'pimple scenario' is but one example of her fudging or changing her testimony." (Report at p. 7.) The referee noted "inconsistent stories changed numerous times." (Report at p. 7.) However, the referee also found, "In many respects, her testimony was sincere and she attempted to respond, but the problem was so much time had passed. She admitted being confused, and her credibility suffered for it." (Report at p. 7.) Thus, the referee must have believed that a substantial portion of Butler's hearing testimony was truthful, but found that some of the testimony was inaccurate, noting Butler's confusion on some points and the passage of time, which apparently affected her ability to remember some of the things she was asked about, leading to her "chang[ing]" "stories" about them. The referee's explanation is best explained as demonstrating his view that Butler's testimony was sincere but mistaken as to portions of her reference hearing testimony on which he found her "not credible."

The disjunctive statement about Butler "fudging or changing her testimony" is not the equivalent of a finding that Butler intentionally testified falsely at the reference hearing. The statement could simply mean

that Butler was trying to explain a previous statement truthfully, but lacked sufficient recall to do so. The latter interpretation of the referee's statement is also the most reasonable interpretation of the evidence.[35]

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[35] The referee expressed his view of Butler's general credibility in sustaining an objection by respondent to unrelated evidence concerning Butler (6 RH RT 1217-1219):

> THE COURT: Well, let me share some thinking with you, might help both of you. The more that this witness testifies, as far as I am considered, considering all the things that she's had to remember and go back over, her credibility is only going up. Not going down. So, I just want you to know that. Because we have had direct, she's been subjected to all the new acts or whatever. I don't know what the tactical reasons are, that's not my fault, my concern here. I allowed you to cross on those acts. And -- but I'm getting quickly fed up when we start talking about massage therapy and things like that in a case this serious. And I have had plenty of opportunity to hear and see her testimony and how she's reacted to the questions and how she's reacted and read and answered questions based on transcripts that are put in front of her, some of them, the trial which we did do today, we have gone back over 20 years, and the bulk of at least two or three years. So, with that, go ahead. And on the redirect, I would expect the same thing. We have got to get her off the stand. In fairness to her, I think I have a sua sponte duty to protect a witness at some point in time. This is that point in time. Go ahead.

(6 RH RT 1218-1218.)

Another significant event in Butler's testimony occurred when, on cross-examination, she was shown a notice to appear dated April 23, 1985, signed by her and issued by "Rogers." Butler became visibly upset, was apparently unable to speak, and the court ordered a break. (6 RH RT 1045-1048; 1 RH Exhs. 59 [Exh. 1 (Kern County Superior Court case number 332098)].) On re-direct examination, she explained she "got so emotional" because she initially thought he had arrested her. (6 RH RT 1222.) The notice signed by Rogers released her from jail. (6 RH RT 1222-1223; 1 RH Exhs. 59.) The evidence consistently showed that Butler had a similar reaction to seeing the news report of Rogers's arraignment after his arrest.

(continued...)

The only express example of Butler "fudging or changing her testimony" concerned the "pimple scenario." (Report at, p. 7.) In her original statement to investigators, Butler said she could see little dark moles on her assailant's back between his shirt and pants when he briefly turned around just before he "made" her "give him oral sex." (6 RH Exhs. 1640.) His actions at that time showed he knew she was not going to try to hurt him. (6 RH Exhs. 1640-1641.) Based on her description of the events, this must have occurred after he slapped her face and shocked her in the neck with a device she called a stinger. (6 RH Exhs. 1638, 1664; cf. 22 RT 5784-5785.) She could not see the device while he was using it because it was "dark outside" and the device made a "real bright" light. (6 RH Exhs. 1664-1666.) When the truck door was opened, no light went on. (6 RH Exhs. 1657.)[36] At the penalty phase of Rogers's trial, Butler gave no testimony about any physical features of her attacker other when she was asked about a mustache on cross-examination. (22 RT 5798-5799.)

At the reference hearing, Butler testified that she had seen "moles or dark splotches" on the lower part of her assailant's back. (3 RH RT 425-426.) She thought that a color photograph of Rogers's back (5 RH Exhs.

(...continued)
(6 RH RT 1014-1018, 1224-1225.) She explained that when she saw the television news report, "that's when it all came together for me about how close I really did come to dying" the night she was assaulted. (3 RH RT 497-498; 6 RH RT 1007-1008.)

[36] Butler's testimony shows that the "stinger" made a "real bright" spark when it was activated, suggesting that her eyes had adjusted to very low light conditions. A spark that was "real bright" in good lighting conditions would be expected to cause severe burns or electrocution. The stated purpose of such devices is to stun, not to cause injury or death. (4 RH Exhs. 1114; see 3 RH Exhs. 651 [Exh. 59].) Butler testified at the reference hearing that there was some light but it was "minimal." (3 RH RT 407, 411.) Such a description appears consistent with moonlight or the lights of the city reflected off clouds.

1384 [Exh. I]) showed pimples, which she remembered seeing and feeling (6 RH RT 1226-1227).[37] The referee did not credit that explanation, but did not expressly find that it was willfully false. This testimony fits the referee's description of testimony that was a "sincere" "attempt[] to respond," but "so much time had passed" that she did not give a convincing response. (See Report at p. 7.)

The referee also noted Butler's testimony at the reference hearing that Rogers had molested her several times in an interview room in the jail after about a month after she had spoken to Deputy Lockhart. (Report at, p. 7; see 3 RH RT 485-495; 6 RH RT 1202-1216 [Butler's testimony].) Butler had told investigators in 1987 that she had "had a lot of trouble" while she was in jail after Rogers knew she recognized him and she did not want any more. (6 RH Exhs. 1671.) She was not asked anything about the "trouble" she had had. Butler testified at the reference hearing that she had been referring to the molestations by Rogers when she had said she had "had a lot of trouble" while she was in jail. (6 RH RT 1202-1204, 1207.) She was asked on cross-examination about telling Investigator Hodgson in 2011 that she had told him about the molestations in the 1987 interview. (RH RT 1200-1203.) First referring to the interview, she said, "And I didn't go into detail. I didn't feel it necessary." (6 RH RT 1203.) Apparently referring to her conversations with Hodgson in 1998, 2001, and 2008, she continued: "At this point that was something that was deeply painful and disturbing to me. And they had him in prison, he was already on death row. Why did I have to humiliate or mortify myself any more with any more details that

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[37] The photograph was one of several taken after his arrest in February 1987. (9 RH RT 1708, 1714-1718; 5 RH Exhs. 1384 [Exh. I]; 6 RH Exhs. 1580-1586 [Exh. Z].) It shows small rounded reddish spots, but no dark spots.

were just not necessary." (RH RT 1203.)[38] The evidence presents no other explanation for her 1987 statement.

The referee said, "she was thoroughly impeached by Ms. Lockhart's (Jeanine Ibarra) and Mr. Simon's testimony" (Report at, p. 7), but no such thing occurred. Both described the proper procedures and the general practices, both left open the possibility that a deputy could disregard proper procedures if he chose and take an inmate down the stairs to an interview room in a lower floor.[39] In fact, Simon described how it could be done. He

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[38] She also testified she had not felt it necessary to tell the investigators in 1987 about every detail of the assault in the field:

> I was mortified. I was afraid. I wasn't trusting police officers in general. But I couldn't tell them all the details I am telling now because oh, my God, I was a young woman. It was bad enough that I had been mortified, humiliated, disgusted. I was a dirty whore, tramp, junky. I thought better of myself at one point. And it -- these were -- these were people of my father's authority, suit and tie, they were gentlemen. I couldn't go to those details.

(3 RH RT 498.)

[39] Only female deputies were assigned to the female inmate sections of C Deck. (5 RH RT 910, 915.) The female cells were behind a locked door, but the female deputies had a key. (10 RH RT 2068-2069.) In addition, male deputies went into the female inmate areas of C Deck to check the female inmate log, check the female inmate cells, or if there were an emergency such as a disturbance. (5 RH RT 915; 10 RH RT 2081.)

Deck checks were "supposed to be performed every half hour" to see if inmates were in their cells. (10 RH RT 2378-2379.) The deck clerk would normally note on a card an inmate's absence from the deck. (10 RH RT 2377-2378.) However, inmate laborers ("trustees") could be out of their cells for long periods of time and the card would show them as in the jail. (12 RH RT 2379-2380; see 5 RH RT 916.) It was not "the practice" for "inmates who were not trustees or inmate labor [to] walk around inside the jail unescorted." (10 RT 1082.) As far as Simon knew women who were inmate labor did not go from deck to deck unescorted. (10 RH RT 2082-2083.)

(continued...)

said that the keys to the locked doors to the stairwell were in an office on A Deck that was open to deputies. (10 RH RT 2072-2073, 2074.) He also said male trustees were able to move about on their deck and assumed it was the same for females. (10 RH RT 2082-2083.) Lockhart said that it was possible for deputies to have improper contact with inmates despite the rules. (12 RH RT 2381.) As Lockhart noted, "[i]n the jail . . . different things happen from minute to minute [*sic*] that you don't you know -- you can't -- . . . ." (5 RH RT 938.)

Referring to Butler's account of the jail molestations, the referee found it "incredible that she remembered the detail that she did after some twenty years." (Report at, p. 7.) The referee might reasonably be skeptical about whether all of the details were completely accurate, but there was no valid basis on which the referee could find that the events did not happen. The referee did not make such an express finding. In fact, the next sentence, the concluding sentence of the same paragraph, was the one noting that Butler's testimony suffered for confusion due to the passage of time. This

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(...continued)

There were interview rooms on C Deck and other floors. (5 RH RT 916-917; 10 RH RT 2074-2075.)

There were stairs behind doors that were kept locked but the keys were in an office on A Deck, either the sergeants office or the jail office, which was open to the deputies who were in the area. (10 RH RT 2072-2073, 2074.)

The elevators are behind bars and a jailer station is in front of the elevator doors. (5 RH RT 938; 10 RH RT 2068.) There were two deputies at the jailer's station. (10 RH RT 2073-2074.) Simon testified, other than during an emergency in the cells, "I'm guessing that most of the time you would find at least one there at the jailer's station." (10 RT 2085.)

Lockhart said C Deck was an active place, but was not normally active during the evening hours or on weekends. (12 RH RT 2382-2383.)

observation could fully explain the referee's statement that Butler was "not credible."

Another reason the referee cited in finding Butler's hearing incredible was based on her testimony in which she "she denied talking to other inmates about the case." (Report at, p. 7.) The referee believed this testimony was false, stating, "Ms. Butler talked with other inmates extensively about the case . . . . She talked with her friend and cellmate, Kay Davis, about the TV news broadcast when her friend and cellmate alerted her to the news by saying, 'O my god there he is!' (3 RH RT 497.)" (Report at, p. 7.)[40]

Contrary to the referee's premise, Butler did not testify at the hearing that she had *no* discussions at all with *any other* inmates about Rogers's case.

Initially, the People note that Butler's hearing testimony occurred against the backdrop of her penalty phase testimony that she had not discussed the *details* her *own assault* with a *number* of other inmates. (22 RT 5803; see RBR 34-35.) She had also testified, "Some of the girls knew that I was raped, yeah, but as far as the details, no, I didn't go into details. It's something that I haven't really wanted to think about." (22 RT 5803.) Subsequently, defense investigator Ermachild placed a statement in Butler's declaration, "I lied when I said I hadn't seen Rogers on TV and when I said other women in jail were not discussing the case," which Butler testified at the reference hearing was false. (3 RH RT 537-538.) On cross-examination, Butler said that when she accepted a plea bargain on January

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[40] The reference to TV news demonstrates that the pertinent subject was Rogers's case, rather than the assault against Butler. The degree to which Butler discussed the assault against her with other women in jail was a subject of the claim that Butler had testified falsely at the trial. (See RBR 34-36.)

8, 1988, she did not know the progress of Rogers's case. (6 RH RT 1114.)[41] Later, defense counsel asked Butler if she had thought the alternative to the death penalty would be "having a term of 20 to life or life imprisonment" "because you had been following the case on TV and watching it and you continued to watch it?" (6 RH RT 1132-1133.) Butler answered the question by saying, "I didn't follow the case on TV" (6 RH RT 1133), which clearly incorporated the concept of whether she "continued" to follow the case. The time period to which the question referred was necessarily the time between Rogers's arrest and Butler's penalty phase testimony. As cross-examination continued, Butler said, "I personally didn't watch the news that much." (6 RH RT 1135.) She added that she had been told by her friend Kay and her boyfriend (William Weise; 3 RH RT 389) that Rogers "was already in prison for 20 to life." (6 RH RT 1135.)[42] She then said that she did not "stop[] watching the story" after she testified at the penalty phase. (6 RH RT 1136.) Earlier in her testimony she said her friend Kathleen Davis was the only person she had told about the *sexual assault against her* (Butler) between the time she spoke to

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[41] During the much of that time Butler was out of custody, using heroin, and working as a prostitute. Rogers's trial had begun on November 16, 1987, about seven months after Butler had been released from her previous jail sentence. (CT 496; 1 RH Exhs. 54, 61-62, 73; see above, pp. 31-32.) Butler was arrested on November 29, 1987, was released, and appeared in custody on December 18, 1987. (1 RH Exhs. 128-143, 148-149; 6 RH Exhs. 1607-1610.) Jury selection in Rogers's case continued until February 10, 1988. (2 CT 478-479.) The evidentiary portion of the trial commenced with opening statements on February 17, 1988. (2 CT 478, 480.)

[42] Rogers was found guilty of one count of first degree murder and one count of second degree murder, both with the use of a gun, with a multiple murder special circumstance on March 16, 1988, seven days before Butler testified. (2 CT 596.)

Lockhart about it in October 1986 and before the investigators came to speak to her in February 1987. (6 RH RT 1067-1068.)

In summary, Butler did not deny she had seen any news coverage of the Rogers case, and did not deny she had discussed it with anyone, but testified to the effect that she did not follow the Rogers case closely over an extended period of time, as defense counsel's questions suggested. Neither the referee nor Rogers has described any hearing testimony in which Butler characterized her discussions with other inmates about the Rogers case before her trial testimony. (See POBR 94-95.) Butler simply did not give the hearing testimony on which the referee's conclusion is premised. Thus, the referee's conclusion that Butler testified falsely at the reference hearing with respect to her discussions of Rogers's case with other inmates is not supported by any evidence.

In addition, the referee erred in relying on Butler's startled reaction to seeing a television news story that Rogers has been arrested for murdering two prostitutes as showing that she "talked with" her cellmate about the case. (Report at p. 7.) As Butler testified, the new and horrifying aspect of the news story consisted of the murder allegations against the person she had recognized as her rapist almost a year earlier. Her startled utterance also had no tendency to show she had followed television news accounts over a period of time, contrary to her hearing testimony. As far as the evidence shows—and consistent with her startled reaction—this was the first news report about Rogers of which Butler was ever aware. The evidence shows that the report which caused such a reaction was a story about Rogers's arraignment on February 17, 1988, broadcast on a 10:00 p.m. news show. (2 RH Exhs. 395-396; 3 RH Exhs. 497-498, 702; both quoted in part at Report at p. 8.) Butler was taken from her cell the next morning and brought to where the investigators were waiting to speak to her at around 8:00 a.m. (2 RH Exhs. 395; 6 RH Exhs. 1637; 6 RH RT

1068.) Not only was there little time between the news story and the interview, Butler had no advance warning that the interview would occur. (3 RH Exhs. 807.) Thus, she had little or no opportunity discuss or consider any possible option other than to tell the investigators the truth to the best of her ability about the assault a year before and her recognition of Rogers a few months after that. It follows that there is no reasonable basis on which to conclude that any of Butler's hearing testimony on the subject was false.

The referee also said, "And she repeatedly assured both Mr. Hodgson and this Court that the only reason she agreed to talk with the detectives was because she received (depending on the version) either '150' or '175 kites' from the men in the jail, urging her to do so. (3 RH Exhs. 807, 836; 3 RH RT 537, 6 RH RT 1066, 1102-04)" (Report at pp. 7-8.)

Before the reference hearing, Butler only described receiving "kites" (notes passed in jail) in two telephone conversations with Investigator Hodgson on August 4 and October 17, 2008. (3 RH Exhs. 767-813, 814-853.) The August 4 telephone call from Hodgson to Butler occurred after the Order to Show Cause was issued and three months before the Return was filed. During the conversation, Hodgson asked what had led to the 1987 interview with investigators and if she had told anyone about the sexual assault. (3 RH Exhs. 806.) Butler then reminded Hodgson that the interview had occurred because she had told Deputy Lockhart that a deputy who was working on a lower floor of the jail had raped her. (3 RH Exhs. 806.) Butler thought she had conveyed to Hodgson in the 1987 interview that her assailant was in one of the photographs on a certain page. (3 RH

Exhs. 806; 3 RH RT 482-484.)[43] Butler continued her statement, saying, "I was very aggressive when you guys came in because as far as I was concerned, I wasn't going to be a rat fink." (3 RH Exhs. 806.) She added, "I had no idea you guys were coming" and "I had no idea until you showed up." (3 RH Exhs. 807.)

Hodgson said, "And then we asked you about what you had told her." (3 RH Exhs. 807.) Butler answered, "Uh-huh. And didn't you guys go and come back? Did I refuse to see you the first time?" (3 RH Exhs. 807.)

When Hodgson said he was trying to remember, Butler said:

> I'm pretty sure that I turned you away the first time because I was not gonna, I wasn't gonna be a rat while I was in jail. I was scared. I was scared to do anything against a cop while I was in jail and I'm pretty sure I turned you guys away the first time and you came back because I know that night, I got like 150 kites from the guy's end, telling me to do what I had to do, that nobody was gonna hurt me, they'd watch my back and then the next time you all came back, which was the next day, I testified/ I'm pretty sure that's what happened. You all came back, which was the next day, I testified [sic]. I'm pretty sure that's what happened.

(3 RH Exhs. 807-808.)

Butler also said, "I didn't want to be stupid. . . . I watched a lot of movies. I didn't know if I would wind up dead in a girls cell or what." (3 RH Exhs. 808.)

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[43] Rogers's photograph is one of the photographs on page 90 of the 1985 edition of "Behind the Badge." (6 RH Exhs. 1704.) It appears in the section for "Main Jail" personnel. (6 RH Exhs. 1701-1704.) A photograph of Deputy Jeanine Lockhart appears on the same page, which shows deputies whose last names start with the letter L through the end of the alphabet. (6 RH Exhs. 1704.) The photographic lineup that was shown to Butler at the outset of her interview with investigators consisted of six photographs from the same issue. (5 RH Exhs. 1372-1383 [Exh. H (Trial Exh. 69)].)

In October, Hodgson called Butler and went over the typed declaration on which Rogers relied in his habeas corpus petition. He asked about the statement that the investigators had convinced her to testify. She said she refused to talk to the investigators, but the "boys at Lerdo" convinced her to give a statement by sending "like 175 kites" and said, "I think you guys even came back twice even came back twice." (3 RH Exhs. 835-836.)[44] She said she "was afraid to testify against a cop," because "cops are stronger than street people." (3 RH Exhs. 837.) She said the investigators "influenced" her "not to keep quiet," did not influence what she told them. (3 RH Exhs. 837-838.)

Thus, the two separate statements show a development of Butler's recollection from asking Hodgson whether she had initially refused to tell them about the sexual assault to ultimately making simple direct statements about what she remembered had happened. Her 2011 testimony was entirely consistent with what she had told Hodgson on two occasions.[45] (3 RH RT 537; 6 RH RT 1066, 1102.)

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[44] Butler said:

> What I remember is that you guys came and I wouldn't have anything to do with you and that night I got like 175 kites in [sic] the boys side of Laredo? Telling me to go ahead and do what I gotta do, don't be afraid. No body's gonna get on to me for ratting this cop off. Then you guys came back the next day and I [gave you a statement]. That's how I remember it.

(3 RH Exhs. 837.)

[45] On direct examination, Butler explained:

> I had told my boyfriend I'm not doing this, I'm not going to rat, I don't want to put myself in jeopardy. The next night I had the biggest bag of any girl in the jail. Do it, girl. Go for it. Do what you have got to do. You have got to do this for everybody else. They were the ones that convinced me to testify.

(continued...)

In order to conclude that the kite account was intentionally false, it would be necessary to first conclude that Butler had fabricated every pertinent part of the two 2008 statements to Hodgson—including the development of her recollection over two conversations two months apart. It would have taken considerable talent to act out such a scene convincingly without making a mistake which would give away the ruse.

Moreover, Butler had no reason to think she would gain anything from telling such a story. In particular, there was no basis on which to conclude that Butler had any understanding of why doing so might support her trial testimony or any other statement she had made. It is utterly fantastic to conclude that Butler had engaged in such a calculated, well-planned, and flawlessly-executed charade with no motive.

Presumably, the defense theory would be that Butler was motivated to tell the kite story to support her trial testimony that she expected no benefit, such as early release. On the other hand, it would undermine the allegation that the investigators had tried to convince her that Rogers was guilty of the charged murders and that she should testify to strengthen the evidence for the death penalty. However, those theories would require more knowledge and understanding of the issues involved in the habeas corpus claims than is apparent from Butler's several statements to investigators and to Hodgson and her testimony on two occasions.

(...continued)
(3 RH RT 537.)

There was no testimony contradicting Butler's testimony that kites were permitted at that time in the Lerdo Minimum Detention Center, (3 RH RT 537) at least on a selective basis, such as between inmates who posed no security risk. It is conceivable that all of the kites to Butler were collected by Weise from other male inmates and sent by him.

The recorded telephone conversations with Hodgson showed only that she was trying to remember what had happened and tell Hodgson. Unless the entirety of both conversations amounted to a high-quality acting performance, the only possible conclusion is that she was not thinking beyond the simplest and most immediate effects of her statements.

Moreover, Butler had no reason to think she should go beyond the basic facts known to her that she was not promised early release and that there was no arrangement for early release, either express or implied.

Despite the reference to the inconsistency in the number of kites, the referee did not state that the kite story was intentionally false. Even if such was the referee's conclusion, it would be unreasonable. Butler's statements as to the number of kites in what appeared to be two informal conversations were obviously either estimates (or guesses) which she did not intend to be taken literally. It would not be reasonable to interpret her statements as meaning that she had counted the kites (twice with different results) or that she then gave intentionally false testimony about the number of kites.

If the referee did not (unreasonably) believe that the kite story was intentionally false, he must have thought it was a mistake or, consistent with Rogers's repeated arguments, unreliable. However, if the story was not intentionally false, it would provide no basis on which to find that any of Butler's reference hearing testimony was intentionally false. If any of Butler's hearing testimony was unintentionally mistaken or unreliable, it would be reasonable to discount some or all of her *hearing* testimony, but there would be no rational basis on which to view it as reflecting negatively on Butler's *trial* testimony, given 25 years earlier under far different circumstances.

d. The differences between Butler's description of Rogers and Rogers's actual appearance are insufficient to show her identification was false

The referee found that Butler had testified falsely during the penalty phase of Rogers's trial in identifying him as her assailant. The finding was based largely on a handful of descriptors from Butler's 1987 interview statement that the referee believed were inconsistent with Rogers. In addition to the descriptors, the referee also found that Butler had recanted and was not credible. As found in *Cox* and *Lawley*, the repudiation of a claimed recantation, especially when made in live testimony in court, deprives the recantation of any special status. As discussed above, the declarations were deprived of any credibility by their internal inconsistencies, the circumstances under which they were obtained, and inconsistencies with proven facts. As a result, even if Butler's reference hearing testimony was not credible, there would still be no substantial or credible evidence to disprove Butler's trial testimony.

All of the descriptors on which the referee relied were either vague, subjective, or, if any discrepancies existed, subject to reasonable explanations that were not disproven by Rogers. In addition, the referee failed to consider the most important and objective descriptors, including a seven-inch difference in height, and obvious differences in head hair, skin color, and age. More importantly, Butler recognized Rogers as her assailant after having ample opportunity to observe his face, physical characteristics, mannerisms, and voice, and before any motive for bias or fabrication could have arisen. That identification is unchallenged by the evidence.

In addition, Rogers has not argued, and the referee did not find, that Butler's identification was intentionally false, and the circumstances and other facts do not support such a conclusion. The alternative is that

Butler's identification was sincere, a conclusion which is virtually compelled by the evidence. Rogers's theory that the identification was mistaken is not supported by the evidence. His theory that the identification was unreliable does not meet his burden of proving that the identification was false; and, in any event the evidence fails to show that her identification testimony at trial was unreliable, given that the jury apparently credited Butler's testimony after the presentation of potentially impeaching evidence similar to that presented here.

The referee relied on several descriptors of her assailant that Butler had provided to investigators in 1987. The referee concluded these descriptors did not match Rogers and therefore Butler must have testified falsely as to the identity of her assailant. (Report at pp. 6-7.)[46] The descriptors were:

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[46] The referee's discussion of the descriptors was as follows:

#lB. None of the descriptors given by Ms. Butler of her assailant fit the petitioner.

The following are Ms. Butler's descriptions of the assailant:

Lerdo jail, 2-18-1987 (RHRT 17-18-19, 1741; 4 RH Exhs. 886, et seq.)

Thick brushy mustache

Big hands

Big hairy chest larger than stomach

Dark moles across his back above fanny characterized by Ms. Butler as dark splotches, (RH Exhs. 48-49) then she switched to "ugly pimples" (RHRT 1077)

Ms. Butler said he had no other markings

Based on Dr. Pezdek's testimony that height and weight are difficult to estimate, and Ms. Butler's testimony that she never saw the assailant standing out of the truck, the Court finds there is insufficient evidence to ascertain the assailant's height and weight.

(continued...)

- His mustache
- "Big hands"
- "Big chest"
- Moles
- Lack of a visible tattoo
- White pickup with boards

The referee rejected Butler's report of the assailant's height and weight, and did not discuss any other descriptors given by Butler in 1986 which were far more objective and were a far better fit to Rogers than to the alternative perpetrator proposed by Rogers.

The original source of the descriptors on which the referee relied was Butler's statement to investigators in February 1987. Rogers had taken position in his habeas corpus petition that the 1987 statement was the most reliable source of information about the 1986 assault and was Butler's best single description of her assailant, although it had been given a year after the assault. (Pet. 38.) In his brief to the referee after the evidentiary hearing, Rogers took the position that "the best evidence available" consists of "Ms. Butler's statements closest in time to the actual event" (POBR 195),

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(...continued)

> Petitioner had a small chest, small hands, no moles on his back. [*Sic.*] Nor did he have hair on his chest across the front or down the belly. Petitioner had a visible tattoo on his right arm. As to the mustache, petitioner never had a mustache. Respondent's argument that petitioner could have used a theatrical mustache is not persuasive. Extensive searches of petitioner and his property uncovered many items of incriminating evidence such as a gun and tire tracks, but nothing to indicate a mustache or a stun gun.

(Report at pp. 6-7.)

referring to Butler's 1987 interview with investigators (POBR 196-197). (See RBR 25-26) The referee took the same position. (Report at, p. 6.)[47]

The interview took place almost exactly a year after the assault, during which time Butler had many other customers. (3 RH RT 397.) It took place the morning after a nighttime news report of Rogers's arraignment when she was taken to an interview room with no advance notice. (3 RH Exhs. 807.) Even if the "kites" account is accurate and the events occurred before the interview and not the penalty phase, Butler would have had little opportunity to falsify or "fudge" her story. It is clear she did not adjust her description to fit her observations of Rogers, the most important of which she made while on A Deck of the jail. If she wanted to do that, she would not have said her assailant had characteristics such as a mustache and big hands.

Butler said her assailant was strong and added that his hands were big and rough (6 RH Exhs. 1643-1644), but his hands and fingernails were clean (6 RH Exhs 1651).

She described the man as being shorter than her height of five feet, eight and one-half inches. (3 RH Exhs. 1642-1643.) She described him as having a "big chest." (6 RH Exhs. 1640.) "He didn't have much of a stomach," (6 RH Exhs. 1640) and "his chest seemed more fat than his stomach" (6 RH Exhs. 1643). She estimated his weight at "[a]bout 160, 175," but under-estimated Detective Lage's weight as the same, although

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[47] The referee's statement referred to the "Lerdo jail" interview on "2-8-987" and cited testimony by Detective Soliz about how the interview occurred (9 RH RT 1741) and Rogers's exhibits consisting of transcriptions of the interview (3 RH Exhs. 886-935). The transcripts introduced by the People (6 RH Exhs. 1637-1666) are apparently the same transcriptions, but with minor format edits.

he said he weighed around 190 pounds. (6 RH Exhs. 1643.)[48] She said he had hair "across the front" of his chest and "down the belly." (6 RH Exhs. 1641.)

Before any of the sex acts, the man dropped his pants and underwear at the same time; Butler said she could tell the underwear was boxer shorts by "the way they were sitting in his pants." (6 RH Exhs. 1662.) The man did not take any of his clothes all the way off. (6 RH Exhs. 1661, 1662.)[49] After the man shocked her on the neck, Butler saw little dark moles on the man's back between his shirt and pants when he briefly turned around just before he made her orally copulate him. (6 RH Exhs. 1638, 1640, 1661.)

Butler estimated the man's age as approximately "forty-five, forty-eight, close to fifty." (6 RH Exhs. 1642.) His head hair was thinner on top than on the sides. (6 RH Exhs. 1641.) His skin color was "fair." (6 RH Exhs. 1641.) She said he had a "[t]hick brush" mustache that "wasn't real curly," but "was straighter." (6 RH Exhs. 1640.)

When asked to describe her assailant's pickup truck, Butler said it was "a nice truck," "a newer truck," and "reminded [her] of a dealer truck," but "probably wasn't new when he got it;" it was not as new as a 1986 truck. She said, "[B]ut it wasn't, you know, like a '60 or '70. It wasn't old." (6 RH Exhs. 1648.) The word, "Chevrolet," was in red letters on the tailgate. (6 RH Exhs. 1647.) It was "just a plain, basic truck," but had weathered two-inch lumber boards around the bed. (6 RH Exhs. 1648-1650.) It had air

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[48] Lage was six feet tall (3 RH Exs. 1643), so if Butler was estimating weight based primarily on her assailant's build, he must have weighed substantially less than Lage. Based on Butler's description, her assailant was not a large man.

[49] Butler testified at the hearing that the man unbuttoned his shirt. (3 RH RT 419.) He was not wearing a T-shirt. (6 RH Exhs. 1662.)

conditioning, which the man had on when Butler got into the truck. (6 RH Exhs. 1648-1649.)

Several of the descriptors on which the referee relied on to exclude Rogers as the real assailant were vague and subjective, and thus insufficient for that purpose. Specifically, Butler's description of the man's hands as big and rough appeared to have been connected to her impression that the man was "strong" when he was controlling and physically abusing her. (6 RH Exhs. 1643-1644.) Her description of the hands as clean was likely more objective. Her description of the man's chest as big was likely influenced by the events of the assault, similar to the reported phenomenon of "weapon focus." The evidence fails to show that Butler had an opportunity to make an objective comparison of her assailant's hands to those of an average man. (Compare Report at p. 6 [height and weight].)[50] By the time Butler was aware of a reason to observe the man's hands and chest, she was in a remote area with very little light, and her assailant only had his shirt unbuttoned during a portion of the time they were in the field which was not described in the interview. In any event, the color photographs of Rogers's body at the time of his booking show that neither his hands nor his chest were small, contrary to the referee's conclusion. (6 RH Exhs. 1580-1582, 1585-1586; cf. 3 RH Exhs. 634-636; Report at p. 6.)

The referee implicitly accepted Butler's description of her assailant's stomach, noting her comparison that his chest was larger than his stomach.

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[50] The referee accepted without qualification Butler's characterizations of her assailant's hands and chest, despite the absence of evidence of a basis for comparison. However, he rejected Butler's estimates of her assailant's height, although she could compare her own height and her assailant's height to the roof of the truck (Report at p. 6), as the People will discuss. There was no explanation or evidentiary justification for this inconsistency.

(Report at p. 6.) Butler's specific description was, "He didn't have much of a stomach." (6 RH Exhs. 1640.) Her description of her assailant's small stomach and implication that his chest was not particularly muscular was a very good fit to the photographs of Rogers at booking. (6 RH Exhs. 1580-1581.) As will be discussed, the stomach description was inconsistent with Rogers's proposed alternative perpetrator Michael Ratzlaff.

Other descriptors are subject to reasonable explanations which Rogers has not disproven. Butler's description that her assailant's chest had hair "across the front and down the belly" (6 RH Exhs. 1641) is not a close fit for Rogers, but neither is it completely wrong. The best photograph of Rogers's chest shows slight hair on his chest muscles and scattered hair at the top of his chest under the shoulder blades. (6 RH Exhs. 1581.) The evidence shows no more than a reasonable mistake based on extremely poor conditions for observation and the lapse of a year between the event and the description.

For similar reasons, items that can be easily acquired temporarily and then disposed of, such as a mustache and stun gun, do not provide an adequate basis for a conclusion that Rogers was not Butler's assailant. This is especially true where, as here, there was ample time to dispose of evidence of an assault a year earlier and warning that he might be investigated for the related crimes. The evidence shows Rogers knew Butler was accusing him of a serious offense due to her conduct toward him in the booking area a few months after the assault. It would be reasonable for him to dispose of a false mustache and a stun gun since they would be the most obvious and distinctive items of evidence if a search were made. The referee noted that Rogers did not dispose of the murder weapon (Report at p. 6), a Colt .38-caliber Detective Special snub-nosed revolver. However, such a gun would not be distinctive for a police officer. In addition, Rogers might think that disposing of the gun would be futile in

light of the existence of a police report that could connect him with the disappearance of the gun. He might even have enough interest for public safety to be concerned that a discarded firearm might be discovered and used by another criminal. Moreover, it does not appear that Rogers had a specific reason to believe he could be connected with the Clark murder, which he committed five days before he was stopped while driving and arrested. (17 RT 4527-4530, 4630-4632, 4635-4636, 4639, 4644-4649.) Finally, the actions of serial killers are not always logical.

The referee's opinion on this point should be given no weight because none of the habeas corpus evidence proved that Rogers could not have worn a false mustache when he picked up Butler while prowling the prostitution area off-duty.[51]

In any event, it is quite possible that Butler simply made a reasonable good faith mistake about whether her attacker had a mustache; her first statement mentioning a mustache was over a year after the assault. One possibility is that she had an impression of a mustache because Rogers had not shaved recently. He was unshaven when he was booked, suggesting he did not shave on his days off. His booking photograph shows dark beard growth on his upper lip with apparently less beard on the adjoining part of

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[51] No known witnesses saw Janine Benintende get into a vehicle driven by Rogers, and Connie Zambrano did not see Rogers when Tracie Clark got into his pickup truck. However, even assuming Rogers did not have a mustache on those occasions, that fact would have no connection to whether he wore one when picking up Butler. The trial evidence, which is now conclusive, strongly shows that he intended to kill Benintende and Clark when he picked them up, and thus might think he had no reason to wear a mustache as a partial disguise. In contrast, it is apparent that he did not intend to kill Butler when he picked her up, and would therefore have a reason to wear a disguise. The possibility that he never wore a mustache on any other occasion fails to prove that he did not wear a mustache when picking up Butler.

his lower jaw, giving the distinct impression of a mustache, albeit a short one.[52] Further, a mustache, like eyeglasses, is a characteristic that can come and go, and some witnesses simply don't remember whether the characteristic is present, especially a year later. Butler obviously had no reason to incorrectly say that her assailant had a mustache. In fact, if her mustache description was a mistake, it would tend to strongly show that Butler was not willing to lie to support her identification. By the time of the statement to investigators, Butler had seen Rogers without a mustache in jail several times and had seen his photograph without a mustache in the 1985 Behind the Badge annual that Lockhart had shown her. She did not recall him having a mustache at that time. (6 RH RT 1225.)

The referee also noted Butler's failure to tell investigators about the tattoo Rogers had on the outside of his upper right arm. (6 RH Exhs. 1580.) However, the evidence does not show that she had an opportunity to see it. Butler told investigators her assailant wore a plaid shirt and did not take off any of his clothing. (6 RH Exhs. 1644.)[53] The evidence does not contradict the natural inference that the plaid shirt the assailant was wearing on a winter night had long sleeves or that a short-sleeved shirt covered the tattoo, as some of the pictures in evidence tend to show. (1 Pet. Exhs. 213-214.)

Butler's description of dark moles that Rogers did not have is explainable by factors such as a failure of recollection a year after the fact, an erroneous recollection of lighter spots on Rogers's back, or an incorrect impression formed under stress and in near-darkness.

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[52] Rogers had a full beard during the trial. (22 RT 5798.)

[53] Her statement, "he had his shirt off" apparently referred to having his shirt unbuttoned. (6 RH Exhs. 1661.) Otherwise, it would be in conflict with her statements that he never took off any of his clothes and her description of seeing his lower back between his pants and his shirt. (6 RH Exhs. 1638, 1640, 1661.)

In sum, any inconsistencies between Butler's initial descriptions are insufficient to support a conclusion that Rogers's was not Butler's assailant. Moreover, other factors strongly support the conclusion that Butler's assailant was Rogers and could not have been Michael Ratzlaff, the alternative assailant proposed by Rogers as a major part of the basis of his claim based on false identification. (Pet. 32-35; POBR 188-189, 198-201; PRBR 10-13, 52-53; see RBR 29-32.)

e. Other descriptors support Butler's identification of Rogers

Other characteristics described by Butler strongly tended to confirm her identification of Rogers, most significantly height, weight, body build, and head hair. (6 RH Exhs. 1642-1643.) Butler's description of the assailant's light skin (6 RH Exhs. 1641) and age (6 RH Exhs. 1642), are similar to Rogers, but not so close that they are strongly positive.

Butler told investigators her assailant was shorter than her height of five feet, eight and one-half inches. (6 RH Exhs. 1642-1643.) Rogers was five feet, eight inches, tall (4 CT 877; JR RT 49), slightly taller than her estimate of his height, but still shorter than Butler.

The referee stated there was "insufficient evidence to ascertain the assailant's height and weight," noting the testimony of defense witness Kathy Pezdek that "height and weight are difficult to estimate." (Report at p. 6.)[54] Such a generalization can be valid where it is limited to precise

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[54] Pezdek testified – as a matter of opinion rather than fact – "[T]he eyewitness who never stood next to the person is going to be of dubious value in terms of estimating the height of someone that she never stood next to. So, it would render her estimate of the person's height unreliable to any degree of specificity." (4 RH RT 660-661) The first sentence is very vague, and merely restates a matter of common knowledge that height is difficult to estimate to the inch. It is the reason convenience stores and banks have height scales on exit doors. The second sentence is patently

(continued...)

estimates and it cannot logically apply where there is a basis for comparison. Butler told investigators that she walked up to her assailant's pickup truck and got in (6 RH Exhs. 1637, 1652-1653), which gave her a basis on which to compare her height with the height of the door opening and the top of the cab of the truck. Butler saw her assailant standing outside the truck with his forehead about level with the top of the door opening. (6 RH Exhs. 1639-1640, 1642-1643, 1661.) She could also compare his height with that of the top of the cab of truck, as she did retrospectively with Detective Lage. (6 RH Exhs. 1643.)

The referee stated that Butler "never saw the assailant standing out of the truck." (Report at p. 6.) The statement is mistaken. Butler told the investigators *she* never got out of the truck until she was pushed out. (6 RH Exhs. 1661.) She described *her assailant* getting out of the truck while she was inside (6 RH Exhs. 1639-1640, 1642-1643, 1661.) Rogers has argued that Butler could not estimate the height of her assailant because, when investigators asked, "Did you ever stand up next to him?" she said she did not. (POBR 55; 6 RH Exhs. 1642; see RBR 69-70.) However, Rogers has not asserted that the assailant was never outside the truck. (POBR 14, fn. 15, 33, 79-81.)

The referee did not question the credibility or sincerity of Butler's initial description of her assailant's height and weight, but only questioned

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(...continued)
unreasonable in asserting that "*any*" degree of specificity would be impossible. Nothing in Pezdek's testimony suggests that a person cannot estimate whether a person is taller or shorter than a fixed point, such as the roof of a truck. If such were the case, height markers on doors would be useless, as would standing next to someone. Moreover, Pezdek's testimony does not, but its own terms, apply to a comparison of heights, which is more than merely an estimate. If done with a valid basis, such a comparison is an objective fact.

its accuracy. Butler had valid bases for comparing both the height and weight of her assailant. As a result, the referee could apply a reasonable margin for error to Butler's estimates, albeit a narrow one as to height, but there was no reasonable basis on which to reject them entirely. Since the referee's assessment of Butler's initial description had no connection to her reference hearing testimony, it is entitled to no deference. Under a reasonable interpretation of Butler's description of her assailant's height, weight, and torso proportions, they are consistent with Rogers.

Based on seeing her assailant standing near the cab of the truck, Butler told investigators he was shorter than her height of five feet, eight and one-half inches, and estimated that he was five feet, six or seven inches tall. (6 RH Exhs. 1642-1643.) In fact, Rogers was five feet eight inches tall. (4 CT 877; JR RT 49.) Using either Pezdek's testimony or common experience and logic, Butler's comparison that her assailant was shorter than she was should be taken as accurate and her estimate of his height should be applied with a small range of error under the circumstances. As she said, Rogers was shorter than Butler and was only an inch taller than the high end of her estimate. As a result, Rogers's height fit her description.

Butler described her assailant as having a "big" but somewhat fat chest and a less-fat stomach. (6 RH Exhs. 1640,1643.) The description was vague and somewhat subjective, with an uncertain meaning and basis. Nevertheless, within the limits of the description, it is consistent with Rogers, whose chest was reasonably broad, but not particularly muscular. (6 RH Exhs. 1580-1581.)

Presumably based on his height and build, Butler estimated her assailant's weight as "[a]bout 160, 175," although she underestimated Detective Lage's weight during the interview. (6 RH Exhs. 1643.)

Rogers's weight was 160 pounds (4 CT 877), which was consistent with her estimate of "[a]bout 160, 175" (6 RH Exhs. 1643).

In addition, Rogers's head hair was "thin on top," as she had described her assailant's hair to investigators. (5 RH Exhs. 1368 [photo line-up]; 6 RH Exhs. 1580 [photo at booking], 1595 [photo in 1984 "Behind the Badge"], 1641 [Butler interview]; 1 Pet. Exhs. at pp. 213-216 [personal photos].)[55] The referee did not mention this descriptor, although it was noted in the People's brief. (See RBR 65-66.)

With or without the descriptors that the referee did not consider, any inconsistencies between Butler's initial descriptions are insufficient to support a conclusion that Rogers was not Butler's assailant. Thus, the referee's statement that "[n]one of the descriptors given by Ms. Butler of her assailant fit the petitioner" is contradicted by the evidence. On the contrary, the descriptors which are the most objective and least subject to an alternative explanation fit Rogers and are absolutely inconsistent with Ratzlaff.

Although the referee did not discuss the point, Roger's claim was based largely or wholly on the theory that Butler's actual assailant was Michael Ratzlaff, who was convicted of a sexual assault on prostitute Lavonda Imperatrice, committed three months after Rogers was sentenced. (Pet. 32-35; POBR 188-189, 198-201; PRBR 10-13, 52-53; see RBR 29-32.)

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[55] While apparently looking at Rogers's picture in the photo lineup, Butler said, "it just seemed like he had more hair. . . . It seemed thicker." (6 RH Exhs. 1640) and "It was thin on top," but "[i]t just . . . seemed like there was more" on the "[s]ide of the head. . . . But it just, seemed to be thicker, longer or something what I seen [*sic*]." (6 RH Exhs. 1641.) Thus, the comment was directed at the hair on the sides of Rogers's head, as shown by the photo; it did not question the thinning hair on the top of Rogers's head. It may be noted that the photo did not show Rogers's hair well; it was cut short on the sides, as well as on top. (5 RH Exhs. 1368.)

The People will discuss the Ratzlaff theory here. Several descriptors given by Butler not only provide strong support for the conclusion that Butler's assailant was Rogers, but also show that her assailant could not possibly have been Michael Ratzlaff.

Most importantly, Ratzlaff was six feet, three inches tall (7 RH RT 1256; 4 Pet. Exhs. at p. 58; 4 RH Exhs. 1096), seven inches taller than Rogers (4 CT 877; JR RT 49), and far taller than Butler's initial description of her assailant (3 RH Exhs. 1642-1643). Butler said that, in contrast to her assailant, Detective Lage, at six feet tall, "should stand above the truck." (6 RH Exhs. 1643.)

In her first conversation with Investigator Hodgson since 2001, after this Court issued its order to show cause, Hodgson asked Butler how much of the assault she could describe. (3 RH Exhs. 773.) Butler then began a narrative in which Butler said that she could tell that her attacker was approximately her height because he clamped his chin over her shoulder while holding her against him. (3 RH Exhs. 774.) At a later point in the interview, Butler discussed how she knew that Rogers had attacked her despite Ermachild's apparent effort to convince her otherwise. Butler said that her assailant was pressed up against her with his chin clamped over her shoulder and a taller man would have had to "squat" or curve his body so that he would not be pressing against her. (3 RH Exhs. 792-794.) She gave a similar account and explanation at the reference hearing. (3 RH RT 427-428, 430, 433-435, 450, 560.) (See RBR 68-69.) Even if Butler's post-trial statements and hearing testimony were disregarded, there is no reasonable basis on which to entirely reject Butler's initial description of her assailant's height, as would be required to conclude that Ratzlaff had assaulted her.

Butler's description of her assailant's chest and stomach also excluded Ratzlaff. Butler had said her assailant had a "big" but somewhat fat chest

and a less-fat stomach. (6 RH Exhs. 1640,1643.) She estimated his weight at about "[a]bout 160, 175" pounds. (6 RH Exhs. 1643.) Ratzlaff reportedly weighed 220 pounds in 1986. (1 RH Exhs. 288; cf. 1 Pet. Exhs. at p. 58; see also Pet. Exhs. at p. 17 [2015 in 1988]; 7 RH RT 1259 ["couple hundred pounds," "[n]ot overweight but not skinny"].) He was obviously a very large man, far taller and clearly heavier than Butler's description of her assailant. He did not have a notably large chest, but his muscular shoulders were a prominent feature (5 RH Exhs. 1344-1347; cf. Pet. Exhs. at pp. 281-284), consistent with his railroad job (7 RH RT 1258-1259)—something Butler did not mention in her description and which Rogers did not have. By 1986 he had a distinct "pot belly" (DW RT 60; cf. RH Exhs. 284), which was inconsistent with Butler's description. In addition, the hair on Ratzlaff's head was quite thick and his complexion was moderately dark. (5 RH Exhs. 1344-1347; 3 RH RT 521; 7 RH RT 1259.)

His mustache noticeably curved inward and drooped down at the ends in several photos taken in 1980 and 1986. (5 RH Exhs. 1344-1346.) It would usually be described as bushy, but that was not how Butler described it before Melody Ermachild appeared at her door. In contrast to the exaggerated description in the declaration, Butler's original description suggests a fairly straight mustache. Her reference to a "brush" mustache suggests the appearance of a paint brush, hair brush, or a brush for a workbench or desk, which generally have straight bristles, in contrast to the "bushy" mustache worn by Michael Ratzlaff. His ex-wife described Ratzlaff's mustache is described as a "bushy brown moustache, which he wore rather long, over his upper lip." (1 RH Exhs. 280, 284; see 7 RH RT 1293-1294.)

Ratzlaff's age of 31 in 1986 was also inconsistent with Butler's estimate of her assailant's age of "forty-five, forty-eight, close to fifty." (4

Pet. Exhs. at p. 18; 6 RH Exhs. 1642.) Rogers was only 40 (4 CT 877), but Butler's assailant gave her the impression of being older and "settled" (6 RH Exhs. 1642), which could result from having confidence in physical confrontations, as would be expected of a police officer.

In sum, several of Ratzlaff's characteristics are inconsistent with Butler's description of her assailant, most markedly height, body build, age, and skin color. Moreover, if Butler had been describing Ratzlaff, her description would have been markedly different in a number of characteristics, such as height, muscular shoulders, pot belly, thick head of hair, long mustache, dark skin, and younger age.

Further, Butler's description did not fit Ratzlaff's truck. Ratzlaff's truck was not all white, but was obviously a two-tone truck with a black cab from the windows up. (5 RH Exhs. 1348, 1350; cf. Pet. Exhs. at pp. 285, 287; 7 RH RT 1266.) It was a 1977 Ford (7 RH RT 1266), while Butler's description suggested a truck that was only a few years old in 1986 (6 RH Exhs. 1648). Butler has consistently said that in 1986 and 1987, she could not distinguish a Ford from a Chevrolet by appearance. (22 RT 5794; 3 RH RT 548.) Another specific recollection Butler had of the truck was that it had air conditioning, which the assailant turned down after Butler got in. (6 RH Exhs 1648-1649.) Ratzlaff's truck did not have air conditioning. (2 RH RT 259, 301; see 7 RH RT 1269-1270.)

The referee stated, "[Butler's] description of white pickup truck with grey weathered sideboards and cluttered interior is important because petitioner was driving a white pickup when he picked up and killed Tracie Clark around the end of January 1987 (17 RT 4595, 4639, 4644-4649; 18 RT 4914-4916; 3 Pet. Exhs. at p. 307), but he 'did not own' the above-described truck or any white pickup until nearly a year after the attack on Ms. Butler. (RHRT 325-326, RHRT 329-330)." (Report at p. 7.) However, this statement does not appear to resolve the factual question of whether

Rogers had access to this pickup truck at the time of the assault, and definitely does not suggest that it was impossible for Rogers to have driven another truck in the assault on Butler.

Toby Coffey had testified at the trial that he sold his beige 1966 Ford pickup truck to Rogers probably around December 5, 1986, the date Coffey obtained a smog certification for it. (17 RT 4667; 2 RH Exhs. 324.) He thought Rogers only took possession of the truck "approximately a couple of weeks later." (17 RT 4668.) Coffey testified at the hearing that it was his policy, "I don't loan my vehicles to nobody," and he did not recall loaning his truck to Rogers. (2 RH RT 329-330.)

However, Rogers had told investigators on February 13, 1987, he had purchased the truck months earlier, although he said "it wasn't ready to be in my possession until, I think, January of this year." (17 RT 4674.) It was still registered to Coffey at the time. (17 RT 4675.)

In addition, prostitute Connie Zambrano testified she was familiar with the truck, having talked to Rogers many times on Union Street when he was driving either a green Datsun pickup or a beige Ford pickup with a camper shell. (17 RT 4640-4642, 4658, 4660.) She saw the beige pickup several times (17 RT 4660-4662) before February 8, 1987, when she saw Tracie Clark get into the beige pickup with Rogers on Union Avenue the night Clark was murdered (17 RT 4626-4628, 4643-4651; cf. 6 RH Exhs. 1559). Tire tracks at the scene of the murder matched tires on the beige pickup. (17 RT 4539-4532, 4547-4548, 4552, 4625-4628, 4755.) Zambrano told Detective Soliz about her observations on February 9, 1987,

when she was asked if she could identify Clark's body. (17 RT 4593-4595.)[56]

Prostitute Katherine Hardie testified at the trial that she had seen the beige pickup on Union Avenue after she was released from jail in August 1986 and before she was arrested again in January 1987, when she had to jump out of the truck because the driver wanted to go to the orchard instead of where she wanted to go and wouldn't let her out. (18 RT 4913-4916, 4918.) She had previously said the event had occurred around January 1987; that she saw the same pickup with a camper shell several times after that; and that she did not recognize Rogers's green Datsun. (3 Pet. Exhs. at pp. 306-307.)

Thus, in 2011 Coffey did not actually remember whether he had loaned his pickup truck to Rogers 25 years earlier. Although he said it was his policy not to loan vehicles, it would not be surprising if one neighbor made an exception for another in the case of a pickup truck that was 20 years old at the time. Moreover, Rogers told the investigators on February 13 he had "had it for months," but it "wasn't ready to be in [his] possession" until January. (17 RT 4674.) The same truck was used to pick

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[56] Zambrano "dated" Rogers once when she took off her clothes and lay on the bed while he masturbated. (17 RT 4638-4643, 4654-4658, 4664.) She did not know he was a deputy sheriff until he was arrested. (1 CT 110-111; 17 RT 4630-4632, 4652.) Polaroid photos of naked younger females were found inside the camper shell of the beige pickup truck. (11 RH RT 2118.) When Rogers's locker and house were searched, Polaroid photographs of Zambrano (wearing clothes) were found in both places. (17 RT 4634-4635.) Rogers told his psychiatrist after his arrest that it was not unusual for him to be on Union Avenue and his psychotherapist that he had a "compulsion" to be with prostitutes. (20 RT 5240, 5405.) In addition to other statements, Rogers's trial testimony about picking up Connie Zambrano and Tracie Clark shows he was very familiar with hiring prostitutes. (20 RT 5353-5359.)

up prostitute Katherine Hardie on Union Avenue between August 1986, and January 29, 1987, and Hardie saw the truck several times after that. Zambrano was familiar with the truck and saw Rogers driving it several times. The sightings of the truck in the Union Avenue prostitution area by Zambrano and Hardie must have occurred no later than February 9, 1987, when detectives started questioning prostitutes about Clark's murder, which was the day after Rogers picked up Tracie Clark in the truck and murdered her. (17 RT 4595, 4639, 4644-4649; 18 RT 4914-4916; 3 Pet. Exhs. at p. 307.) However, the truck was still registered to Toby Coffey at the time of Rogers's interview on February 13. (17 RT 4675.)

It would be inconsistent with Coffey's stated "policy" to give possession of his truck before it had been re-registered. In addition, Rogers's admission that he had the truck "months" before February 13 was at least impliedly inconsistent with Coffey's testimony that he sold the truck around the time Coffey had it smog-tested on December 5, and was thus in drivable condition then. Moreover, the truck was seen a number of times by two prostitutes, which was consistent with Rogers's admission that he had had the truck for months. The referee did not resolve the conflicts in the evidence about Rogers's use of the truck, but only noted that Rogers did not own the truck at the time of Butler's assault. In particular, the referee did not state any reason to disbelieve the testimony of Zambrano or Hardie or Rogers's admission. (See RBR 75-77 [discussing this evidence].) Under the circumstances, the referee's statement on the subject is not entitled to deference.

The most reasonable conclusion is that Coffey's reference hearing testimony was not credible and, as a result, Rogers has not proved he could not have driven the beige 1966 Ford pickup at the time of the assault on Butler.

Even if the beige pickup was not available, there were "a lot of white trucks around town" in the 1980s, as Coffey testified. (2 RH RT 332-333.) Rogers has not proven he did not, or could not, have borrowed or rented a truck described by Butler in early 1986.[57]

While taking Butler's description of the side boards and "cluttered interior" literally, the referee apparently disregarded Butler's description of seeing the word "Chevrolet" on the tailgate (6 RH Exhs 1647), and accepted Butler's hearing testimony, which was essentially that her recollection of seeing that word was probably in error (6 RH RT 1142-1143, 1147). There was no explanation for treating these descriptors differently. If, as appears the most reasonable, allowances are made for the circumstances of the assault and the passage of a year until the interview, it would be unreasonable to find Butler's trial testimony false based on individual features in her description.

Instead, the most important features of Butler's description of her assailant's truck are credible, it was absolutely inconsistent with Ratzlaff's

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[57] The grey weathered wood sideboards described by Butler were consistent with those Ratzlaff occasionally put on his truck to haul cargo. (6 RH Exhs 1648-1650; 7 RH RT 1290-1291.) However, the descriptions by Butler and Ratzlaff's ex-wife were of old unpainted boards placed on the bed walls of the pickup in order to carry more cargo. The sideboards described by Ratzlaff's ex-wife were merely plain wood boards which had been nailed or screwed to short two-by-two inch posts and were slipped into holes in the bed walls which were provided for that purpose. (See *ibid.*) Obviously, they would be simple to make and could not be much less common than white pickup trucks were (see 2 RH RT 332-333). (See RBR 74-75.)

A "cluttered interior" would not be unusual. In any event, the evidence was equivocal as to whether Rogers kept his truck completely free of clutter (JR RT 14) or whether Ratzlaff's truck was "cluttered" (5 RH RT 860-861; 7 RH RT 1287-1288). Of course, if Rogers used a truck he did not own, he would not be responsible for the condition of the interior. (See RBR 63-64.)

truck, principally due to color scheme, make, age, and lack of air conditioning.[58]

f. Other aspects of the assault on Butler in light of Rogers's position as a deputy and his other offenses

Other aspects of the assault on Butler were consistent with Rogers and were uncharacteristic of Ratzlaff. Much of Rogers's behavior was indicative of law enforcement training and experience. Consistent with Rogers's experience, he attempted to maintain control of every situation; and consistent with his pre-existing emotional issues,[59] he used the control he maintained in order to degrade his victims, especially when they challenged his control.

After forcing sex acts on Butler, her assailant went through the pockets of her pants while he was driving when she was in the process of putting them on. (6 RH Exhs. 1679.) He immediately recognized her package of tar heroin, although it was just a brown lump in aluminum foil, which surprised her. (6 RH Exhs. 1657-1659, 1679; 22 RT 5788-5789.)

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[58] There are a few reported characteristics of Butler's assailant that appear inconsistent with both Rogers or Ratzlaff, specifically moles (see JR RT 15-16, 7 RH RT 1292) and boxer shorts (6 RH Exhs. 1662; see JR RT 16; 7 RH RT 1292). (As noted, Rogers has failed to prove he did not have access to a white truck and there is positive evidence he drove Toby Coffey's truck before Coffey testified it was available. Clearly, Rogers could have worn a false mustache.) Discrepancies which are explainable by failure of memory due to intervening events and the passage of time have no significance, especially since there has been no dispute that Butler was assaulted as she described, and in light of Rogers's claim that Ratzlaff was the actual perpetrator.

[59] Defense evidence at the trial tended to show serious emotional problems involving women, which was consistent with prosecution evidence of hostility to prostitutes in particular. (*People v. Rogers, supra,* 39 Cal.4th at pp. 843, 846); RB 33, 45-46, 57; RB 33, 45-46, 57; RBR 71.)

Butler commented, "[I]t's like he knew I was a junkie right off the bat." (6 RH Exhs. 1657.) He then asked, "[H]ow bad to you want it?" while snickering, made her beg for it, and then threw it in her face. (6 RH Exhs. 1657-1658; 22 RT 5789.)

He showed a confident attitude and was nice at first, but when she refused to do what he wanted, he controlled her by slapping her, using an electric shocking device, and placing a gun on her nose and shooting it out of the window, nicking her skin and momentarily blinding her in the darkness with the flash. (6 RH Exhs. 1663-1664.) His attitude was that there was nothing she could do to him, which scared her. (6 RH Exhs. 1646.) He told her, "What can you do? Call the cops?" explaining, "You're just a hooker." (6 RH Exhs. 1646, 1684.) The man drove Butler back into town, slowed down, pushed her out of the truck with his foot, and then tried to run over her. (6 RH Exhs. 1680-1681; 22 RT 5790-5791.) Butler's trial testimony was substantially the same. (22 RT 5780-5791.) Butler's account of the sexual assault is unchallenged.

Butler's assailant generally employed a measured use of force to gain control rather than to inflict injury. After Butler had oral and vaginal sex with the man, she got up, saying he was taking too long. He first slapped her and told her she was going to do what he wanted. When Butler refused, he shocked her with a stun gun, while controlling her hands so that she could not resist. He stopped shocking her when she said she would cooperate. After more oral copulation and vaginal intercourse, he turned her over and attempted to have anal intercourse with her. When Butler refused and started to put her pants on, he threatened her with a gun. At that point, he had a very confident attitude and projected the belief that she could not do anything to hurt him. He had anal intercourse with her, but ejaculated onto her back by masturbating. Afterward, when Butler was fastening her pants, he went through her pants pockets. He pulled out cash

and a package of tar heroin. He instantly identified the heroin and made her beg for it. When they were back in town, he pushed her out of the truck and tried to run over her.

After that evening, Rogers apparently tried to intimidate Butler by following her at unexpected times for a period of about two weeks, until her boyfriend tried to chase him. When Butler saw the same man, Rogers, in jail, he threatened her to keep quiet and forced her to submit to humiliating lewd acts, including rubbing her anus with an object. The actions of Butler's assailant reflected a skilled and confident use of measured techniques to control and ultimately dominate and humiliate her. (See RBR 81-82.)

The crimes proven against Rogers have the same characteristics, although applied to different goals. The penalty phase evidence showed that in 1983 Rogers drove up to a car in a cemetery not far from Union Avenue, to check for prostitution activity (22 RT 5945-5946). Prostitute Ellen Martinez told Rogers that her customer had pulled a switchblade knife on her. Another deputy, Alberta Dougherty—she changed her name later to Roberta Cowan—joined Rogers. Rogers falsely told Martinez they had the knife, after which Dougherty let the customer go and then apparently left. Rogers told Martinez he was going to take her "downtown," took pictures of her breasts with her top off, and directed her sit in the patrol car and spread her vagina while he took pictures. He dropped her off on a corner near her motel room. (22 RT 5764-5774.)

Later, a customer pulled a gun on Martinez and forced her to walk away naked, leading to a call to police by someone who saw her. When Deputy Jodie Marlatt responded to the call, Martinez told Marlatt about the earlier incident in the cemetery. (22 RT 5556-5557, 5768-5769, 5775.) Martinez was arrested three or four times during the month or two she

worked as a prostitute, and she left the state with active warrants. (22 RT 5772, 5776-5778.)

Guilt phase rebuttal evidence showed that Marlatt forwarded Martinez's report to the Internal Affairs Division and Rogers was fired, but was reinstated by the civil service commission when Martinez did not appear to testify. (21 RT 5556-5558.)

At the end of January 1986, on her first night in Bakersfield, Rogers took prostitute Janine Benintende to a remote area and shot her to death, once in the front at a 70 degree downward angle and twice in the back through the same entry wound, although there were no powder marks around the wound, indicating the two shots were fired from at least 16 inches away. (18 RT 4790, 4792-4800, 4896-4901, 4911-4914, 4917-4918.) Her body was found in a canal several weeks later. (18 RT 4733.)

Around August 1986, prostitute Katherine Hardie, who had seen Benintende the night she disappeared (18 RT 4911-4914, 4917-4918), was picked up by man driving the "white" pickup truck which had been owned by Toby Coffee; she jumped out when the driver did not go where she wanted to go, started to drive to the "orchard" instead, and would not let her out (18 RT 4914-4916, 4918.)

Connie Zambrano was a prostitute who had talked to Rogers many times when he was driving his green Datsun pickup or a beige Ford pickup, but did not know he was a deputy sheriff. During the early morning hours of February 8, 1987, Zambrano saw prostitute Tracie Clark, whom she had never seen before, get into Rogers's white pickup. She saw Clark point toward a hotel on the street, but the pickup did not stop at the hotel. (17 RT 4639, 4644-4649.) Rogers took Clark to a road next to the same canal in which Benintende's body was found (17 RT 4716-4717) and shot her six times. He shot her once in the right side at close range, once in the upper right abdomen, once in the right breast close to the nipple that was "just an

abrasion," once in the right breast close to the nipple, once in the back, and once in the front while her back was against a solid surface, such as the ground. (17 RT 4611-4618, 4639, 4644-4649.) When she was dead, he dragged her body into the canal. (17 RT 4618.)

After he was arrested, Rogers told investigators he shot Clark the first time when she threatened him with long fingernails, and decided to empty the gun into her so she couldn't report that he had shot her. (17 RT 4678-4685, 4693-4695, 4701, 4705, 4707-4708.) He implausibly said he could not remember killing Benintende. (18 RT 4929-4930.)

All of the bullets which Rogers fired into Benintende and Clark were hollow-point high-velocity bullets of a type issued by the Sheriff's office. (18 RT 4852-4858, 4866-4869, 4872, 4884.) Rogers had shot both with the same .38-caliber Colt Detective Special snub-nosed six-shot revolver (18 RT 4622-4623, 4752-4753, 4761-4762) he had stolen while on duty in 1982 from a convenience store after breaking into the store after hours (18 RT 4902-4904, 4919-4924, 4930; Exh 108). It is reasonable to conclude that he used the .38-caliber Detective Special on Benintende and Clark because it was more reliably lethal than a .25 automatic. Because he had stolen the .38, his name would not appear on firearms records. As his "off-duty" gun, he carried a .380-caliber semi-automatic pistol, which was more capable than the .25. (4 CT 851-852, 875, 887; 6 RH Exhs. 1523.) The evidence suggests he did not intend to kill Butler, as he did Benintende and Clark, because Butler's disappearance would be noticed, and he used a small .25-caliber gun to frighten her into compliance rather than shooting her with a more powerful .38, which would likely have been fatal.

The evidence showed that Ratzlaff assaulted four prostitutes: Delia Winebrenner on January 28, 1986; Jeannie Shain and Deborah Lilly separately around March 1988; and Lavonda Imperatrice on May 21, 1988, which led to Ratzlaff's arrest and conviction.

When Winebrenner complained to Ratzlaff that he was taking too long to complete a sex act, he became "infuriated," and strangled her into unconsciousness, causing her to urinate on herself. When she regained consciousness, she offered him a "free blow job" in the future to take her back to Union Avenue. He took her to a convenience store, bought her a beer and gave her twenty cents to make a telephone call. She pretended to make a telephone call as she asked a store customer to get the license number of the truck. The customer did so and also called the Bakersfield police. (4 Pet. Exhs. at pp. 60-61.) Sheriff's Deputy Ulysses Williams, a close friend of Rogers, responded.[60] Williams went to Ratzlaff's house, where he denied any violence and Williams took no further action. (4 Pet. Exhs. at p. 61; DW RT 6-45; 11 RH RT 2105.)[61] The report contains no indication that Williams examined Winebrenner's neck for strangulation marks, her eyes for petechiae (ruptured capillaries), or her clothing for urine or blood. In the space for "Offense(s)," the report listed only, "PC 242 Battery" with the "Classification," "Assault Hands Feet Etc. Non Agg." (4 Pet. Exhs. at p. 58.)

Ratzlaff was a long-time regular customer of prostitute Jeannie Shain when, on March 16, 1988, he beat her severely, breaking her jaw and inflicting a head injury. (5 RH RT 863; 4 Pet. Exhs. at pp. 247-249.)[62]

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[60] The first page of the report form contains the handwritten notion that the vehicle used was a 1977 black over white "Chevrolet," but it appears that that word was written over the word, "Ford." (4 Pet. Exhs. at 58.) The narrative, which was dictated by Williams and then transcribed, shows that the vehicle was a Ford. (4 Pet. Exhs. at p. 61.)

[61] An inferior copy of the same report appears elsewhere. (4 RH Exhs. 1096-1107.)

[62] An inferior copy of Shain's medical records appears elsewhere. (2 RH Exhs. 641-644.)

Shain had no recollection of the beating. (5 RH RT 865.) However, Ratzlaff was seen by Deborah Lilly leaving Shain's motel room after she was injured. (7 RH RT 1312-1317.) Shain testified at the reference hearing that Ratzlaff asked for anal intercourse "all the time," but she refused. (5 RH RT 863.) He never forced her to have anal intercourse. (5 RH RT 874.) He paid her "extra" to photograph her unclothed on a few occasions. (5 RH RT 876.)

After that, Ratzlaff hired Lilly several times as a prostitute. (7 RH RT 1317-1318.) He asked for anal sex but she refused. (7 RH RT 1341.) On one occasion, they were parked in a field, Ratzlaff was unable to get an erection, became very angry, and strangled her as she fought him. (7 RH RT 1321-1322, 1341.) Ratzlaff then went around his truck, stomping his feet and beating the truck. (7 RH RT 1322.) He had been drinking. (7 RH RT 1323.) She calmed him down and he was able to complete a sex act after several hours. (7 RH RT 1322-1323, 1342.) She "dated" him about ten times after that because he paid her well. (7 RH RT 133.) He paid her by giving her "connection" money to buy heroin for her, but he never used it. (7 RH RT 1338-1339.) She did not report the incident to the police because she "had been attacked before and they never did anything about it." (7 RH RT 1324.) She had been assaulted a total of 12 to 16 times. (7 RH RT 1344, 1350.) She noted that prostitutes did not report things to the police. (7 RH RT 1324, 1343-1344.)

On May 21, 1988, Imperatrice agreed to orally copulate Ratzlaff for money, but he physically restrained her (apparently with plastic ties), threatened her with a gun, shocked her "on the stomach and the pubic area with a stun gun," and "beat her in the face," inflicting bloody injuries, and fired a pistol at her as she fled to a house some distance away. (2 Pet. Exhs.

at p. 67 [opinion on appeal]; see RBR 54-63, 80-81.)[63] The resident called police; a deputy took a report and took her to a hospital. (4 Pet. Exhs. at pp. 12-14, 26-28; 4 RH Exhs. 1084-1086, 1093.) The assaults on Shain and Lilly came to the attention of authorities for the first time when detectives investigated the assault on Imperatrice. (4 Pet. Exhs. at pp. 19-21; 4 RH Exhs. 960-961, 1098-1100.)

In contrast to Rogers's confident use of tactics and techniques to control his victims, Ratzlaff lost control in explosions of rage involving a high degree of physical violence. As with their use of force generally, Rogers used his gun in a controlled and calculated way while Ratzlaff did the opposite. Rogers fired aimed shots into Benintende and Clark, while Ratzlaff reportedly fired wildly after Imperatrice as she ran for no good reason other than rage. Firing his gun across Butler's nose out the window, to blind and stun her and frighten her into compliance fit Rogers's pattern, but not Ratzlaff's. Among other differences in their patterns, Rogers only assaulted prostitutes he had not "dated" before, but planned to kill some but not others; while Ratzlaff had prostitutes he hired repeatedly and sometimes assaulted them when he became engaged at something they said or did.

Unfortunately, assaults on prostitutes are not rare (9 RH RT 1679), which can be partially attributed to the vulnerability of their situations, frequent drug use, and their perception that police are unwilling to investigate any assaults which are reported. (See RBR 84-86.) The evidence in the instant proceeding includes several instances in which

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[63] Ratzlaff did not attempt to have anal sex with Imperatrice and her claim of digital penetration was rejected by the jury. (2 Pet. Exhs. at pp. 89, 92-96, 104-129, 139, 157-158.) Detective Fidler, who investigated Ratzlaff's case, testified that sodomy is not unusual in a sexual assault. (9 RH RT 1679-1680, 1690.) The forcible sodomy committed on Butler was an act of degradation, rather than a sexual preference, as it was for Ratzlaff (4 Pet. Exhs. at p. 21 [Winebrenner]).

reports of assaults against prostitutes were not pursued. None of the offenses against prostitutes shown in this proceeding were reported by the victims or any other prostitute. While this proceeding also shows that there are officers who were willing to pursue investigations of assaults against prostitutes, Butler's assailant essentially told her that the police would do nothing if she reported the assault and he then took advantage of the situation to continue the assault with a feeling of immunity. There is no evidence Ratzlaff used a similar tactic.

g. Butler's account of recognizing Rogers as her assailant has been consistent and is unchallenged

Butler spent around two hours with her assailant (6 RH Exhs. 1681), beginning on a city street where she could see him and she was not under unusual stress and ending when they were driving back to town.

She saw him about two days later, when he was watching her performing oral sex on a customer on a car. (6 RH Exhs. 1682-1683.) She also saw him two or three days after that when he cruised by, about a week after that when she saw him sitting on his truck watching her, and some time later when he parked and indicated for her to come to his truck. (6 RH Exhs. 1683-1686.)

Butler told the investigators she had known who the man was "for quite some time." (6 RH Exhs. 1670.) She said, "about a month, month and a half" after the assault, "I seen him [*sic*] when I went to jail on an under the influence charge." (6 RH Exhs. 1682.) She also passed through A Deck two or three times when she went to visit her boyfriend (6 RH Exhs. 1671, 1677, 1682) and she "kept seeing this cop" (6 RH Exhs. 1671, 1682). She "kept looking" at the officer and told him she knew him from somewhere and that he had a white truck. At first he said she didn't know him, but then said he had arrested her in Arvin for being under the

influence while he had been driving a white squad car; Butler told him she had never been arrested in Arvin. (6 RH Exhs. 1671-1672.) At that point she realized who he was, although the uniform had "kept throwing [her] off, and "looked at him real hard." He told her to keep her mouth shut. (6 RH Exhs. 1672; 6 RH RT 1140-1141.) Butler said there was "No doubt in my mind at all" about her identification. (6 RH Exhs. 1675-1676.)

After Butler was arrested on September 25, 1986, she was in the main jail having a conversation with Deputy Jeannine Lockhart in which Lockhart asked about the dangers from being a prostitute. (22 RT 5807-5808 [Lockhart]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1054-1055 [Butler].) Butler said she had been raped by a Sheriff's deputy who worked on a lower floor. (22 RT 5792, 5796-5799 [Butler], 5806-5808 [Lockhart]; 3 RH RT 475-485, 528 [Butler]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1091 [Butler].) Butler recognized Rogers as her assailant by his photograph in the "Behind the Badge" annual, but she refused to tell Lockhart who had assaulted her because she was afraid. (22 RT 5792-5793, 5796-5797, 5799 [Butler], 5805-5807 [Lockhart]; 5 RH RT 920 [Lockhart].) Lockhart told her supervisor, Senior Deputy Norm Simon, but he told her nothing could be done because Butler had not identified anyone. (22 RT 5810; 5 RH RT 941.)

Butler made her statement to investigators on February 18, 1987. She was called out of her cell without prior warning and was interviewed by Detectives Soliz and Lage and Investigator Hodgson. She initially confirmed she had been raped by a sheriff's deputy and pointed out his picture in a six-photo array. During the taped interview, Butler said she had no doubt at all that Rogers had assaulted her and said she had known who he was "for quite some time." (6 RH Exhs. 1670, 1675-1676.)

The investigators had no further contact with Butler until she was brought to the courthouse without warning, in jail clothes, on March 23,

1988. (3 RH RT 506; 10 RH RT 1949-1952, 1995.) At that time, Deputy District Attorney Ryals met with her, asked her to briefly tell her story, and called her as a witness the same morning. (10 RH RT 1948-1956.) Although Butler's trial testimony was the same in substance as her interview, it was far more abbreviated since Ryals asked specific questions and Butler limited her answers accordingly. (22 RT 5777-5804.) Butler specifically testified that she recognized Rogers, who was sitting in court, as the person she had seen "[o]n Union Avenue in the incident when he assaulted her and on A Deck" of the jail, when he was in uniform. (22 RT 5779-5793.) She testified about his recognition of her heroin (22 RT 5788-5789), and about having seen him on A Deck (22 RT 5802), but was not asked, and did not testify, about having seen him on Union Avenue after the assault or about the sexual abuse in jail.

In her later statements, Butler made it clear that she had known who Rogers was when she had spoken to Lockhart. (3 RH Exhs. 714-715 [2001 Texas interview, Exh. 63B] [Supp. RH Exhs. 67-68, Exh. 128B]; cf. 1 RH Exhs. 232 [Ermachild report].)[64] Butler testified at the reference hearing, "I already knew who he was before I got there," apparently meaning before she was arrested and booked into jail in November 1987. (3 RH RT 552-553.) She already knew Rogers by name when the television news story about Rogers came on. (3 RH RT 532-533.) When she recognized him in

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[64] "Tambri was in the jail and she was made a trustee. One time she was standing around talking to four female deputies, one of them Lockhart, and she made a remark about there being bad cops downstairs, referring to Rogers." (1 RH Exhs. 232.) "[Lockhart] already knew that I was referring to an officer and I already knew who the officer was ...." (3 RH Exhs. 715.) "Before that happened. I had already confirmed to her that there was a cop but I had no idea he'd killed anyone – when I told Ms. Lockhart." (3 RH Exhs. 715.)

booking, she saw his name tag that said, "Rogers." (3 RH RT 481; 6 RH RT 1140-1141.)

Butler testified at the reference hearing that she knew Rogers was the man who had assaulted her when she saw him in the booking area laughing and carrying a cup of coffee while walking with his shoulder and back toward her. (3 RH RT 560; 6 RH RT 1140-1141, 1225-1226.) She recognized him based on his height, body build, "the look, the demeanor, the way he spoke to me . . . the way I felt in my opinion that he knew who I was, the way he humiliated me, the way he demeaned me. There is no doubt in my mind." (3 RH RT 560; 6 RH RT 1225.) Butler also testified at the hearing she was sexually abused by Rogers in the main jail, beginning about three weeks later, before she was transferred to the Lerdo jail facility as a sentenced prisoner. (3 RH RT 485-499; 6 RH RT 1202-1204, 1207, 1226.)

Thus, Butler saw Rogers in the prostitution area at least four times within approximately two weeks after the assault and saw him in uniform in jail within about four weeks after that, and saw him repeatedly during her stay in the jail in late 1986. She maintained her identification with the exception of a short time about 11 years after the trial when Melody Ermachild's efforts to convince her that Ratzlaff had assaulted her caused her to "second guess" herself.

Butler's identification of Rogers is strongly supported by her opportunity to see him during the assault, her sightings of him following her several times within about two weeks after the assault, and her recognition of him in jail a few weeks later—which has not been contradicted. These circumstances negate Rogers's argument that she only identified him because she saw him on television or for any other reason than recognizing him by his face, body, voice, and mannerisms. Rogers's follow-up intimidation of Butler within the weeks after the assault and a

few weeks after Deputy Lockhart and Supervising Deputy Simon learned she had disclosed the assault to authorities showed consciousness of guilt. (See *People v. Vines* (2011) 51 Cal.4th 830, 866-867.) Butler had no reason to make up a jail molestation story in 2011, just before the reference hearing. As she said, it would only "humiliate or mortify" herself more. (6 RH RT 1203.) In addition, Rogers's reaction in jail confirmed her recognition and further showed consciousness of guilt. Under the circumstances, any variance between Butler's initial description of her assailant and Rogers cannot reasonably undermine her recognition of Rogers on A Deck of the main jail as her assailant.

h. There is no reasonable basis on which to conclude that Butler's trial testimony was not generally sincere and credible

On March 23, 1988, during the penalty phase of Rogers's trial, Butler testified that Rogers raped and assaulted her around February 1986. (22 RT 5778-5805.) Her account of the assault and her description of the attacker were consistent with the detailed statement she gave investigators on February 18, 1987, identifying Rogers as her assailant the morning after his initial arraignment (4 RH Exhs. 886-936), and with a much briefer statement a few months before that in which she said her assailant was a deputy sheriff working in the jail.

Rogers has not asserted that Butler was not sexually assaulted as she described, has not disputed that Butler told Lockhart that *a sheriff's deputy working in the jail* was the perpetrator, and has not asserted (nor is there any evidence) that she was sexually assaulted by another deputy and falsely accused Rogers. His only theory has been that Michael Ratzlaff was the person who actually assaulted Butler. This would mean that Butler either confused the two in thinking she recognized Rogers on A Deck—an impossibility considering the differences in their appearance—or she

perversely and intentionally decided to falsely accuse Rogers at some time after the disclosure to Lockhart—a theory which would be utterly inconsistent with the undisputed evidence as to the circumstances leading up to Butler's testimony. The referee's findings contain nothing to suggest that Butler's identification was intentionally false and Rogers has not argued that it was.

It has not been disputed that Butler actually identified Rogers when she recognized him in jail when he was in uniform with a name tag. Neither the referee nor Rogers has provided any possible explanation as to why Butler would fabricate a story to Deputy Lockhart that she had been sexually assaulted by a man she later recognized as Sheriff's deputy who worked in the jail.

The facts that she refused to identify the deputy and had not formally reported the assault during two periods of custody precludes any possibility that made the initial disclosure to Lockhart in order to gain some advantage in terms of custody time or financial gain. This conclusion is confirmed by the fact that the disclosure was unintentionally prompted by Lockhart, which led Butler to make a sarcastic remark, after which Lockhart pressed Butler for information. The basic facts are shown by Butler's consistent statements and her testimony at both the trial and the evidentiary hearing and confirmed by Lockhart's testimony at both the trial and the evidentiary hearing. Rogers does not dispute that the disclosure occurred as Butler and Lockhart described it. The evidence unquestionably shows that Rogers worked in the jail during the time period in early 1986 when Butler has consistently said she recognized him as her attacker.

In addition, the disclosure was made several months before Rogers murdered Tracie Clark, and it was only the Clark murder evidence which led to his identification and arrest as the person who had murdered Janine Benintende nine months before the disclosure to Lockhart.

When Butler was brought to the courthouse to testify at the penalty phase of Rogers's trial, she appeared not to know why she was there until the prosecutor asked her about the assault. There is no specific evidence she had been informed in advance she would be taken to court to testify in Rogers's trial. The prosecutor's practice was not to prepare her witnesses to testify, but merely put them on the stand and let them tell their stories. (10 RH RT 1954.) And despite the lack of warning, her account of the assault and the description of her attacker were remarkably accurate compared to the statement she gave to detectives a year earlier.

Even if it could be conjectured that Butler told her story to Lockhart intending to accuse Rogers of the sexual assault at some later time, no evidence has been presented that Butler had any motive to do so at the time. Even if it is further conjectured (with no supporting evidence) that Butler had heard from other prostitutes that Rogers might have murdered Benintende, the circumstances are inconsistent with any intention to accuse Rogers of the assault at a later time. Butler had no reason to think such an accusation would be believed many months later and with no corroborating evidence. As far as the evidence shows, Butler had no reason to believe Rogers would be accused of murdering any prostitute since the Benintende murder investigation was apparently at a dead end and Tracie Clark had not even arrived from Los Angeles.

Moreover, Butler's testimony is undisputed that she did not connect the Deputy Rogers whom she had seen working in jail with any offenses against prostitutes other than her. Specifically, there is no evidence Butler knew Rogers had abused Ellen Martinez in 1983, murdered Janine Benintende in January 1986, or attempted to kidnap Katherine Hardie around August 1986. Since Rogers bears the burden of proof in this proceeding, the necessary conclusion is that Butler did not have any knowledge before February 1987 that Rogers had committed any offenses

against prostitutes—other than the sexual assault Butler disclosed to Lockhart.

The only possible conclusion is that the disclosure to Lockhart was truthful, as was Butler's statement to investigators and her trial testimony. The apparent fact that she questioned her identification in the wake of the Ermachild ambush had no tendency to show that her initial identification was incorrect.

Under the circumstances of this case, Rogers should be expected to provide a theory that makes sense under the facts. He has provided no such theory supported by the evidence, and none is apparent.

Moreover, if Butler had testified falsely at the trial, the first declaration would have contained a positive statement to that effect, and after signing the second declaration, she would not have contacted the District Attorney's Office and ultimately repudiated the declarations.

As discussed, the referee's findings and explanations do not support a conclusion that Butler falsely identified Rogers as her assailant, either intentionally or otherwise.

It should be noted that Butler's penalty phase testimony was subject to impeachment on several grounds, including habitual drug use, her profession as a prostitute, and drug and prostitution convictions; her prior statements involving her assailant's name (22 RT 5782, 5797, 5807-5809, 5813); whether he had a mustache (22 RT 5797-5799, 5802, 5909-5910); insinuations of bias, a tainted identification, and an expectation of leniency (22 RT 5795, 5803); and evidence of the timing of Rogers's ownership of the beige truck (17 RT 4666-4668). Thus the jury at Rogers's trial was aware of reasons to potentially disbelieve Butler. The reasons involving drug use and prostitution were far more significant than Rogers's current claims, but the jury apparently found her credible.

As stated in *In re Roberts, supra,* 29 Cal.4th at p. 744, "It is not the function of a referee or an appellate court to reweigh credibility determinations made by the jury. It is true that the referee observed [the witness's] demeanor while testifying at the reference hearing, but the jury already had observed [the witness's] demeanor when he testified at trial. The jury was in the best position to determine the truthfulness of [the witness's] trial testimony. (See *In re Bell* (2007) 42 Cal.4th 630, 637, 642 [a discrepancy which was presented to the jury does not establish false testimony].)

D. The referee's finding that Butler falsely denied seeing Rogers on television does not warrant relief and the people take exception to the referee's finding that two other portions of Butler's testimony were false

In question two, this Court asked the referee to adduce evidence and make factual findings as to whether Butler testified falsely as to "other matters." This Court asked:

> (2) Did Tambri Butler testify falsely at the penalty phase of petitioner's trial regarding any other matter, including: 1) whether she had seen petitioner on television before she identified him as her attacker; and 2) whether she had been promised leniency for her testimony and/or was aware that she would be released early after she testified?

As to item 1), the referee answered, "Yes. The Court finds Ms. Butler saw petitioner on TV before she identified him." (Report at pp. 8-9.) The referee noted Butler's earlier statement to investigators, in which she said "they flashed his face" on television and on later statements and testimony.

As to item 2), the referee answered, "No express promise of leniency. However she was aware of early release if she testified." (Report at p. 9.)

In addition, the referee found that Butler "testified falsely, either inadvertently or otherwise, about an issue material to her credibility as a

witness," in answering the question, "What are you in custody for?" (Report at pp. 9-10.)

The People agree that Butler saw an image of Rogers on a television screen in jail, but contends that her testimony on the subject had little or no significance in light of her other testimony and the context of the case. The People disagree with the finding that Butler was "aware that she would be released early after she testified." She may have heard jail folklore suggesting that she would or might be released early, but she could not be "*aware* that she would be released early" because there was no such promise or arrangement when she testified; whether the circumstances which actually led to her early release would occur was a matter of speculation. The evidence does not support a conclusion that Butler expected leniency as a result of her testimony. In addition, the evidence does not contradict Butler's testimony that she did not want to be released early at the time she testified. The People also disagree with the referee's finding that Butler testified falsely in saying that she "was in custody for" "possession of heroin," since Butler answered the question in the same way as it was asked. The question was asked in a general sense and did not ask for the specific offense of which Butler was convicted.

1. The referee's finding that Butler testified falsely with regard to whether she saw Rogers's picture on the television before speaking to investigators does not warrant relief

During Butler's cross-examination at the penalty phase, defense counsel said, "And it's true that you saw photographs of Mr. Rogers on television or in the newspaper before you talked to the police, did you not?" Butler answered, "No, sir, none whatsoever." (22 RT 5795.)

In later statements and testimony, she said that she saw a news report of Rogers's arraignment, which included an image of Rogers, but she only saw a "flash[]" of his image. (3 RH Exhs. 702; 6 RH RT 1025; cf. 6 RH

RT 1224.) In light of the question, Butler's other testimony, and in the context of the case, Butler's answer was not false and was not "substantially material or probative on the issue of . . . punishment." (Pen. Code, § 1473, subd. (b).)

In making his finding, the referee relied on evidence that was favorable to the People in showing that Butler only had a fleeting glimpse of Rogers on television.

As the referee noted, Butler was interviewed by investigators the morning after the television news report of Rogers's arraignment on February 17, 1987, was broadcast. (Report at p. 8.) Over ten years after the trial, Butler made a telephone call to the Chief Criminal Deputy District Attorney to say that she had been contacted by a defense investigator. (3 RH Exhs. 671.) Investigator Hodgson returned the telephone call on October 27, 1998. (*Ibid.*) After Butler confirmed that she had identified Rogers at the trial from her memory of the person who had raped her, she added, "I had already known from the jail. I didn't forget the face." (3 RH Exhs. 701.) When Hodgson introduced the subject of the interview after Rogers was arrested, Butler volunteered, "Actually I found out he had done the murders, it was at [Lerdo]. It was like ten o'clock at night and the news came on and they flashed his face . . . ." (3 RH Exhs. 702, quoted in part at Report at p. 8.) As the referee noted, she said she "saw his face [on television] that night for the first time" that night. (Report at p. 8; 3 RH Exhs. 702.) She said, at that point, "for the first time I realized he wasn't a bad cop that raped me he was a bad cop that raped and murdered several people. It came into full realization and then before, I mean before I even had the time to wake up and take my first pee, you guys were there." (3 RH Exhs. 702.)

In addition, when they met in 2001, Butler told Hodgson, "I seen [*sic*] on the news -- just that quick (snaps fingers) and I realized like I said then

that this man--it kind of hit home that this man that I knew had the potential of killing me where I thought he was just trying to scare me as a trick before." (3 RH Exhs. 714; cf. *id.* at p. 716.) Butler explained that she was reading a book and the news story was almost or already over when her friend Kay Davis told her about it, saying, "that was him." (3 RH Exhs. 727.) She had previously told Davis about the sexual assault. (3 RH Exhs. 728.) Butler denied the news report led to her identification, noting that she had already told Deputy Lockhart there was a "bad cop," but "[n]o one knew who I was referring to . . . until after" he was arrested. (3 RH Exhs. 714-716.)

The referee relied on similar hearing testimony by Butler that she knew why the investigators had come to see her:

> Because it came on that night on the news, ten o'clock news. I was reading a book with my girlfriend and she alerted me to the news. She goes oh, my God, there he is. And I go, huh? And I looked up to see a badge, Kern County Sheriff's badge, on the television. And they were talking about Kern County police officer Dave Keith Rogers. And at this point was when I realized that this man . . . had killed someone. I had never known this. So now reality is just like oh, wow, oh, my God, this man really was serious. And that's when it all came together for me about how close I really did come to dying.

(3 RH RT 497-498, quoted in part at Report at p. 8.)

On cross-examination, Butler said was asked, "what do you mean you saw him on TV?" She answered:

> Honestly whether I saw his face or whether I saw a badge, I remember reading my book and glancing up. And just as I glanced up it went from a face to a badge. Didn't matter at that point because as soon as I heard the name, saw the badge, I already knew from booking, from the jail, oh, my God, he wasn't just a bad cop, he was actually in jail for being a bad cop.

(3 RH RT 1224, quoted in part at Report at p. 8; cf. 6 RH RT 1008.)[65]

Thus, the referee relied for his finding on evidence that Butler had a fleeting glimpse of Rogers's image on television. However, neither the evidence nor the referee's report resolves the question of whether Butler's glimpse of Rogers on television permitted her to see a recognizable image of his face. The finding was simply that Butler "saw petitioner on TV" (Report at p. 8) before she "talked to the police" (22 RT 5793 [defense counsel's question]) and "identified him as her attacker" (Question 2) during that interview.

The pertinent question to Butler came early in her cross-examination at the penalty phase of the trial. In answering defense counsel's first question, Butler implicitly admitted "seeing Mr. Rogers on television" by answering a question which assumed such a fact. (22 RT 5795.)[66] The sixth question concerned whether she had seen "photographs of Mr. Rogers on television or in the newspaper" before "the interview." (22 RT 5975.) Butler said she hadn't.

Under the circumstances, the main issue is the meaning of Butler's trial testimony, a matter on which the referee's finding is not entitled to

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[65] It should be noted that the "oh my God" comments came only from Kay Davis upon seeing the news report and from Butler in retrospect after realizing that her assailant was also a murderer. As shown by reference hearing testimony on which the referee relied, it was Davis's statement, not the news report itself, which initially informed Butler of this fact. (3 RH RT 497-498; Report at p. 8.)

[66] Q Other than seeing Mr. Rogers on television, you don't know anything about him, do you?

A Not personally, no.

(22 RT 5795.)

deference. (*In re Roberts, supra,* 29 Cal.4th at p. 742.) However, assuming arguendo that the use of the plural term, "photographs," in the question should not be construed literally, the use of the term, as well the context, carries the clear connotation that any television image would have adequate quality for the relevant purpose— recognition—and the question was whether *Butler* saw such an image. As a result, if Butler had not seen a recognizable image, or had not seen it well enough or long enough to recognize the person in it, "No" would be the truthful answer.[67] Rogers fails to carry his burden of showing that Butler's answer was false.

In any event, Butler's testimony on this point is not substantially material because she had previously recognized Rogers as her assailant only a few months after the assault and almost a year before he was arrested.

The pivotal moment of Butler's identification of Rogers as her attacker came when she saw him on A Deck at the Kern County main jail.

At the penalty phase, Butler testified that she saw Rogers working in jail three times and that she knew she "knew him," but did not "know

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[67] In her hearing testimony Butler specifically repudiated an unbelievable assertion in the declaration:

> Q. Paragraph 13: "I testified and I lied when I said I hadn't seen Rogers on TV and when I said other women in jail were not discussing the case."
>
> A That's not true.
>
> Q Did you tell her anything close to that?
>
> A No. I told her I heard a story on the news.

(3 RH RT 537-538.)

As discussed, only reasons for Butler to sign the declarations would be, consistent with her testimony and the other evidence, that Ermachild fed her exaggerated, incomplete, and false information and manipulated her into questioning her identification, likely combined with the fear that her life would be in danger if she did not appear to cooperate with Rogers's investigator.

where because the uniform kept throwing me off, but I knew I knew this man and then it dawned on me when I knew him." (22 RT 5791.) Her testimony described their interaction:

Q. Did you ever have any conversation with him?

A. Yes, ma'am.

Q. What did you say to him?

A. I asked him if he ever arrested me before, and he said, yes, in Arvin. I have never been arrested in Arvin.

Q. At that time did you remember where you had seen him?

A. Yes, ma'am.

Q. What did you do?

A. I just, I looked at him and said, you son-of-a-bitch.

Q. Did he say anything?

A. He told me that I better turn around and keep my mouth shut.

(22 RT 5791-5792.)

Butler had described this incident and her previous observations of Rogers in greater detail in her statement to investigators. (6 RH Exhs. 1670-1671, 1675-1677, 1682-1686.) Butler confirmed her recognition in her conversation with Hodgson in 1998 (3 RH Exhs. 690-691, 701), in later conversations (3 RH Exhs. 714-721, 732), and her hearing testimony (3 RH RT 552-553, 560; 6 RH RT 1140-1141, 1225-1226). Butler's statements and testimony on this point have never been contradicted or effectively disputed.

Thus, the evidence shows that Butler had known Rogers's name, deputy status, and what he looked like since early 1986 from her observations of him in jail. As Butler has consistently stated, what was

important to her in the news report was not what he looked like, but that the person she knew as Deputy Rogers had not only sexually assaulted her, but had murdered two other prostitutes. Under the circumstances, the extent of Butler's observations of the television news story of Rogers's arraignment cannot, and could not have, affected the validity of her identification.

2. There was neither an express nor an implied promise of leniency in exchange for Butler's testimony

A part of question two asks whether Butler was promised leniency for her testimony or was she aware that she would be released early after she testified. The referee found that Butler was not promised leniency for her testimony, but that she was "aware" that she would be released early if she testified. The referee's finding relied on a single statement made in a telephone conversation in 2011 expressing frustration over being required to come to California to testify when she needed to work to support herself. The statement does not support the referee's finding.

At the trial, the prosecutor asked Butler, "[A]ny promises of leniency or any type of deal been made with you to testify?" She answered, "None whatsoever. I have been told I had nothing coming." (22 RT 5794 [2 RH Exhs. 377].)

The following occurred on cross-examination:

> Q. You have had your arrests and you have done your time, that sort of thing, correct?
>
> A. Yes, sir.
>
> Q. Well, isn't it true that although--perhaps no formal promises have been made to you that you, you hoped to get out of jail as soon as possible?
>
> A. No, I don't get out until August the 9th.
>
> Q. Unless somebody helps you out a little bit?

A. I don't expect any help.

Q. You know you are not going to go to prison.

A. I have already been sentenced to county.

(22 RT 5781 [2 RH Exhs. 384].)

Later, defense counsel brought up a related point:

Q. And isn't it true that you want to get out as soon as possible so you can go right back to the same thing basically?

A. No. I want to do my time.

Q. And are you totally cleaned up this time?

A. I can't say I am totally cleaned up. I can't ever say I will quit doing drugs. I hope to. I have got a job. I have got plans too. [End of Butler's testimony.]

(22 RT 5804; 2 RH Exhs. 387.)

Defense investigator Ermachild wrote that in 1998 Butler said she had told the investigators she did not want felony probation, but "[t]hey made it clear I had nothing coming to me, no reward for testifying." (1 RH Exhs. 222 [¶ 11], 247.) Butler said she did not want to testify because she "wasn't a rat." (1 RH Exhs. 221, 247.) She also told Ermachild she was not interested in getting out of jail early because her "boyfriend William Weisi [*sic*] was also in jail" and she was "trying to get healthier by staying in jail, off drugs." (1 RH Exhs 221 [¶ 8], 247.)[68] Rogers has not argued that these statements, or Butler's similar testimony at trial, were false.

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[68] The language that it was made clear to Butler she had "nothing coming" was changed in they typed declaration to say she "would have nothing in return for testifying." (1 RH Exhs. 257 [¶ 15].) The typed declaration had nothing indicating that "everyone" thought they could get of jail early by testifying but that Butler herself did not want to testify, did not want to be a "rat," and in fact wanted to stay in jail. (See 1 RH Exhs. 257.) Although the People do not believe that the declarations are credible

(continued...)

The main purpose of the 2011 conversation was to permit Hodgson to make arrangements for Butler to fly to California to testify at the reference hearing. (3 RH Exhs. 855.) Butler asked how important her testimony was (3 RH Exhs. 855) and said she did not care if Rogers's death sentence was sustained (3 RH Exhs. 855-856). Butler noted the hardship of coming to California when she needed to work to support herself. (3 RH Exhs. 857-860, 867.)[69] She was irritable and angry (3 RH Exhs. 862, 867), commenting that the state had not done anything for her, except that she did not have to serve her full jail sentence (3 RH Exhs. 867-868).[70] She said she "understood" from the circumstances that her testimony was necessary to obtain a death sentence, although no one had told her that. (3 RH Exhs. 856, 869.)[71] Thus, they were essentially an expression of frustration of having to come back to Bakersfield to testify about being sexually assaulted 25 years earlier when she was a prostitute and a heroin addict.

(...continued)
in general, the portions summarized in the paragraph above may be considered as admissions adverse to Rogers's case. Their reliability is supported by the alteration of these portions or their omission from the typed declaration.

[69] At the time, she was also concerned that she might be subject to probation violation proceedings in her felony case. (6 RH RT 1230.)

[70] In her comments, Butler referred to 16 or 18 months in the county jail, apparently forgetting that her previous jail term was ordered to run concurrently with the new 1987 sentence of one year. (3 RH Exhs. 868.) She knew that her sentence would be "cut down," apparently referring to statutory time credits for good behavior and working. (3 RH RT 368.)

[71] Since Butler was testifying as to an aggravating circumstance at the penalty phase, it was obviously true that the purpose of having her testify was to obtain was a verdict of death. However, in the heat of the moment, 25 years after the events on which she was commenting, she was obviously not thinking of all of the evidence that could be considered in aggravation—principally the facts and circumstances of the murders.

Under less stressful, neutral circumstances only three years earlier, she had said she had "no idea" she would be released from jail when Rogers's "case ended." (3 RH Exhs. 808-809.) She added, "I was not really wanting to get out of jail quite honestly because my boyfriend was in jail at the time and I didn't really have a place to go. And now it really kind of inconvenience me." (3 RH Exhs. 808.) She explained that she had bought items from the commissary that had not arrived when she was released. (3 RH Exhs. 810.)

Butler addressed her 2011 comments at the hearing: "[t]hat was anger talking here. I was very angry." (6 RH RT 1030.) She was angry that, even though she had testified at the penalty phase of Rogers's trial as the only witness regarding any additional violent offense, she had to serve a long jail term and was then subject to felony probation, on which she had expected to fail. (6 RH RT 1029-1031; 3 RH Exhs. 867-868 [Exh. 64A] [Supp. Exhs. 75-78 [Exh. 128B].) Butler confirmed her trial testimony that she had no expectation of leniency, and did not believe or assume she would be released from jail early. (6 RH RT 1026-1027, 1030.)

This view is supported by the testimony of Investigator Hodgson and Deputy District Attorney Sara Ryals that the reason Butler was released early was not a reward for her testimony, but for her safety. Their concern for her safety was well supported by Rogers's close relationship to some other officers (9 RH RT 1804; 11 RH RT 2104-2105, 2163-2164), including one who expressed open hostility at the time of petitioner's arrest (11 RH RT 2169-2170 [Alberta Dougherty]) and another who dangerously and repeatedly stood close to Rogers at the counsel table while wearing his gun (11 RH RT 2163-2157, 2169-2171 [Ulysses Williams]).

Ryals testified that, on more than one occasion, one of Rogers's friends in the Sheriff's Department walked back and forth in an intimidating manner outside the courtroom doors so that any witness who

was in custody had to go past him to get into the courtroom. (10 RH RT 1963-1964, 1983-1984.) The same deputy and one other went into the courtroom, past the gate, up to the counsel table and spoke to Rogers while wearing their firearms on their belts. (10 RH RT 1963-1966.) A third friend of Roger also came in, but he may not have been in uniform. (10 RH RT 1965-1966.) They were not assigned to the trial and had no apparent other business in the courtroom. (10 RH RT 1964-1966.)

There is nothing to suggest that Butler had any idea she would be released early for her own safety—although she knew she might not be safe in jail (3 RH Exhs. 808 ["I didn't know if I would wind up dead in a girls cell or what."].) The fact that Butler did not follow Hodgson's instructions to call him for assistance in leaving the area strongly suggests that she had no knowledge of Hodgson's plan before the appearance on May 2, 1988, when she was ordered released. It is reasonable to expect that, if there had been a pre-arranged plan, Butler and Hodgson would have discussed what Butler would do when released and agreed on a plan. As it was, there must have been a miscommunication, misunderstanding, or lack of agreement between Butler and Hodgson, which would be unlikely if there had been a plan before May 2, or any expectation by Butler that she would be released early. This conclusion is confirmed by what happened when she was released: She did not have a place to live, she started using drugs again, and was arrested again, violating her probation and risking a prison sentence.

Rogers's theory that Butler had a motive to "curry the favor of law enforcement" (POBR 184) is contrary to her testimony and is negated by the circumstances. As Butler testified twice and affirmed to Ermachild, she did not want to get out early, in part because she did not want to go back to using drugs and be sent to prison on a probation violation. In addition, evidence does not indicate that she voluntarily submitted to the interview or

chose to testify at Rogers's trial. Instead, she was simply brought where the authorities wanted her and was questioned when she was there—first a jail interview room and later the jury room and then the witness box.

Butler's attorney in her felony case, Daniel Ybarra testified that in some cases he had handled, there was be an informal expectation, at the time of a plea, for prospective performance, normally involving drugs. (8 RH RT 1565-1566.) Deputy District Attorney Baird and Butler confirmed that there was no "understanding" in Butler's case. Ybarra did not recall any such understanding as he probably would have, and certainly would have if it had involved Rogers's case. In addition, the circumstances of Butler's case and plea bargain showed that she was not given favorable treatment.

Even if Butler's 2011 comments are taken at face value, they do not show any reason for Butler to believe she would be released early. Butler's reference hearing testimony shows that the statement on which the referee relied was based solely on jail gossip or folklore, rather than Butler's own belief.

Moreover, Butler could not have been "aware" of something that did not exist at the time of her testimony. There is no evidence that any decision to seek Butler's release was made before the judgment of death was actually imposed over a month after Butler testified. The referee's findings contain nothing to undermine the hearing evidence that the decision to release her was only made after the death verdict was returned and was made for her safety rather than as consideration for her testimony. Butler could not have been "*aware* that she *would be* released early" (Question 2, italics added) because there was neither an explicit nor an implicit arrangement, or even evidence of any plan, for an early release at the time Butler testified. In short, there was no future reality of an early release of which Butler could have been aware.

The referee's findings variously refer to Butler's opinion as being that she "could," "would," or "may be" released early. (Report at pp. 9, 15.) Neither the findings nor the new evidence disproves Butler's trial testimony that, at the time she testified, she did not "expect any help," and in fact she did not hope for early release, but wanted to do her time because she was not "totally cleaned up." (22 RT 5781, 5804.) Thus, the evidence does not reasonably support a conclusion that Butler's trial testimony regarding favorable treatment was false.

In fact, the referee noted in Question 6, discussed *post*, that "[Butler] was aware she may be released; however, no credible evidence to indicate the prosecution could be aware of her expectations." The referee's finding on whether Butler testified falsely as to whether she was promised leniency by the prosecution is not consistent with the referee's finding that there was no evidence to indicate the prosecution was aware of Butler's privately held expectation that she could be released early.

Moreover, it is an important fact that Butler *did not want* to be released early and thus her testimony could not have been affected by jailhouse talk about early release. As a result, the contents of Butler's 2011 statement was not "substantially material or probative on the issue of . . . punishment." (Pen. Code, § 1473, subd. (b).)

3. The referee's finding that Butler testified falsely regarding the reason she was in custody was erroneous and is immaterial to the issue of her credibility

When asked at the penalty phase of Rogers's trial "What are you in custody for?" Butler answered, "For possession of heroin." (22 RT 5579.) The referee found that Butler's answer was false, necessarily construing the question and answer as concerning a specific offense. However, in context, the question called for, and received, a generic answer which described the

cause of Butler's incarceration more accurately than relying on the offense of which she had been convicted.

As with the television claim, the evidence shows the actual facts and, as a result, there is no real factual dispute, and no basis on which to give deference to the referee's conclusion. Apparently the lack of a factual dispute was the reason this Court did not include the claim in its reference order.

At the time of the plea, the attorneys agreed that she was pleading to a violation of Health and Safety Code section 11352 as a lesser offense of a violation of section 11351, which was based on an act of "furnishing." (See above, at p. 39.)

The prosecutor initially asked Butler if she was in custody (22 RT 5778), which could be inferred from the jail clothing she was wearing (3 RH RT 506; 10 RH RT 1995.) Next, the prosecutor asked the general question, "What are you in custody for?" (22 RT 5779.) Butler gave a general answer, "For possession of heroin." (*Ibid.*) Butler confirmed that she was heroin addict. (*Ibid.*) In answer to the question, "What do you do for a living," Butler answered, "I am a prostitute." (*Ibid.*) She said had been a prostitute for about ten years. (*Ibid.*)

Butler testified on cross-examination that she had about eight or nine heroin arrests and about three or four prostitution arrests, and that she had been in jail for about a month when she recognized Rogers as her attacker. (22 RT 5795-5796, 5801.) She was subsequently released in April 1987 after serving about six months in jail. (22 RT 5795-5796.) When defense counsel said, "You know you are not going to prison," Butler answered, "I have already been sentenced to county time." (22 RT 5801.) She thereby implicitly admitted that the offense for which she was in custody at the time of the trial was a felony. Thus, she described multiple convictions for heroin and prostitution and serving multiple extended terms in jail. She

testified that she could not say she was "totally cleaned up" or that she ever would quit using drugs, although she hoped to and had a job and plans. (22 RT 5804.)

The referee appears to believe that Butler should have answered the question she was asked by saying she was "in custody for" possession of heroin for sale, the common description of a violation of section 11352. However, the most reasonable interpretation of the question is that it sought a description in common terms of the *conduct* which led to her conviction, an interpretation supported by Ryals's reference hearing testimony. (10 RH RT 1981-1982.) Thus, an answer that she was in custody for possession for sale would not accurately describe her conduct while an answer that she was in custody for furnishing would not accurately describe the offense of which she was convicted. Under the circumstances, Butler's answer that she was "in custody" "[f]or possession of heroin" accurately described the conduct which led to her conviction without injecting anything misleading into the answer. Thus, the answer was truthful. If either of the attorneys had wanted a better explanation of the reason Butler was in jail, he or she could have asked.

The referee noted that the conviction involved a crime of moral turpitude. (Report at p. 10.) However, the jury was not instructed on the consideration of felony conviction in assessing credibility (see 21 RT 5631), nor did Rogers request such an instruction. In any event, Butler admitted she routinely committed acts of prostitution, which are also crimes of moral turpitude. (*People v. Alvarez* (1996) 14 Cal.4th 155; see also *People v. Chandler* (1997) 56 Cal.App.4th 703, 708-709.)

Given that Butler freely admitted currently being a long-time prostitute with a number of heroin and prostitution convictions and having a felony conviction, there is no reason to believe Butler was trying to minimize her record. Instead, she merely gave a brief general answer to a

brief general question during a brief examination. (2 RH Exhs. 362, 379, 384; 22 RT 5779, 5796, 5800.)

In any event, a full and complete description of the circumstances which led to Butler's incarceration would not have been "substantially material or probative on the issue of . . . punishment." (Pen. Code, § 1473, subd. (b).) During direct examination, Butler said that she was a heroin addict and was a prostitute and that she was in jail because she had been in possession of heroin. (22 RT 5778-5779.) On cross examination, Butler admitted to "about eight, nine" heroin arrests and "three, maybe four" prostitution type arrests. Another drug-related offense would not have significantly changed how credible the jury found her testimony. In addition, defense counsel had insinuated a reason Butler might be biased against his client: her belief he had murdered other prostitutes.

The evidence does not support the claim for relief. (*In re Cox* (2003) 30 Cal.4th 974, 998, 1005, 1008, 1011-1015 [testimony was either not false or false statements were not substantially material]; *In re Lawley*, *supra,* 42 Cal.4th at pp. 1239-1240 [relying on trial evidence to rebut the petitioner's hearing evidence].)

II. ROGERS FAILS TO DISCLOSE NEWLY DISCOVERED, CREDIBLE EVIDENCE THAT HE DID NOT ASSAULT BUTLER IN 1986

A. Introduction and summary of argument

This Court directed the People to show cause regarding "1) newly discovered evidence and use of false evidence, as alleged in claim III." (Amended Order to Show Cause, filed December 20, 2007.) After the People filed its Return, the Court issued a reference order which asked whether there is "newly discovered, credible evidence indicating that petitioner did not assault Tambri Butler in 1986, including evidence that another person committed the assault? If so, what is the evidence?" (Question 3, quoted in full above.)

In Argument II, the People will address this question; specifically the evidence Rogers claims points to another person, Michael Ratzlaff, as the perpetrator of the 1986 assault on Butler. (POBR 197-201.) The evidence, Ratzlaff's assaults on one prostitute in early 1986 and three others in early 1988, is the principal "newly discovered" evidence. (POBR 199-201.)

As will be discussed in detail below, much of the evidence the referee cited in support of his findings is not newly discovered, in the sense that it was unknown to Rogers and could not have been discovered by him through the exercise of reasonable diligence based on what he knew. Nor does any of the credible, newly discovered evidence—little of which actually exists—show that Ratzlaff assaulted Butler; this evidence tends instead to confirm that Ratzlaff did not assault Butler and that Rogers did. For these reasons, Rogers's claims of newly discovered evidence are without merit and should be denied.

B. The standard of relief for claims of newly discovered evidence

Rogers accepts the principle that newly discovered evidence does not include "evidence that defense counsel 'could . . . with reasonable diligence have discovered and produced . . . at the trial.' (*People v. Delgado*, 5 Cal.4th 312, 328 (1993))." (POBR 198.) "[A] habeas petitioner must present evidence that was unavailable at trial." (*In re Richards*, *supra*, 55 Cal.4th at p. 968.) Thus, contrary to Rogers's premise, if he personally knew of the evidence on which he relies, or had reason to believe it existed, the evidence is not "newly discovered." (*People v. Beard* (1956) 46 Cal.2d 278, 282.)

Moreover, the standard of proof that applies to a claim of new evidence is different from that which applies to claims of false evidence or incompetence of counsel. "'The high standard for newly discovered evidence claims presupposes that all the essential elements of a

presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. [Citation.] . . . .' (*Strickland v. Washington* [(1984)] 446 U.S. [668,] 694, 104 S.Ct. 2052,] 2068.)" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 (*Gonzalez*); compare with *In re Lawley*, *supra,* 42 Cal.4th at pp. 1239-1240 [false evidence]; and *In re Clark* (1993) 5 Cal.4th 750, 766 (*Clark*) [incompetence of counsel].) As this Court has previously stated:

> [N]ewly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. (*In re Hall* (1981) 30 Cal.3d 408, 417, 179 Cal.Rptr. 223, 637 P.2d 690; *In re Weber* (1974) 11 Cal.3d 703, 724, 114 Cal.Rptr. 429, 523 P.2d 229; *In re Branch* (1969) 70 Cal.2d 200, 215, 74 Cal.Rptr. 238, 449 P.2d 174.) "[A] criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings." . . . (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246, 275 Cal.Rptr. 729, 800 P.2d 1159.)

(*In re Clark*, *supra*, 5 Cal.4th at p. 766; cf. *In re Richards*, *supra*, 55 Cal.4th at p. 959-960.)

> At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (*In re Hall* (1981) 30 Cal.3d 408, 417, 179 Cal.Rptr. 223, 637 P.2d 690; *In re Weber* (1974) 11 Cal.3d 703, 724, 114 Cal.Rptr. 429, 523 P.2d 229.) By analogy, "new" evidence should not disturb a penalty judgment unless the evidence, *if true*, so clearly changes the balance of aggravation against mitigation that its omission "more likely than not" altered the outcome. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693–694, 104 S.Ct. at pp. 2067-2068.)

(*Gonzalez*, *supra*, 51 Cal.3d at p. 1246 [emphasis added].)

Each item of new evidence is considered separately and cumulatively, in light of the trial evidence. (See *In re Richards*, *supra*, 55 Cal.4th at pp. 967-970.)

C. Factual Background on Michael Ratzlaff

From 1986 through 1988, Ratzlaff lived in Bakersfield with his wife, Helen Scoville, and their two children. (7 RH RT 1256-1258.) He was employed by the railroad, working a variety of hours in different locations. (7 RH RT 1258-1259.)

During that time, Ratzlaff drove a black-over-white full-sized 1977 Ford F-150 pickup truck. (4 Pet. Exhs. at p. 58; 7 RH RT 1266.) He owned lumber side boards that slipped into holes in the walls of the truck bed; the side boards were only on the truck when Ratzlaff was transporting wood. (7 RH RT 1290-1291.) The truck had no air conditioning. (7 RH RT 1269-1270.)

When Ratzlaff was arrested for sexual assault in 1988, it surprised his wife. (7 RH RT 1302.) Before Ratzlaff's arrest, his wife had not been aware that he had been using prostitutes or that he had a stun gun. (7 RH RT 1275-1276, 1290, 1303.) Nor had she seen any indication that he used illegal drugs, except that she found marijuana in his possessions once and threw it away. (7 RH RT 1298-1299.) Before they were married, Ratzlaff tried to strangle Scoville on one occasion when he became angry; she adamantly told him never to do it again. (7 RH RT 1300-1301.)

1. The January 28, 1986 assault on Dena Winebrenner

The earliest known attack Ratzlaff committed on a prostitute was on Dena Winebrenner in early 1986.

Around 11:30 p.m. on January 28, 1986, Kern County Sheriff's Deputy Ulysses Williams met Winebrenner at a convenience store at Brundage Lane and Union Avenue. (4 Pet. Exhs. at p. 58.) Williams, in

his report, stated that around 10:00 p.m. the same day, Winebrenner was solicited for prostitution at Adams Street and Union Avenue when she was picked up by a white male, later identified as Ratzlaff. (4 Pet. Exhs. at p. 58.) After they agreed on a price for sex, they went to a location on Casa Loma Drive, about one-quarter mile east of Cottonwood Road. (4 Pet. Exhs. at p. 58.) Winebrenner reported drinking at least a six-pack of beer herself while drinking with Ratzlaff. "[A]fter approximately a half an hour of attempting to have sex," she said, Ratzlaff was unable to obtain an erection. (4 Pet. Exhs. at p. 60.) Winebrenner became irritated that Ratzlaff was taking so long and told him she had to leave because he was wasting her time and she was not making any money. (4 Pet. Exhs. at p. 60.)

Ratzlaff became "infuriated" when Winebrenner told him she had friends waiting for her who would be upset with him if he detained her any longer. (4 Pet. Exhs. at p. 60.) "[H]e grabbed her by the throat and began choking her," Deputy Williams reported. She "felt herself losing consciousness" and urinating on herself. (4 Pet. Exhs. at p. 60.) When she regained consciousness, she asked "why he had choked her, and he told her that she reminded him of something distasteful which he had experienced in Viet Nam." (4 Pet. Exhs. at pp. 58-60.)

Winebrenner offered Ratzlaff a "free blow job" in the future if he would take her back to Union Avenue. (4 Pet. Exhs. at p. 60.) He "drove her to the convenience store at Brundage Lane and Union Avenue, and she asked him to buy her some beer and they would part company." (4 Pet. Exhs. at p. 60.) Ratzlaff bought her a beer and gave her twenty cents to make a telephone call. (4 Pet. Exhs. at p. 60.)

Winebrenner pretended to make a telephone call as she asked a store customer to get the license plate number of the truck. (4 Pet. Exhs. at p. 61.) The customer handed her a piece of paper with a license place

number. (4 Pet. Exhs. 61.) He also called the police. (4 Pet. Exhs. at pp. 60-61.) The customer was still in the store when Deputy Ulysses Williams arrived at 11:30 p.m., but Ratzlaff and his truck were gone. (4 Pet. Exhs. at p. 61.)

Williams requested vehicle information based on the license plate number from Winebrenner and the customer, and was informed that it was registered to Ratzlaff. (4 Pet. Exhs. at p. 61.) Williams went to the address, found Ratzlaff, read him his rights, and Ratzlaff agreed to talk with him. (4 Pet. Exhs. at p. 61.) Below is a summary of Ratzlaff's statement to Deputy Williams:

> RATZLAFF said that he had gotten off work earlier in the evening when he saw a girl hitchhiking, and he stopped and picked her up and gave her a ride to the store. He . . . bought her a beer and then he left. He said he had not spent any extensive time with the female, nor had he paid her for an act of prostitution, nor had he choked her, or caused her any pain or any damage in any way. [¶] After talking to Mr. RATZLAFF, I took no further action. [¶] No further action or information to report at this time.

(4 Pet. Exhs. at p. 61.)

The report contains no indication that Williams examined Winebrenner's neck for strangulation marks, her eyes for petechiae (ruptured capillaries), or her clothing for urine or blood. In the space for "Offense(s)," the report listed only, "PC 242 Battery" with the "Classification," "Assault Hands Feet Etc. Non Agg." (4 Pet. Exhs. at p. 58.) No further investigation of the incident occurred until after the sexual assault on Lavonda Imperatrice on May 21, 1988.

After the sexual assault on Lavonda Imperatrice on May 21, 1988, Winebrenner was identified in Polaroid photographs seized from Ratzlaff and was interviewed by Detectives John Fidler and John Porter on June 9, 1988. (4 Pet. Exhs. at pp. 17, 21.) Winebrenner said she had "dated"

Ratzlaff several times, and that he "likes anal sex also." (4 Pet. Exhs. at p. 21.) She told the officers that Ratzlaff "dates several prostitutes on the Union Avenue area [*sic*] and he only becomes violent when he has been drinking." (4 Pet. Exhs. at p. 21; DW RT 68.) She said he had showed her his stun gun and had asked to pay her to take pictures of her. (4 Pet. Exhs. at p. 21.)

At a conditional examination before the reference hearing, Winebrenner testified that she had started working on Union Avenue "about two years" before the violent incident with Ratzlaff. (DW RT 17.) She knew "all" of the law enforcement officers, "got along very well with officers," and became friends with "a lot of them"; they would warn her when there was police activity in the area. (DW RT 18-20.) She had previously seen the officer who took the report of the assault on her. (DW RT 51-52.) Winebrenner testified she had not "dated" Rogers on duty and was sure she had not "dated" Rogers off-duty, explaining, "Well, you would know a cop. They brag about their jobs when they're off-duty, I would imagine. I know other girls that have dated cops off-duty, and they talk about it, but I could just say, no, I haven't dated a cop off-duty." (DW RT 74-75.)

On one occasion, Rogers "busted [Winebrenner] giving a guy a blow job." (DW RT 42.) Rogers told the guy to leave, put Winebrenner in the front seat of his patrol car, drove her to a liquor store near Brundage Lane and Union Avenue, and then took off his gun belt and put it in the trunk. (DW RT 42-45.) Winebrenner testified, "[he] told me I was beautiful and if I didn't quit doing what I'm doing that I was going to end up being killed." (DW RT 42.) After talking to her for about 15 minutes, Rogers let her out. (DW RT 43, 46.) She thought he was a "[v]ery nice man" and was "acting more like a father image." (DW RT 43-46.)

During the conditional examination, Winebrenner testified that she was "strangled and almost killed" by Ratzlaff. (DW RT 6-8, 35.) He abruptly became frustrated and started to strangle her with his arm after she said he was taking too long and she had other things to do. (DW RT 9-10, 29, 30-32, 35.) When she regained consciousness, Ratzlaff seemed scared; she "conned" him into taking her back to town by saying she was okay and suggesting that they get another beer. (DW RT 12, 31-34.) When Ratzlaff saw her speaking to a man in the convenience store, he drove away. (DW RT 13-14.) That night, she showed a sheriff's deputy the blood on her shirt, but the blood did not show well on the fabric. (DW RT 36-37.) Ratzlaff did not talk about any weapons that night or show any weapons to her. (DW RT 33.) He did not hit her. (DW RT 35.)

She had "dated him before numerous times," but did not "date" him again after he had assaulted her. (DW RT 6, 21-22, 27.) He never showed her any pictures of his wife or his children. (DW 23-24.) Ratzlaff also dated other prostitutes. (DW RT 40.) After the incident, she agreed to go to a restaurant with Ratzlaff, where she asked him why he had strangled her; he told her "he flipped out to Vietnam." (DW RT 27-28.) She only saw him on that one occasion after he assaulted her. (DW RT 28.) Based on what she knew about Ratzlaff and her one contact with Rogers, Winebrenner "considered Ratzlaff a psychopathic torturer, different than Rogers." (DW RT 73-74.)

2. The assaults on Jeannie Shain and Deborah Lilly around March 1988

The next reports of assaults involving Ratzlaff did not occur until March 1988, around the time when Rogers was being sentenced to death. Investigations into these assaults did not occur until after Rogers had been convicted and sentenced.

Ratzlaff was a long-time regular customer of prostitute Jeannie Shain when, on March 16, 1988, he beat her severely, breaking her jaw and inflicting a head injury. (5 RH RT 863; 4 Pet. Exhs. at pp. 247-249.) Shain had no recollection of the beating. (5 RH RT 865.) However, Ratzlaff was seen by Deborah Lilly leaving Shain's motel room after she was injured. (7 RH RT 1312-1317.) Shain testified at the reference hearing that Ratzlaff asked for anal sex "all the time," but she refused. (5 RH RT 863.) He never forced her to have anal sex. (5 RH RT 874.) On a few occasions, Ratzlaff paid Shain "extra" to photograph her unclothed. (5 RH RT 876.)

After that, Ratzlaff hired Deborah Lilly several times as a prostitute. (7 RH RT 1317-1318.) He asked for anal sex but she refused. (7 RH RT 1341.) On one occasion, when they were parked in a field, Ratzlaff was unable to obtain an erection, became very angry, and strangled her as she fought him. (7 RH RT 1321-1322, 1341.) Ratzlaff then went around his truck, stomping his feet and beating the truck. (7 RH RT 1322.) He had been drinking. (7 RH RT 1323.) She calmed him down and he was able to complete a sex act after several hours. (7 RH RT 1322-1323, 1342.) She "dated" him about ten times after that because he paid her well. (7 RH RT 133.) He paid her by giving her "connection" money to buy heroin for her, but he never used it. (7 RH RT 1338-1339.) She did not report the incident to the police because she "had been attacked before and they never did anything about it." (7 RH RT 1324.) She had been assaulted a total of 12 to 16 times. (7 RH RT 1344, 1350.) She noted that prostitutes did not report things to the police. (7 RH RT 1324, 1343-1344.)

3. The May 21, 1988 assault on Lavonda Imperatrice

The assault that placed Ratzlaff on the police's radar was the assault on Lavonda Imperatrice.

On May 21, 1988, at approximately 3:30 p.m., Sheriff's Deputy Bill Williams went to a residence on Porterfield Avenue near Fairfax Road and

contacted a man who had called the Sheriff's Department. (4 Pet. Exhs. at p. 13.) The deputy found Lavonda Imperatrice lying on the couch with dried blood around her lips, eyes, face, and wrists. (4 Pet. Exhs. at p. 13.) "She stated she is from Union Avenue and that a subject had picked her up for a party and he had taken her to the remote area and had raped her," read Williams's report of the assault. (4 Pet. Exhs. at pp. 13-14.) Imperatrice took the deputy to the location of the assault, a mile south of Highway 58 and one-half mile east of Oswell, where he found a condom and a plastic cable tie. (4 Pet. Exhs. at p. 13.) She said she was at Truxton Avenue and Union Avenue and had gone with a man in a white Ford pickup. (4 Pet. Exhs. at p. 13.) On the way to the location where they were going to "party," the man pulled a small gun on her, tied a cable tie tightly around her wrists, and blindfolded her. (4 Pet. Exhs. at pp. 13-14.) When he parked, he put his fist in her vagina and then pushed her out of the truck and told her to remove her clothing and urinate. (4 Pet. Exhs. at p. 14.) He shocked her on the stomach and then her vagina with a Nova or similar stun gun. (4 Pet. Exhs. at p. 14.) He then put on a condom and placed his penis in her mouth. (4 Pet. Exhs. at p. 14.) When she resisted, he began hitting her with his fists. He told her to run and fired his gun after her as she ran. (4 Pet. Exhs. at pp. 12-14, 27; 4 RH Exhs. 1084-1086, 1093.) A technical investigator arrived and took photographs of the scene, the evidence, and Imperatrice. (4 Pet. Exhs. pp. at 26-28.) The deputy took Imperatrice to Kern Medical Center at 4:45 p.m. (4 Pet. Exhs. at p. 14; 4 RH Exhs. 1086.)

The next reported events began on June 8, 1988 with the attempt by Detectives Fidler and Porter to find Imperatrice. (4 Pet. Exhs. at p. 18; 4 RH Exhs. 1097.) Fidler contacted "an informant," who told them about a man named "Mike Ratzcliff," in his late 30s, "at least 6 foot" tall, "about 200 to 210 pounds with brown hair and a brown mustache," who drove a white Ford pickup, worked for Southern Pacific Railroad, and had "dated

several girls from the Union Avenue area." (4 Pet. Exhs. at p. 19; 4 RH Exhs. 1098.) A road foreman for Southern Pacific informed them that "Mike Ratzlaff" would be arriving for work in about an hour. (*Ibid.*)

When Ratzlaff arrived, he had a very small F.I.E. .25-caliber semi-automatic pistol in his right front pants pocket, for which he had a concealed weapon permit. (4 Pet. Exhs. at p. 19; 4 RH Exhs. 1098, 1109-1110.) In the glove box of his pickup was a Nova XR5000 stun gun with an apparent pubic hair on the electrical contacts. (2 Pet. Exhs. at p. 102; 4 Pet. Exhs. at p. 19; 4 RH Exhs. 1098, 1112 [Exh. 22].) Behind the seat were several Polaroid photographs of nude women. (4 Pet. Exhs. at pp. 19-20; 4 RH Exhs. 1098-1099.)

Around 2:30 p.m. on June 8, 1988, Detectives Fidler and Porter went to Union Avenue, where Deborah Lilly told them that a customer named Mike drove a white Ford pickup and always took her to a field in the area of Oswell Street and Highway 58, the same area where Imperatrice was assaulted. (4 Pet. Exhs. at pp. 19-21; 4 RH Exhs. 960-961, 1098-1100.) Lilly said Mike had a stun gun he kept in his truck and a Polaroid camera. (4 Pet. Exhs. at p. 20; 4 RH Exhs. 1099.) Mike had asked Lilly if he could take pictures of her and to have anal sex with her but she refused both requests. (4 Pet. Exhs. at pp. 17, 20-21; 4 RH Exhs. 1099-1100.) Lilly and Misty Gatewood identified nine photographs as showing Dena Winebrenner and twelve as showing Jeannie Shain. (4 Pet. Exhs. at pp. 17, 21; 4 RH Exhs. 1100.) The detectives went to Ratzlaff's house and spoke to his wife about their investigation around 3:40 p.m. on June 8. (4 Pet. Exhs. at pp. 21; 4 RH Exhs. 1100.)

On June 9, 1988, Fidler learned that Winebrenner had reported Ratzlaff for assault in 1986. (4 Pet. Exhs. at p. 22; 4 RH Exhs. 1101.) Fidler obtained the case file. (*Ibid.*)

The detectives were unable to locate Imperatrice until June 16, when they were informed she was in the Fresno County jail. (4 Pet. Exhs. at p. 22; 4 RH Exhs. 1101.) They interviewed her there the next day. (4 Pet. Exhs. at pp. 22-25; 4 RH Exhs. 1101-1104.) She told them the assault made her think she would die if she continued to be a prostitute, so she decided "to straighten out her life, and she wished to prosecute" Ratzlaff. (4 Pet. Exhs. at pp. 22, 24; 4 RH Exhs. 1101, 1103.)

On the morning of June 21, 1988, Detective Fidler obtained a warrant to search Ratzlaff's person and property. (4 Pet. Exhs. at pp. 38-49; 4 RH Exhs. at 1114-1125.) The next morning, Ratzlaff was arrested at his house and the house was searched. (4 Pet. Exhs. at p. 35; 4 RH Exhs. 1129-1132.) The detectives learned that Ratzlaff was in the process of divorce and had been living at a friend's house for a week. (4 Pet. Exhs. at p. 36; 4 RH Exhs. 1130.) Fidler then obtained a search warrant for the friend's house, which was executed on the afternoon of June 23, 1988. (4 Pet. Exhs. at pp. 50-56; RH Exhs. 1123-1125.)

4. Ratzlaff's trial, conviction, and subsequent events

Imperatrice testified at Ratzlaff's preliminary examination on September 1, 1988, and he was held to answer on the five counts charged in the criminal complaint. (3 Pet. Exhs. at pp. 12-62.) An 11-count information was filed on September 14, 1988. (3 Pet. Exhs. 64-68.)

Ratzlaff's jury trial was held from February 2-14, 1989. (3 Pet. Exhs. at pp. 98-99, 101-102, 104-105, 107, 110, 129.) On February 14, 1989, after three days of evidence, arguments, and instructions, Ratzlaff was found guilty of forcible false imprisonment while armed with a firearm; assault with a deadly weapon, a firearm; two counts of assault with a stun gun; forcible sexual battery with a dangerous weapon, a stun gun (apparently by "touch[ing]" her "groin"); and assault by means of force likely to produce great bodily injury while armed with a firearm, but not

guilty of sexual penetration with a foreign object, or of three other counts of assault with a stun gun. (3 Pet. Exhs. at pp. 104-129 [Ratzlaff CT 88-113].) Ratzlaff was sentenced to state prison for a total term of six years on March 23, 1989. (3 Pet. Exhs. at pp. 246-249 [Ratzlaff CT 230-233]; see 3 Pet. Exhs. at pp. 66-67 [Ratzlaff CT 56-57].)

Imperatrice testified at Ratzlaff's trial that she was 21 years old with a cocaine habit, and had worked as a prostitute on Union Avenue for a "few months" when Ratzlaff picked her up and agreed to pay $20 for a "blow job." (2 Pet. Exhs. at pp. 79-81, 136, 140, 142, 144; see 2 Pet. Exhs. at pp. 269-284 [defense argument regarding discrepancies].) He offered her an extra $20 to go to a place other than her room and she agreed. (2 Pet. Exhs. at pp. 81-82.) He had a strong odor of alcohol but did not have any difficulty speaking and he "acted like a normal person." (2 Pet. Exhs. at pp. 83-84, 148.) After they had parked out in "the country," she orally copulated him for about twenty minutes, but he did not have an erection. (2 Pet. Exhs. at pp. 82, 84-85.) Imperatrice said she had to leave, but agreed to stay a little longer when Ratzlaff offered her an additional $20. (2 Pet. Exhs. at pp. 85, 137.)

After another twenty minutes, Imperatrice told Ratzlaff she had to get back to town. (2 Pet. Exhs. at pp. 86-87.) When she said she could not stay any longer and stopped orally copulating him, Ratzlaff pulled out a gun and pointed it at her right temple. (2 Pet. Exhs. at pp. 86-88, 90.) She then orally copulated him some more and they had vaginal sex. (2 Pet. Exhs. at pp. 150-154.) At some point, Imperatrice told him the gun wasn't real, but he shot a cup of Pepsi she had placed beside her legs on the floor "and blew it up." (2 Pet. Exhs. at pp. 87, 138.) He put plastic ties around her wrists and put his fingers and his whole hand into her vagina and then her rectum, which made her cry. (2 Pet. Exhs. at pp. 89, 92-96, 139, 157-158.) He

threatened to shoot her in the stomach unless she stopped crying. (2 Pet. at pp. 95, 101-103.)

After a few minutes, Ratzlaff told Imperatrice to urinate outside the truck. (2 Pet. Exhs. at pp. 96-98.) When she could not, he repeatedly shocked her with a stun gun in different places on her stomach and then near her vagina. (2 Pet. Exhs. at pp. 98-105, 109-110, 140.) She pulled her hands out of the ties and tried to kick Ratzlaff between the legs, where he was naked. (2 Pet. Exhs. at pp. 96-106.) He grabbed her by the hair, called her a bitch, and punched her in the mouth. (2 Pet. Exhs. at pp. 106-107.) She tried to fight him to get away, but he hit her again and threw her down on the ground, causing her to hit her head on a concrete water pipe. (2 Pet. Exhs. at pp. 107-108, 113.) After struggling to get away, Imperatrice gave up and told him, "If you are going to kill me, get it over with and do it now." (2 Pet. Exhs. at p. 108.) He said he would let her go, but first he directed her to spread her legs as he took Polaroid pictures. (2 Pet. Exhs. at pp. 108-109.) He then gave back her clothes and told her to run. (2 Pet. Exhs. at p. 110.) He fired four shots after her as she ran holding her clothes and shoes. (2 Pet. Exhs. at p. 110.)

Imperatrice ran to a house about a half-mile away, knocked loudly on the door, and yelled, "Help me." (2 Pet. Exhs. at pp. 110-111.) When the resident opened the door, she told him she had just been raped and beaten up. (2 Pet. Exhs. at p. 111.) She did not tell him she had been shot at. (2 Pet. Exhs. at p. 143.) He had not heard any shots, but had been in the shower. (2 Pet. Exhs. at p. 170.)

The resident, Harold Jaggers, testified at Ratzlaff's trial that Imperatrice "was beaten to a pulp." (2 Pet. Exhs. at pp. 165, 170.) She had blood all over her front and down her legs. (2 Pet. Exhs. at p. 167.) He called 911 and went back to Imperatrice, who was in the open garage "very hysterical." (2 Pet. Exhs. at pp. 165-166; cf. 2 Pet. Exhs. at p. 189.)

Senior Deputy Bill Williams arrived about twenty minutes later, at around 4:00 p.m. (2 Pet. Exhs. at pp. 111, 124, 175.) Imperatrice took him to the place where she had been raped and beaten. (2 Pet. Exhs. at pp. 126, 177-178.) Deputy Williams then took her to the hospital. (2 Pet. Exhs. at p. 126.) She left after being there for several hours without being examined and then went to her mother's house in Fresno County. (2 Pet. Exhs. at pp. 127-128, 160, 161, 179.) Some of her injuries were photographed, but the only stun gun marks photographed were on her stomach. (2 Pet. Exhs. at pp. 121-125, 129-133, 211-212.) A pubic hair on the stun gun was similar to Imperatrice's. (2 Pet. Exhs. at pp. 224-229.) There appeared to be blood on the hair. (2 Pet. Exhs. at pp. 229-230.) Photographs taken of Imperatrice that night showed blood coming from her lip and ear (2 Pet. Exhs. at pp. 115-116), blood on her face and damage to her teeth (2 Pet. Exhs. at pp. 116-117), and blood on her wrists and arm (2 Pet. Exhs. at pp. 118-119).

About a month after the attack, Imperatrice surrendered herself on two Fresno County warrants for prostitution and was in jail for a total of about three months. (2 Pet. Exhs. at pp. 120, 134-135.)

Ratzlaff testified that Imperatrice orally copulated him and they had sex pursuant to their monetary agreement. (5 RH Exhs. 1391-1394; 2 Pet. Exhs. at pp. 233-237.) Ratzlaff denied firing a gun at Imperatrice, using his stun gun on her, or taking any pictures of her. (5 RH Exhs. 1395, 1404, 1422; 2 Pet. Exhs. at p. 232.) He struggled on the ground with Imperatrice and punched her in the mouth after she stole a notebook from him and kicked him in the groin. (5 RH Exhs. 1393-1395; 2 Pet. Exhs. at pp. 236-251.) Ratzlaff's wife testified that a bullet hole in the dashboard of the truck was three years old. (5 RH Exhs. 1387-1388.)

After serving his prison term, Ratzlaff moved away and began to engage in drug trafficking. Rhonda Brown, who was Ratzlaff's partner in

drug trafficking, testified at the reference hearing that Ratzlaff only used methamphetamine occasionally when she knew him in the early 1990s. (5 RH RT 896-897, 908.) She said Ratzlaff looked different from the earlier set of photographs she was shown (Exhibit C), noting that when she knew him, "He didn't smile." (5 RH RT 905-905.) However, he was "neater" and "more kept up" than in a later photograph (Exhibit G). (5 RH RT 906-907.) She never knew him to sell or use heroin. (5 RH RT 904-905.) He could be violent, and was "obsess[ed]" "with handguns, and stun gun [*sic*], and mace." (5 RH RT 898-899, 903-904.) Once he punched a man in the face over a debt "with such force that it bruised his whole face." (5 RH RT 903-904.) For that reason, she did not "cross him" or have a sexual relationship with him. (5 RH RT 898-899, 903-904.) Brown was arrested with Ratzlaff in 1995 for selling methamphetamine. (5 RH RT 896-899, 907.) She was sentenced to two years in prison while Ratzlaff was sentenced to around nine years. (5 RH RT 900.)

Ratzlaff was dead by the time of the reference hearing. (6 RH Exhs. 1714-1716 [Exh. SS, photographs of his body slumped in a chair and on a steel table].) The parties agreed that he was killed in 2003. (12 RH RT 2457-2458.)

D. The Referee's Findings Are Not Supported by Substantial Evidence; There Is No "Newly Discovered, Credible" Evidence That Conclusively Proves Someone Other than Rogers Assaulted Butler in 1986

The referee found that "newly-discovered, credible" evidence exists to support the proposition that someone other than Rogers attacked Butler in 1986. (Report at p. 10.) He points to two types of evidence to support the finding: (1) evidence that the descriptors Butler provided to detectives did not entirely match Rogers (Report at p. 11); and (2) evidence of attacks Ratzlaff committed against other prostitutes that "shared the same

circumstances" as the attack on Butler (Report at p. 10). The referee's findings are not supported for two reasons.

First, most of the evidence the referee cited in his report is not "newly discovered" because Rogers knew of the evidence, or could have discovered the evidence by a reasonably diligent investigation, prior to judgment. Second, none of the evidence that could be considered newly discovered and credible conclusively shows that Ratzlaff assaulted Butler. In fact, the evidence tends to show that Ratzlaff should be excluded as the person who assaulted Butler in 1986.

1. Some of the evidence the referee identified as newly discovered was available prior to judgment and should not be considered newly discovered

As stated above, newly discovered evidence applies only to evidence which was not known, or could not have been discovered by diligent investigation, prior to judgment. (*In re Hall*, *supra*, 30 Cal.3d at p. 420.)

The following evidence, which the referee listed in his findings, was available to Rogers in the police report created to memorialize the interview police had with Butler in 1987 (4 RH Exhs. 1037-1044): (1) long thick mustache curling over lip; (2) layers of hair covering (but not obscuring) his chest and abdomen; (3) extremely big hands; (4) thick hair; (5) big chest; (6) big, crowded keychain; (7) white pickup truck with weathered sideboards; (8) tool chest and large silver thermos; (9) interior cab of his truck strewn with litter; and (10) stun gun. For this reason, the referee's finding that certain facts (Report at p. 11), related to Butler's description of the assailant, and which the referee believed did not match Rogers, was not newly discovered

For any characteristic that was not included within the report, a reasonably diligent investigation would have uncovered, assuming counsel did not already possess this information, the audio recording of Butler's

complete interview with detectives. (4 RH Exhs. 1038 [report noting two cassettes existed of interview].) Thus, the evidence of Butler's description of her assailant, and the extent it did not match Rogers, was available prior to judgment and should not be considered newly discovered evidence.

2. Any newly discovered, credible evidence would not so clearly change the balance of aggravation against mitigation that its omission "more likely than not" altered the outcome

As for the other evidence, to be significant enough to warrant reversal, newly discovered evidence must "so clearly change the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." (*Gonzalez, supra*, 51 Cal.3d at p. 1246.) The referee found the evidence of Ratzlaff's attacks on other prostitutes significant because, as he wrote, the "attacks on other women shared the same circumstances" as the attack on Butler. (Report at pp. 8-9.) But the shared circumstances the referee cited are too broad to make them significant. For instance, as discussed *post*, when Rogers described the events that led to Tracie Clark's murder, many of the circumstances the referee notes (see Report at p. 10) are present in Rogers's recounting of the events. For example, Rogers picked up Clark off Union Avenue (17 RT 4675); took her to the countryside (17 RT 4677); began encounter with oral copulation (17 RT 4680); could not perform (20 RT 5358-5359); victim wanted to return to Union Avenue (17 RT 4702-4703); assailant was pleasant but became violent (17 RT 4679, 4680-4683); and the victim was dumped in the countryside (17 RT 4687-4690). Other circumstances were simply inconsistent with the attack on Butler.

Rogers argued, "[p]erhaps the most persuasive new evidence lies in the disgusting parallels between the Butler assault and Mr. Ratzlaff's other documented attacks on defenseless women, including Jeannie Shain, Deborah [Lilly] Castaneda, Delia Winebrenner, and of course Ms.

Imperatrice . . . ." (POBR 199.) Other than the "disgusting" nature of the attacks, there are no distinctive similarities between the confirmed Ratzlaff assaults and the assault on Butler, but there are distinct differences.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 393, this Court stated the controlling rule for whether evidence of other criminal conduct is admissible under Evidence Code section 1101. The Court contrasted the showing required for a common design or plan which involves "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.* at p. 402.) This Court then stated:

> The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." [Citation.]

(*Id.* at p. 403.)

The evidence the referee identified as sharing the "same circumstances" as the attack on Butler is not sufficiently distinctive so as to support the inference that the same person, Michael Ratzlaff, committed all the assaults.

a. The perpetrator's chosen location implies that Ratzlaff did not assault Butler

The fact that the prostitutes were picked up off Union Avenue and taken to the countryside was common. Clark was picked up off Union Avenue and taken to countryside before Rogers murdered her; Janine Benintende similarly ended up in the countryside after her encounter with

Rogers. Thus, those two facts provide no support for the inference that Ratzlaff was the person who committed the assault on Butler.

In fact, the opposite is true. One aspect of the relevant assaults that are likely partially practical and partially individualistic is the choice of the location to which the victims were taken. Ratzlaff took the prostitutes to locations close to, and south of, Highway 58, choosing locations that were secluded but not far from town. (5 RH RT 874.) Butler was taken "way out" to a remote field off the end of White Lane beyond Cottonwood Road; the intersection was about two miles south of Highway 58 and about one mile east of Union Avenue. (6 RH Exhs. 1647, 1656.) The fact that Butler was taken to a location some distance from the areas used by Ratzlaff is a strong indication that the man who picked her up was not Ratzlaff. Rogers chose more remote locations than Ratzlaff, inferably due to his concern with being identified if the encounter led to violence.

Indeed, the Benintende and Clark murders, the apparent kidnapping of Katherine Hardie, and the Butler assault all shared significant similarities. One being the customer's insistence on going to a location several miles out of town. Although Ratzlaff preferred to be in the country, he was willing to "date" Jeannie Shain in a motel. Rogers was similarly willing to be with Connie Zambrano in a motel, he only paid her to take off her clothes, which had little potential for violence or a complaint to the Sheriff's Department. (17 RT 4638-4643, 4654-4658, 4664.)

b. The fact that the perpetrator sodomized Butler during the assault does not prove someone other than Rogers assaulted Butler

The referee also cited the fact that the assailant was "obsessed with anal sex," as another shared circumstances between Ratzlaff's assaults on other women and the assault on Butler. But nothing in evidence proves that Ratzlaff was "obsessed with anal sex," or that the assailant was similarly

obsessed with anal sex. Although the evidence showed that Ratzlaff liked anal sex, he could not have been obsessed since both Shain and Lilly refused his requests to have anal sex and he did not react with force or violence. Ratzlaff did not attempt to have anal intercourse with Imperatrice when he assaulted her. In contrast, Butler's attacker used anal sex for domination and humiliation, reinforced by ejaculating on her back by masturbating. (6 RH Exhs. 1639, 1679; 3 RH RT 435.) Moreover, as Detective Fidler testified, sodomy is not an unusual form of sexual assault. (9 RH RT 1679-1680, 1690.)

c. The other identified characteristics of the assault are not sufficiently unique to exclude Rogers as Butler's attacker

The same objection can be made from the referee's finding that the evidence that the "assailant [was] pleasant, then got drunk and became violent" was sufficiently distinctive to show that Ratzlaff committed the assault on Butler.

In fact, many of the circumstances the referee noted in his findings are simply common features in sexual assaults. While Rogers relied on the sequence of events in the proven assaults by Ratzlaff and in the assault on Butler to show a distinctive pattern—he notes that each incident began with an agreement to sex for money, followed by an inability to perform, a demand or request by the prostitute to end the encounter, resulting in violence by the customer—Rogers provides no reason to believe that this pattern is uncommon or unique. Detective Fidler's testimony shows the opposite.

Unfortunately, assaults on prostitutes are far from uncommon. Detective Fidler had handled more than ten assaults in less than two years working on sexual assaults. (9 RH RT 1679.) One obvious factor is that their activities place the victims in highly vulnerable situations, especially

when they park with customers out in the country. Before the age of cellular telephones, no assistance was available unless the prostitute managed to get away from her assailant, as Winebrenner did by persuading Ratzlaff to take her to a store and as Katherine Hardie did by jumping out of Rogers's truck. In fact, by the time Butler talked to the investigators, she had been raped "four or five times" (6 RH Exhs. 1673); by the time she quit prostitution, Butler had been raped approximately eight times. (3 RH RT 396-397.) (22 RT 5793.) Lilly had been assaulted a total of 12 to 16 times. (7 RH RT 1344, 1350.)

Many of these victims never report the crimes to police. When asked at Rogers's trial if she had wanted to make a report, Butler answered, "I wanted to, but I knew there wasn't a whole lot I could do . . . . I am a working girl and a junkie. You know, what are they going to do." (22 RT 1573.) She also testified she was afraid. Lilly similarly did not report the incident with Ratzlaff to the police because she "had been attacked before and they never did anything about it." (7 RH RT 1324.) She noted that prostitutes did not report things to the police. (7 RH RT 1324, 1343-1344.) In Detective Fidler's experience, the Union Avenue prostitutes did not report assaults very often and few would testify at a trial. (9 RH RT 1678.)

The evidence in this case demonstrates the close connection between drug addiction and prostitution: an addicted woman will often turn to prostitution to finance her habit. When such women are assaulted, they often don't appear to testify and probably would not make good witnesses if they did. Since the job prospects for drug-addicted prostitutes are low, they find it difficult to break out of their lifestyle of drugs and prostitution.

Indeed, Fidler said that a "rare" feature in the Ratzlaff case was the prostitute-victim's willingness to cooperate in the prosecution. (9 RH RT 1678.) Imperatrice's decision to cooperate with Ratzlaff's prosecution was motivated by a determination to quit prostitution and drugs, which led her

to turn herself in on two Fresno County warrants. (2 Pet. Exhs. at pp. 886-87; 4 Pet. Exhs. at p. 22.) The necessity and difficulty of doing so to permit a successful prosecution shows why such prosecutions are rare.

Importantly, what this information shows is that there is nothing distinctive in the pattern of disputes between prostitutes and customers fitting the pattern described in the Rogers's brief. The evidence in this case demonstrates such a pattern in the assaults by Ratzlaff, the Clark murder as described by Rogers, and in the assault on Butler. Nothing in the pattern itself provides any reason to believe that Ratzlaff and not Rogers assaulted Butler.

Indeed, some facts simply did not match the attack on Butler. Ratzlaff would become frustrated, fly into an uncontrollable rage, and, due to his size and strength, overwhelmed his victim with an explosion of violence. He either punched his victims repeatedly or strangled them, usually inflicting severe injuries. Ratzlaff's pattern—to the extent that he had one—was markedly different from the assault on Butler. When Dena Winebrenner, for instance, told Ratzlaff he was taking too long to ejaculate during sex and she had to leave, he became "infuriated" and strangled her until she lost consciousness and urinated on herself. He stopped spontaneously and let her talk him into driving her to a store, buying her a beer, and giving her money for a pay telephone. These actions show regret for what he had done as well as a lack of criminal (or any) sophistication. He later said he had "flipped out" due to an experience in Vietnam—possibly involving a prostitute. Two years later, Ratzlaff severely beat Jeannie Shain in her motel room, breaking her jaw and inflicting a head injury, and as a result she had no recollection of the beating. Not long after that, Ratzlaff was parked with Deborah Lilly and became very angry when he could not get an erection. He strangled her as she fought him. She calmed him down and he completed the sex act after several hours.

Due to the many inconsistencies in Lavonda Imperatrice's stories—and the jury's evident disbelief of much of it—it is uncertain what exactly happened. It seems likely she embellished several parts of her story, particularly: Ratzlaff shooting a cup on the floor (leaving no bullet hole); the digital penetration of her vagina and anus with fingers and a fist, and being shocked in five different places rather than the original two. However, the evidence showed that she agreed to orally copulate Ratzlaff for money, but that he physically restrained her (apparently with plastic ties), threatened her with a gun, shocked her "on the stomach and the pubic area with a stun gun," and "beat her in the face," inflicting bloody injuries. (See 2 Pet. Exhs. at p. 67.)

Butler's assailant, on the other hand, generally employed a measured use of force, to gain control rather than to inflict injury. After Butler had oral and vaginal sex with Rogers, she got up, saying he was taking too long. He first slapped her and told her she was going to do what he wanted. When Butler refused, he shocked her with a stun gun while controlling her hands so that she could not resist. He stopped shocking her when she said she would cooperate. After more oral and vaginal sex, he turned her over and attempted to have anal sex with her. When Butler refused and started to put her pants on, he threatened her with a gun. At that point, he had a very confident attitude and projected the belief that she could not do anything to hurt him. He had anal intercourse with her, but ejaculated onto her back by masturbating. Afterward, when Butler was fastening her pants, he went through her pants pockets. He pulled out cash and a package of tar heroin. He instantly identified the heroin and made her beg for it. When they were back in town, he pushed her out of the truck and tried to run over her. After that evening, the man followed Butler for a period of about two weeks, until her boyfriend tried to chase him. When Butler saw Rogers in

jail, he threatened her to keep quiet and forced her to submit to humiliating lewd acts, including rubbing her anus with an object.

Thus, in contrast to Ratzlaff's explosions of rage, the actions of Butler's assailant reflected a skilled and confident use of measured techniques to control and ultimately dominate and humiliate her. The high degree of physical violence inflicted by Ratzlaff is characteristic of a big man in a rage and out of control. In contrast, the behavior of Butler's attacker is characteristic of a smaller man—Butler described the assailant as about 5'6" and 165 pounds—who is in control of himself and is proficient with control techniques.

Moreover, Ratzlaff apparently only assaulted prostitutes he had "dated" previously. In contrast, the available evidence shows that Rogers only assaulted prostitutes he had not "dated" previously. He murdered Benintende and Clark on their first nights in Bakersfield and it appears Hardie did not know Rogers because she did not say she recognized him as being a previous customer. He apparently had repeated positive interactions with Ellen Martinez (before he was fired), Winebrenner, and Zambrano. Fitting that pattern, there is no evidence Rogers had "dated" Butler previously, although it seems likely he had seen her in the prostitution area—at trial, Rogers explained that he "usually" liked to "drive around" and "look at the whores" (17 RT 4697)—and, at least on the night he assaulted her, he followed her toward where she lived.

The referee also cited the assailant's chosen weapons as unique. As noted, Ratzlaff and Rogers used physical force in different ways. Interestingly, they had the same weapons, but, again, they used them in significantly different ways.

d. The evidence about the assailant's use of weapons does not prove Ratzlaff, rather than Rogers, assaulted Butler

A curious fact in this case is that both Rogers and Ratzlaff unquestionably possessed pocket-sized .25-caliber semi-automatic pistols. Rogers's Excam was found on February 13, 1988, in a box under the camper shell of the 1966 Ford that was still registered to Coffey. (22 RT 2119; 11 RH RT 2119-2121.) Ratzlaff's F.I.E. was found in his right front pants pocket when the detectives spoke to him on June 8, 1988. (4 Pet. Exhs. at p. 19; 4 RH Exhs. 1098, 1109-1110.)

However, as with their use of force generally, Rogers used his gun in a controlled and calculated way while Ratzlaff did the opposite. Rogers fired his gun across Butler's nose out the window, to blind and stun her and frighten her into compliance. Ratzlaff, assuming this portion of Imperatrice's testimony is deemed reliable (the People believe it is not), fired wildly after Imperatrice as she ran for no good reason. Although he apparently wanted to scare her into running faster, she was already frightened and fleeing and the only likely effect of shooting after her was to make it more likely she would quickly make a report of the assault to the police, thus making his arrest and conviction more likely.

Similarly, the way the stun gun was used against Butler—as an instrument of control—is inconsistent with the way Ratzlaff's used the stun gun against Imperatrice, which generally was used as an instrument of torture.

Butler told the investigators that after she stopped having intercourse with Rogers and told him she had to leave, he slapped her hard, told her she was going to do what he said, and grabbed a black device about six inches long from the dashboard. (6 RH Exhs. 1638, 1664-1666, 1668.) At first, she had "no idea what that thing was." (6 RH Exhs. 1666.) "And he stuck

it up to my neck and he held it there until I couldn't scream anymore. It was, it burned me. And he took it away and I told him alright, you know, whatever, and he started having sex with me." (6 RH Exhs. 1638.) When it fired, it "was real bright." (6 RH Exhs. 1666.) She was screaming because it burned and hurt. (6 RH Exhs. 1668.) She was trying to pull his arm down, but he held her so that she couldn't. (6 RH Exhs. 1668-1669.) He used it "[j]ust once." (6 RH Exhs. 16781679.) She gave the same account at the penalty phase of Rogers's trial. (22 RT 5784-5785.)

Since Butler was uncertain of the date on which she was assaulted (6 RH Exhs. 1686; 22 RT 5780; 3 RH RT 3998), it is uncertain whether she was assaulted before or after Ratzlaff assaulted Winebrenner on January 28, 1986. If Butler was assaulted first, it would be entirely possible that Ratzlaff had heard that a customer (Rogers) had used a stun gun on a Union Avenue prostitute and decided to buy one himself.[72] Butler told her boyfriend William Wiese what had happened (6 RH Exhs. 1681-1682) and presumably told at least some other prostitutes about it. Even though she did not want to discuss it in jail with women she did not know well, that does not mean she did not tell her friends. In either event, Rogers was in a position to obtain information from various prostitutes—either directly or through other officers—including the information that a customer who became violent when drunk had a stun gun. Regardless, stun guns were available for purchase in 1983. (12 RH RT 2352-2353.) It would not be surprising if a police officer would be aware of such instruments.

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[72] The record is unclear on whether Ratzlaff owned a stun gun in 1986. As noted above, Winebrenner provided inconsistent statements regarding whether Ratzlaff showed her a stun gun in 1986. (4 Pet. Exhs. at p. 21; DW RT 33.)

In addition, Rogers hired prostitutes and had a low opinion of them after he was dismissed from his position as a deputy sheriff when Ellen Martinez reported that he had taken pictures of her genital area in the cemetery. As a result, he could be expected to be interested in devices that would permit him to control a prostitute who did not want to cooperate with him.

Ratzlaff did not use a stun gun on Winebrenner on January 28, 1986. He severely beat Jeannie Shain on March 16, 1988, and strangled Deborah Lilly after that date but before he was arrested in June. He used a stun gun on Imperatrice on May 21, 1988, but he also beat her severely. Thus, the stun gun was hardly "ubiquitous" (POBR 199) in Ratzlaff's modus operandi.

Like a .25 automatic, a stun gun is merely a weapon—one which was readily available for purchase and would be useful to both Rogers and Ratzlaff when they interacted with prostitutes, as both did frequently. Rogers could find a stun gun useful for his interactions with suspects as well. (As the evidence shows, Rogers turned his job-related contacts with some prostitutes into sexual abuse.) Although they were not in wide use at the time, stun guns are not distinctive. Detective Fidler testified that, while working for the Sheriff's Department, he had "come across" other cases in which a stun gun had been used. (9 RH RT 1682.) Imperatrice testified that she had heard of stun guns before Ratzlaff used one on her, had "seen them with the police," and had seen them on television after the assault. (2 Pet. Exhs. at p. 159.) When Jeannie Shain was asked if an exhibit looked like Ratzlaff's stun gun, she said, "They all look alike to me." (5 RH RT 872.)

In addition, Ratzlaff used his stun gun on Imperatrice's stomach and pubic area, apparently only to inflict pain, while Butler's attacker used his stun gun specifically to enforce compliance with his demands, to exert

dominance and control, and inferably to humiliate Butler by demonstrating that she was helpless despite her attempt to display bravado. Thus, the use of weapons was hardly distinctive enough to support the inference that Ratzlaff, and not Rogers, attacked Butler.

3. Butler's post-trial sworn statements do not constitute newly discovered evidence

The referee also relied on what it characterized as a "sworn recantation" to show that Rogers did not assault Butler. "[A] habeas corpus petitioner must present evidence that was unavailable at trial." (*In re Richards*, *supra*, 55 Cal.4th at pp. 968-969.) Contrary to Rogers's premise, newly discovered evidence does not include statements Butler made which allegedly undermine her trial testimony. (See POBR 198-199; *In re Richards*, *supra*, 55 Cal.4th at pp. 956-968 [an expert trial witness' change in his opinion was addressed as potential false evidence].) This Court's question does not appear to encompass changes in Butler's testimony or pre-trial statements. Moreover, Rogers fails to show that he could not have obtained trial testimony from Butler similar to those in his declarations. To the extent that he could not have obtained similar statements, it is because the statements were not actually statements by Butler or were not credible.

III. ROGERS FAILS TO SHOW THAT THE PROSECUTION VIOLATED *BRADY V. MARYLAND* (1963) 373 U.S. 83

A. Introduction and Summary of Argument

This Court directed the People to show cause regarding "2) the prosecution's failure to disclose exculpatory evidence, as alleged in Claim IV." (Amended Order to Show Cause, filed December 20, 2007.) After the People filed its Return, the Court issued a reference order which asked:

> (4) What information did law enforcement agencies involved in petitioner's prosecution possess before, during and after petitioner's trial regarding Michael Ratzlaff's attacks on prostitutes other than Tambri Butler? When did law

enforcement come into possession of that information? Were the individual law enforcement officers who possessed the information involved in petitioner's prosecution? Was the prosecution in petitioner's case aware, or should it have been aware, of the information? Did the prosecution disclose such information to petitioner's defense counsel?

(5) What crime was Tambri Butler serving time for at the time she testified at petitioner's trial? Did the prosecution disclose information about Tambri Butler's criminal history to the defense? If so, what information did it disclose?

(6) Was Tambri Butler promised leniency in exchange for her testimony against petitioner? Did Tambri Butler request early release in exchange for her testimony? Was Tambri Butler aware at the time she testified that she would be released early in exchange for her testimony? Was Tambri Butler threatened by law enforcement agents or given false information about the killing of Tracie Clark before she testified? Was the prosecution aware, or should it have been aware, of any promises or threats made to Tambri Butler or Butler's request or expectation of early release? If so, did it disclose such information to the defense?

(Questions 4, 5, and 6, quoted in full above.)

Below, the People will address each question in turn, along with a discussion of the referee's relevant findings. In the end, the evidence adduced at the reference hearing fails to show that the prosecution in this case violated *Brady* because the prosecution did not have in its possession material, exculpatory evidence that was not disclosed to defense at the time of trial. Rogers's claims to the contrary are simply not supported by the evidence.

B. Applicable Legal Standards

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady*,

supra, 373 U.S. at p. 87.) A violation of *Brady* consists of three parts: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

C. Analysis

1. The prosecution was not aware of and should not have been aware of information regarding Michael Ratzlaff's attacks on prostitutes other than Tambri Butler

With regard to question 4 of the Reference Order, the referee found that "none of the individual law enforcement officers who possessed information regarding Ratzlaff were involved in petitioner's prosecution. The prosecution in petitioner's case was not aware of and should not have been aware of the information." (Report at p. 13.) In particular, the referee made the following factual findings:

> ANSWER: First, on January 28, 1986—a year before petitioner's arrest—the Kern County Sheriff's Department took a report from Dealia Winebrenner regarding the incident in which Mr. Ratzlaff chocked her into unconsciousness. The Bakersfield Police Department traced the vehicle — white pickup — back to Ratzlaff who admitted picking up Ms. Winebrenner but denied hurting her. No further action was taken. (4 RHRT 1101; Pet. Exh. 45)
>
> Second, Ratzlaff assaulted Jeannie Shain on March 16, 1988, and soon thereafter, he assaulted Deborah Lilly, but neither reported the assaults to the police. Ms. Shain testified she was interviewed in the hospital by police officers who showed her pictures of Ratzlaff and suggested they thought he was the assailant in her case and those of other prostitutes in the area. (RHRT 866-67) A few months after she was released from the hospital she remembered that she had been with Ratzlaff the night she was beaten up, but never told the police. (5 RHRT 867, 877-78) Detective Fidler, while investigating the Imperatice assault on June 8, 1988, responded to an informant's

> tip on Mike Ratzlaff who had a white pickup. Twelve of the pictures of naked women Detective Fidler found behind the front seat of Ratzlaff's truck on June 8, 1988 were of Jeanie Shain. (4 Pet. Exhs. 19-21; 9 RT 1648, 1651-52; 4 RH Exhs. 1100).

(Report at pp. 12-13.)

In response to this Court's specific questions, the referee's findings are conclusive on three important points: (1) no law enforcement officers involved in Rogers's prosecution ever possessed information regarding Ratzlaff's attacks on other prostitutes; (2) any information regarding Ratzlaff's attacks on other prostitutes became available on June 8, 1988, after the trial had ended; and (3) not only was the prosecution unaware of information regarding Ratzlaff's attacks on other prostitutes, but the prosecution also should not have been aware of the information.

The prosecutor's duty to disclose material, exculpatory evidence extends only to evidence that the prosecution knowingly possesses or has the right to possess, including evidence in the possession of investigative and prosecutorial agencies and personnel "acting on the government's behalf" (*Kyle v. Whitley* (1995) 514 U.S. 419, 437-38), or "assisting the government's case." (*In re Brown* (1998) 17 Cal.4th 873, 881.) Information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material. (*In re Steele* (2004) 32 Cal.4th 682, 697.) Here, based on the referee's findings, the prosecution team did not have any knowledge, either actual or constructive, regarding Ratzlaff's attacks on other prostitutes before, during, or after Rogers's trial. In short, there was no *Brady* violation.

2. The record fails to disclose any evidence to prove that the prosecution team did not disclose Tambri Butler's criminal record

With regard to Question 5 of the Reference Order, the referee found that Butler was serving time for a violation of Health and Safety Code section 11351. It further found that the prosecution did not disclose Butler's criminal history to the defense. This finding is not supported by substantial evidence.

The referee found the following regarding the prosecution's disclosure of Butler's criminal history:

> ANSWER: No. The prosecution did not disclose information about Tambri Butler's criminal history to the defense.
>
> Ryals contradicted herself with regard to Sheila Bilyeu being on her witness list; she appeared to be overly defensive in her testimony. (RHRT 2001-02) Also there was little documentation to be touched to support that Ryals provided defense counsel with "criminal records of all my witnesses" even though she testified that after attending a death penalty seminar, she had implemented a policy of keeping track of discovery by numbering all documents. No criminal record was ever apparently located. (4 RHRT 1025) Her testimony was credible but not credible enough to support her testimony on the issue without some corroboration other than a "cover your knees" memo she wrote to Tam Hodgson (Pet. Exhs. 109) and the bare support of Mr. Lorenz.

(Report at p. 14.)

"'A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]' [Citation.]" (*In re Cudjo* (1999) 20 Cal.4th 673, 687.) Here, the referee's finding is based solely on his determination that the witness was not credible enough to

believe without corroborating evidence (Report at p. 14). Thus, the referee improperly placed the burden on the People to prove that the witness's statement that she disclosed Butler's criminal record to the defense (10 RH RT 1988), which was supported by defense counsel's own testimony, was actually true (8 RH RT 1497). However, the proper burden in habeas cases requires a petitioner to prove that the prosecution did not disclose this information. (*Duvall*, *supra*, 9 Cal.4th at p. 474 ["For purposes of collateral attack, all presumptions favor truth, accuracy, and fairness of the conviction and sentence; *defendant* must undertake the burden of overturning them"].) Rogers did not meet this burden.

The only evidence Rogers presents to support his claim that the prosecution did not disclose Butler's criminal record is an absence of evidence: that no record had been found in the file, so the referee should presume that the prosecution did not disclose this information. But the law places the burden on Rogers to prove the allegations in his petition (*Duvall*, *supra*, 9 Cal.4th at p. 474), which is not met by showing an absence of evidence, especially when the record casts serious doubts about the completeness of Lorenz's file when it was turned over to the habeas team. (1 Pet. Exh. at p. 7 (¶ 4) [habeas counsel, Alan W. Sparer, describing the case file as "in a state of complete disarray," noting that some documents "bear the impression of an automobile tire"].) In fact, the only evidence presented at the reference hearing suggests that the records were disclosed; the prosecutor's undisputed testimony was that she disclosed the information.

Moreover, Lorenz filed a discovery motion (5 RH Exhs. 1421-1430) seeking information about arrests or misdemeanor convictions. However, the motion was filed in the municipal court before the preliminary examination, when the case was pending before a magistrate and not before the trial court. (4 CT 925-931; see RH Exhs. 1421-1422.) Although

Lorenz asked for items that would be useful to him at trial, he would have known that the magistrate could deny discovery of items sought solely for trial. (See *People v. Hawkins* (1978) 85 Cal.App.3d 960, 968 [a committing magistrate does not sit as a court].) A response by Chief Trial Attorney Stephen Tauzer stated that there was no objection to almost all of the materials sought. (4 CT 932-936.) Before hearing the preliminary examination, the magistrate ruled on the motion, which it characterized as a "pre-preliminary hearing motion[]." (1 CT 22-29.) During the discussion Lorenz recognized that express or implied immunity was a possibility and that dismissed misdemeanors could be relevant evidence of such an arrangement or of bias or interest. (1 CT 27-30; see POBR 206, fn. 207.) When Sara Ryals was assigned to the case after the preliminary examination, Lorenz could properly rely on her to honor the pre-preliminary examination motion, response, and order and to follow her regular practice of providing all reports and information in her case file, even if it included some "work product." Ryals testified, "I gave the defense counsel everything I had. A lot of it was my own work product because that's what I wanted to do because I didn't want the case over turned." (10 RH RT 1988.) She had taken a course about how to do a death penalty case and was "very careful" to comply with all of Lorenz's requests, including criminal records of witnesses. (10 RH RT 1944-1946.) Indeed, at the reference hearing, Lorenz stated, "I don't think I ever had a situation with Sara Ryals as a District Attorney where there was a question that when she sent something to us, it was actually sent or picked up." (8 RH RT 1497.)

Thus, there was no evidence, let alone substantial evidence, to support the referee's finding that Butler's criminal record was not disclosed to the defense. Rogers fails to meet his burden and cannot succeed on this claim.

a. Defense counsel obtained Butler's criminal history before she testified

Assuming, *arguendo*, that the prosecution did not disclose Butler's criminal history to the defense, there would still be no *Brady* violation because that information was obtained by defense counsel before Butler's cross-examination. (See *People v. Wright* (1985) 39 Cal.3d 576, 589 [so long as defendant had the opportunity to present evidence to jury, late disclosure of exculpatory evidence impeaching prosecution witness does not violate *Brady*].) Lorenz testified that he ordered his legal assistant to obtain the criminal records of all the penalty-phase witnesses, including Butler, before they testified. The undisputed record shows that defense counsel had Butler's criminal record, at the latest, the morning of Butler's testimony. (2 RH RT 348-349; 12 RH RT 2448; 4 RH Exhs. 1050.) Under the circumstances, there is no suppression of evidence that denied Rogers a fair trial, and hence, no *Brady* violation. (*In re Sassounian* (1995) 9 Cal.4th 535, 544, citing *United States v. Bagley* (1985) 473 U.S. 667, 682; see *People v. Wright*, *supra*, 39 Cal.3d at p. 589 [so long as defendant had the opportunity to present evidence to jury, late disclosure of exculpatory evidence impeaching prosecution witness does not violate *Brady*].)

b. Evidence of Butler's In-custody offense was not "material" under *Brady*

Lastly, assuming that defense counsel never obtained Butler's criminal record, the information about her in-custody offense was not material under *Brady*.

Suppression of potential impeachment evidence "amounts to a constitutional violation only if it deprives the defendant of a fair trial." (*Bagley*, *supra*, 473 U.S. at p. 678.) Thus, a "conviction must be reversed only if the evidence is material in the sense that its suppression undermines the confidence in the outcome of the trial." (*Ibid.*) More specifically,

"evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*Id.* at p. 682.)

To determine the materiality of impeachment evidence, its evidentiary strength and impact must be evaluated "collectively" in the context of the entire record. (*Kyles v. Whitley* (1995) 514 U.S. 419, 436; see *United States v. Agurs* (1976) 427 U.S. 97, 112.) Undisclosed impeachment evidence, for instance, is not material where "the testimony of the witness is corroborated by other testimony," or where the material "merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." (*United States v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1210.) Here, the evidence of Butler's in-custody offense was not material because it was cumulative of other evidence used to impeach her.

Not only was the jury aware that Butler was in-custody when she testified at the penalty phase (22 RT 5778-79), but Lorenz also asked her about her numerous arrests for drug and prostitution-related offenses. (22 RT 5801.) The jury heard, for instances, that Butler had been arrested "three, maybe four" times for prostitution-related offenses and "about eight, nine" times on heroin-related offenses. (22 RT 5801.) Lorenz further questioned Butler on whether her desire to be released early from jail motivated her to testify against his client (22 RT 5800-01); the exact offense Butler was in jail for was merely cumulative of other evidence used to impeach her testimony. The evidence of Butler's in-custody offense would not have been material under *Brady*.

3. Rogers Fails to present evidence that Butler was promised leniency in exchange for her testimony

With regard to Question 6 of the Reference Order, the referee found that Butler was never promised, either expressly or impliedly, any leniency

for her testimony. (Report at pp. 14-15.) He further found that law enforcement agencies never threatened nor gave Butler false information about the killing of Tracie Clark before she testified. (*Ibid.*) The only positive response to this Court's questions was that Butler "was aware at the time she testified that she would be released early in exchange for her testimony." (*Ibid.*) But the referee clarified, "[Butler] was aware she may be released; however, no credible evidence to indicate the prosecution could be aware of her expectations." (Report at p. 15.) Thus, the record only shows that Butler had hoped that she would be released early, but that hope was not based on any promise made by the prosecution team.

IV. DEFENSE COUNSEL'S DECISION TO FOCUS ON A MENTAL ILLNESS DEFENSE DURING THE PENALTY PHASE, RATHER THAN UNDERTAKE A MINI-TRIAL ON ONE WITNESS, WAS A REASONABLE STRATEGIC DECISION THAT SATISFIES THE SIXTH AMENDMENT

A. Introduction

This Court directed the People to show cause regarding:

> "3) ineffective assistance of counsel, as alleged in subclaims (G), (K), (L), (M), (N), and (O) (to the extent Rogers alleges a failure to request CALJIC No. 2.92) of claim V of the Petition;"
>
> "4) cumulative penalty phase prejudice arising from facts alleged in claim V identified in paragraph 3) above, as alleged in subclaim (Q) of claim V;" and
>
> "5) cumulative penalty phase prejudice arising from the facts alleged in claims and subclaims identified in paragraphs 1) through 4) above, as alleged in claim VI."

(Amended Order to Show Cause, filed December 20, 2007.)

After the People filed its Return, the Court issued a reference order which asked the following questions related to the issues above:

> (7) What actions did petitioner's trial counsel, Eugene Lorenz, take to investigate the 1986 assault on Tambri Butler,

including: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What were the results of that investigation? Was that investigation conducted in manner to be expected of a reasonably competent attorney acting as a diligent advocate? If not, in what respects was it inadequate?

(8) If trial counsel's investigation was inadequate, what additional evidence would an adequate investigation have disclosed? How credible what that evidence? What investigative steps would have led to that additional evidence?

(9) After conducting an adequate investigation of the assault on Butler, would a reasonably competent attorney acting as a diligent advocate have introduced additional evidence regarding: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What, if any, rebuttal evidence would have been available to the prosecution?

(10) Did trial counsel have tactical or other reasons for failing to challenge the admissibility of Butler's testimony? If so, what were those reasons? After conducting an adequate investigation into the 1986 assault, would reasonably competent counsel have moved to exclude Butler's testimony?

(11) Did trial counsel have tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony? If so, what was/were the reason(s)? What impeaching or rebuttal evidence was available to counsel upon reasonable investigation? Would a reasonably competent attorney acting as diligent advocate have impeached or rebutted Butler's testimony? If so, in what manner?

(12) Did trial counsel have tactical or other reasons for failing to present expert testimony on eyewitness identifications? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have presented expert testimony on eyewitness identifications? What would such an expert witness have said?

(13) Did trial counsel have tactical or other reasons for failing to request CALJIC No. 2.92? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have requested CALJIC No. 2.92?

(14) Did trial counsel have tactical or other reasons for failing to address Butler's testimony in closing argument at the penalty phase? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have addressed Butler's testimony in closing argument at the penalty phase? If so, in what manner?

The People will address each question in turn. In the end, the evidence adduced from these questions fails to prove that counsel was constitutionally deficient under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) or the California Constitution. While these questions cover various issues, the fundamental conclusion is that defense counsel decided on a strategy that involved relying on his client's mental issues resulting from extensive physical and sexual abuse as a child, combined with character evidence, to avoid a death sentence. This decision was rational under the circumstances. Rogers attempts to avoid this conclusion by making the entire trial, and whether he ultimately deserved the death penalty for brutally killing two women and dumping their bodies in a canal, based on one mitigation witness whose story essential repeated behaviors Rogers committed against other women. In short, the jury would have sentenced Rogers to death regardless of whether Butler testified or not.

B. Summary of Argument

Strickland v. Washington (1984) 466 U.S. 668, which governs claims of ineffective assistance of counsel, requires courts to accord a high deference to counsel's performance and to presume that the challenged action or omission had a sound strategic justification. Related to *Strickland*'s principle that courts must defer to an attorney's decisions, and no less fundamental, is the Court's firm rejection of any kind of "checklist

of judicial evaluation of attorney performance." (*Strickland, supra*, 466 U.S. at p. 688.) Any "set of detailed rules for counsel's conduct," the Court wrote, could not account for "the variety of circumstances faced by defense counsel" and would both "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." (*Id.* at pp. 688-89.)

Rogers argues in this case that his trial counsel provided deficient representation during the penalty phase because he failed to investigate and impeach Butler in the manner and the extent he determined was necessary. But, as the Supreme Court has repeatedly stated, courts must "judge reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time counsel's conduct" (*Strickland, supra*, 466 U.S. at p. 690), and it is "'[r]are' that constitutionally competent representation will require 'any one technique or approach.'" (*Harrington v. Richter* (2011) 562 U.S. 86, 88-89.) This is where Rogers's arguments falter: he presumes that his method of handling Butler's investigation and subsequent cross-examination was the only approach that any reasonable attorney would have taken, ignoring the possibility that counsel may have had an equally reasonable, alternative strategy to avoid a death sentence. As will be discussed fully below, counsel made reasonable tactical decisions when handling the sentencing phase. And while counsel's strategy ultimately did not succeed in preventing a death sentence, this does not make counsel's strategy unreasonable and his performance deficient.

C. Summary of Applicable Law

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." That right is "fundamental to our system of justice." (*United States v. Morrison* (1981) 449 U.S. 361, 361; see *Strickland v. Washington* (1984) 466 U.S. 668, 685; *Gideon v. Wainwright* (1963) 372 U.S. 335,

344.) As the Supreme Court has explained, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." (*United States v. Cronic* (1984) 466 U.S. 648, 653, footnote omitted.) "The right to counsel plays a critical role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (*Strickland*, *supra*, 466 U.S. at p. 685.)

The Supreme Court's decision in *Strickland*, announced a general test for reviewing claims of ineffective assistance of counsel. Under *Strickland*, a claim of ineffective assistance of counsel at trial or capital sentencing has two components. First, the defendant must show that counsel's performance was deficient, in that "counsel's representation fell below an objective standard of reasonableness." (*Strickland*, *supra*, 466 U.S. at p. 688.) Second, the defendant must show that "the deficient performance prejudiced the defense" (*id.* at p. 687) in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

The requirement that a defendant must show prejudice reflects the principle that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." (*Cronic*, *supra*, 466 U.S. at p. 658.) "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*Ibid.*; see also *Lockhart v. Fretwell* (1993) 506 U.S. 364, 369; *Strickland*, *supra*, 466 U.S. at p. 686.) Accordingly, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute

ineffective assistance under the Constitution." (*Strickland*, 466 U.S. at p. 692.)

The California standards for establishing ineffectiveness of counsel under article I, section 16 of the California Constitution are similar to standards for measuring competence of counsel under the Sixth and Fourteenth Amendments. In *In re Sixto* (1989) 48 Cal.3d 1247, this Court wrote:

> To establish ineffectiveness of counsel under article I, section 16 of the California Constitution, petitioner must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense. (*People v. Williams* (1988) 44 Cal.3d 883, 936, 245 Cal.Rptr. 336, 751 P.2d 395.) In particular, petitioner must show that counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present or discover. When the evidence relates to a diminished capacity defense, the failure to discover or present the evidence will be considered prejudicial only if it might have caused a reasonable jury to conclude that the defendant actually lacked the mental capacity that constituted an element of the charged offense. (*Id.* at p. 937, 245 Cal.Rptr. 336, 751 P.2d 395.) Finally, it must also be shown that the omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make. (*People v. Frierson* [(1979)] 25 Cal.3d 142, 158, 158 Cal.Rptr. 281, 599 P.2d 587.) [¶] The standards for measuring competence of counsel under the Sixth and Fourteenth Amendments are similar. . . .

(*Id.* at p. 1257, italics added.)

D. Factual Background

By the time he stopped doing criminal cases, Eugene Lorenz, Rogers's trial counsel, had done around 15 death penalty trials and probably handled more than 20 death penalty cases, some of which had been resolved by pleas. (8 RH RT 1414.) He had handled "a few hundred

murder cases over the years." (8 RH RT 1439.) He became an attorney in 1971; practiced law in Humboldt County for "a couple years," handling a "few" criminal cases; was with the Kern County Public Defender's Office for seven years; and was then in private practice, when he did criminal defense, he was retained about ninety percent of the time, but also was appointed quite often in conflict cases. By 1990 he had switched to personal injury cases. (8 RH RT 1413.)

In his opinion, Kern County juries were "quite conservative," more so in capital cases due to the selection process. (8 RH RT 1414-1415.)

Lorenz's overall penalty phase strategy, as shown by the evidence he presented and his argument to the jury, was to show that there was a "good" David Rogers and a "bad" David Rogers; that the "bad" David's actions were the result of a horrible childhood; and that the actions and character of the "good" David Rogers outweighed that of the "bad" and warranted a sentence of less than death. (22 RT 5957-5958, 5964-5966; 8 RH Exhs. 1459-1460, 1466-1468.) He noted that, in contrast to people on Death Row, his client did not have a long criminal record or a lack of human feelings. (22 RT 5956-5957.) "We have an individual was in many ways a good man, a friend to his friends, a lover and companion to his wife, a grandfather to his children [*sic*]," Lorenz argued to the jury. (22 RT 5957.) He reminded the jurors that Rogers is "not a violent person by general disposition" and could defuse violent situations without using force himself. (22 RT 5958-5959.)

At the reference hearing, Lorenz testified that he saw the case as raising primarily "a psychiatric/psychological type of defense." (8 RH RT 1425, 1427.) He remembered that there was "a taped confession" to John Soliz, which included an admission of facts showing premeditation. (8 RH RT 1427, 1439.) According to Lorenz, Rogers "had a very nice personality" and "demeanor," but he had "deep psychological problems that

probably would have been ferreted out in a modern Sheriff's Department with psychological testing" and that he might not have committed any of his crimes if he had not been hired as a Sherriff's deputy. (8 RH RT 1427, 1463.) Lorenz noted that Rogers's "'whole background' was that he had been abused as a child." (8 RH RT 1499-1500.)

Lorenz explained that in contrast to many defendants,

> Mr. Rogers had a family, he had other people from the Sheriff's Department who were supportive of him. It is almost as if he had two completely different personalities. I remember him myself just basically when he worked in the jail, you know, being pretty pleasant with prisoners and that sort of thing . I would commonly go up and interview people in the jail and I recall him being, you know, not one of these Sheriff's officers who was pushing inmates around or that sort of thing. He was pretty polite and decent to everybody that I could see.

(8 RH RT 1464.) He also noted that police officers might be "judged more harshly." (8 RH RT 1462.)

With these facts in mind, Lorenz followed his overall penalty strategy by making contact with a number of Rogers's family members, friends, and law enforcement colleagues—either indirectly through investigators or directly.

The defense case at the penalty phase was presented the day after the prosecution case. In the defense case, Lorenz played a videotape of a sodium amytal interview with Rogers concerning his childhood and the Clark shooting (22 RT 5816-5897), and presented testimony from clinical psychologist David Bird (22 RT 5898-5905). Dr. Bird testified at the penalty phase that, at the time he killed Clark, Rogers was under an extreme emotional disturbance from "a lifetime of sexual abuse, physical abuse, loss of sexual identification" and his "inability to function" at the time. (22 RT 5898-5899.) However, Rogers had made substantial progress since then, including his marriage to Jo. (22 RT 5899-5902.)

The video of the sodium amytal interview and Dr. Bird's testimony supplemented the extensive psychiatric testimony at the guilt phase from Dr. Bird (20 RT 5456-5529), psychotherapist Joan Franz (20 RT 5394-5455), and psychiatrist David Glaser (20 RT 5218-5347), as well as Rogers's testimony regarding the Clark shooting, his contacts with prostitutes, and accidental exposure to drugs on the job. (20 RT 5351-5389). He testified he had limited memories of his childhood. (20 RT 5365.) The purpose of the sodium amytal interview was to identify and fill in Rogers's "memory lapses." (20 RT 5223-5224, 5237-5239, 5282-5283; see Return 36-66 [guilt phase defense evidence].)

Also at the penalty phase, Lorenz presented, as witnesses to Rogers's good character, Rogers's older brother (22 RT 5933-5937), his wife Jo (Joyce) (22 RT 5905 5916), and his stepdaughter Carol (22 RT 5931-5933). Jo described their social and family life, and Rogers's on-the-job commendations; and discussed three family photo albums, which Lorenz introduced into evidence. (22 RT 5908-5914.) Lorenz also presented the testimony of seven law enforcement officers who had worked with Rogers, some of whom were personally close to him, as to his effectiveness on the job and good character. (22 RT 5916-5920, 5920-5922, 5922-5925, 5925-5927, 5927-5931, 5937-5940, 5942-5948; see Return 75-88 [penalty phase defense evidence].)

At the reference hearing, Lorenz remembered only a few things about his handling of Rogers's case and did not remember the reasons for his actions in the case. (8 RH RT 1425, 1444, 1479-1480.) He did not remember using investigators other that Susan Peninger. (8 RH RT 1424, 1484-1486, 1503-1504.) He knew he had "probably at least four or five investigators on this case," but he did not remember "who was doing what." (8 RH RT 1501-1502, 1530.) Peninger worked on mitigating evidence from Rogers's family based on his childhood. (8 RH RT 1484-1485.)

However, Rogers was unable to work with Peninger (8 RH RT 1420-1422, 1481.) One visit with Rogers by Peninger "ended up in a potential suicide situation," which meant that "she needed not to be involved." (8 RH RT 1481.) Lorenz had to deal with the situation himself. (8 RH RT 1481.) Peninger was unable to persuade Rogers's mother to testify (8 RH RT 1421, 1483), although she was able to provide "some insights about [the] troubled past that he had." (8 RH RT 1484.) In addition to Peninger, investigator Feer's log showed he had a number of contacts with Rogers and with Elias Munoz, who was going to law school and who worked for Lorenz. (2 RH Exhs. 329, 331; 8 RH RT 1429-1430, 1533.)

Lorenz thought he might have been contacted by other Sheriff's officers who knew Rogers. (8 RH RT 1423.) He called several as witnesses, which leads to the conclusion that he knew what they would say, possibly by speaking to them. Lorenz testified he usually has an investigator interview witnesses. (8 RH RT 1420.) However, he may not have felt that formal interview was necessary, especially if Rogers approved of the witnesses.

At the reference hearing, Lorenz was asked if he had done the best he could in representing Rogers. He answered, "I think so." (8 RH RT 1462.) This answer is consistent with an opinion that he had done what he thought best, but the outcome was not what he wanted.

In the absence of a comprehensive account of Lorenz's actions and reasons, the situation is largely the same as if he had not been available at all. As a result: (1) it must be presumed in the absence of positive evidence that counsel performed adequately; (2) the available evidence may be examined for indications as to what was done; and (3) if the evidence suggests a valid tactical reasons for Lorenz's actions, it must be presumed that his actions were taken for those reasons. (*People v. Diaz* (1992) 3 Cal.4th 495, 566, [there was a "silent record" as to counsel's reasons for his

actions] see *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187 [a "plausible tactical explanation" for counsel's action was possible].)

E. Analysis

1. The evidence generally fails to show the actions counsel took to investigate the 1986 assault on Butler; Rogers therefore cannot establish that counsel's performance was deficient

In Question 7, this Court asked:

> (7) What actions did petitioner's trial counsel, Eugene Lorenz, take to investigate the 1986 assault on Tambri Butler, including: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What were the results of that investigation? Was that investigation conducted in manner to be expected of a reasonably competent attorney acting as a diligent advocate? If not, in what respects was it inadequate?

The referee found that the evidence generally failed to disclose whether and to what extent counsel investigated the 1986 assault on Butler, including the identity of Butler's assailant; whether Butler had seen Rogers on television before she identified him; and whether Rogers had been involved in any prior arrests of Butler before she identified him as her assailant. (Report at p. 15.) Because Rogers bore the burden of proving that counsel failed to make particular investigations and that the omission resulted in the denial of or inadequate presentation of a potentially meritorious defense, the referee's finding that no such evidence exists precludes Rogers from obtaining relief on this claim. (*People v. Karis* (1988) 46 Cal.3d 612 656 [petitioner has burden of proof of showing ineffective assistance of counsel as a "demonstrable reality and not [as] a speculative matter"].) Rogers claim that counsel was deficient for not

adequately investigating the 1986 assault is therefore without evidence and should be denied.

a. Applicable legal standard governing counsel's duty to investigate

In *Strickland*, after setting forth the general standards for evaluating claims of deficient performance, the Supreme Court discussed the application of those standards to "counsel's duty to investigate." (466 U.S. at p. 690.) The Court stated that the general standards "require no special amplification" (*ibid.*), because the duty to investigate is governed by the same basic requirement of reasonableness: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. (*Id.* at p. 691.) That means that, while strategic choices "made after thorough investigation of law and facts" are "virtually unchallengeable," strategic choices "made after less than complete investigation" are likewise reasonable so long as "reasonable professional judgment support the limitations on investigation." (*Id.* at pp. 690-691.) Counsel thus has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Id.* at p. 691.)

In both *Strickland* and *Burger v. Kemp*, in addition to rejecting a challenge to counsel's decision not to present evidence concerning the defendant's background, the Supreme Court rejected a challenge to counsel's decision not to conduct a further investigation of his background. In both cases, the Court relied on the fact that counsel had chosen a reasonable strategy for avoiding a death sentence and had reasonably concluded that the presentation of mitigating evidence would not improve the defendant's chances. (See *Strickland, supra*, 466 U.S. at p. 699 [counsel's strategic decision to rely on defendant's acceptance of

responsibility and argue that he had acted under extreme emotion distress was "well within the range of professionally reasonable judgments," and his "decision not to seek more character or psychological evidence than was already in hand" was "likewise reasonable"]; *Burger v. Kemp* (1987) 483 U.S. 776 [although record "suggest[s] that [counsel] could well have made a more thorough investigation than he did," there was "a reasonable basis for [counsel's] strategic decision that an explanation of [the defendant's] history would not have minimized the risk of the death penalty," and "[h]aving made this judgment, he reasonably determined that he need not undertake further investigation . . . [concerning the defendant's] past"].)

b. Rogers fails to meet his burden of showing deficient performance

The referee found that the evidence generally fails to show whether and to what extent Lorenz investigated items 1, 2, or 4, in Question 7 or what the results of any such investigation were. In other words, Rogers had failed to establish facts showing that counsel's performance was deficient. *Strickland* places the burden on the defendant, not the People, to "show that counsel's performance was deficient." (*Strickland, supra*, 466 U.S. at p. 687.) The referee turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." (*Id.* at p. 689; *Burt v. Titlow* (2013) 134 S.Ct. 10, 17.) Thus, without evidence that counsel failed to investigate the 1986 assault on Butler, Rogers simply cannot establish that counsel's performance in investigating the 1986 assault was deficient. (*Strickland*, at p. 689.) In fact, the only affirmative evidence available shows that Lorenz had valuable information regarding Butler's account of the assault.

In regards to the items 1 and 2, Lorenz had the report of the interview with Butler, which tracked closely with the taped interview. (4 RH Exhs.

1038-1044 [report from Lorenz's file]; compare with 6 RH Exhs. 1637-1686.)[73] The report noted Butler's description of her assailant as having a mustache, moles, and chest hair (4 RH Exhs. 1041, 1042, 1044; see POBR 163), as well as being five feet, six to eight inches tall (4 RH Exhs. 1041). Lorenz knew that Butler's description "did not match his client 'in all details.'" (8 RH RT 1514.) The report showed that Butler described his truck as being a white Chevrolet that reminded her of a dealer truck, with wooden sideboards with brackets. (4 RH Exhs. 1037, 1042; see POBR 163.) The reports of Rogers's arrest showed that he had a crème 1966 Ford pickup with a camper shell. (6 RH Exhs. 1509.) In addition, Lorenz was aware that Rogers's case "was widely discussed" by the Union Avenue prostitutes, that he was shown on television appearing in jail clothes, and that people in jail watch television "all day long" (8 RH RT 1415, 1450-1451, 1526-1529.) Ryals testified, "I gave the defense counsel everything I had. A lot of it was my own work product because that's what I wanted to do because I didn't want the case over turned." (10 RH RT 1988.)

In addressing item 4, Rogers argued that an investigation would have disclosed that "Petitioner had been involved in processing, citing and releasing Ms. Butler in the course of her very first arrest in Bakersfield." (POBR 169.) However, Rogers does not answer this Court's question, which was, "4) whether petitioner had been involved in any prior *arrests* of Butler before she identified him as her assailant?" (Italics added.) The answer the referee found is: No, he was not.

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[73] Lorenz testified, "neither Mr. Soliz or Mr. Hodgson are known to . . . falsify evidence or anything like that either. They have a pretty good reputation as far as I'm concerned." (8 RH RT 1519.) In light of Lorenz's opinion and the apparent completeness of the report, Lorenz could reasonably rely on it to accurately state the substance of the interview and, under all the circumstances, decide not to listen to the tape.

As to item 3, Ryals' testimony showed that she informed Lorenz of Butler's criminal history, which necessarily included the nature of the conviction for which she was serving time. (10 RH RT 1988.) In addition, the evidence shows that he directed his investigator, Charles Feer, to check for "arrest records" on four prosecution witnesses, including Butler, and that Feer gave Lorenz lists of cases with charges, filing dates, and court numbers for each. (2 RH RT 348-349; 12 RH RT 2448; 4 RH Exhs. 1050.) It may not be assumed, as Rogers and the referee do (POBR 206-207), that the request means Lorenz had not previously received any information on Butler's criminal record. It would have been reasonable for him to double-check any information he received from the District Attorney's Office on the possibility that information from Butler's "rap sheet" was incomplete, especially as to recent events. As such, the evidence fails to show that the investigation was not "conducted in a manner to be expected of a reasonably competent attorney acting as a diligent advocate" or in what respects it might have been inadequate.

Nonetheless, the referee still found that counsel did not investigate "the identity of Butler's assailant; whether she had seen petitioner on television before she identified him; Butler's criminal history; and whether Butler had been involved with petitioner in previous arrests (in this case previous citation and notice to appear) . . . ." But without evidence to show whether and to what extent Lorenz investigated these issues, the referee's finding that Lorenz did not investigate these issues is not supported by substantial evidence and should be disregarded.

Indeed, the referee pointed to a single fact in support of its conclusion that Rogers's counsel failed to adequately investigate the 1986 assault on Butler: the timing of when Lorenz requested material to impeach Butler. This fact alone is not enough. As discussed above, the record does not reveal the precise moment when Lorenz began to prepare for Butler's

testimony; he may well have obtained copies of Butler's arrest report from the District Attorney's Office before his investigator delivered the report in court. In short, the record does not provide enough evidence about Lorenz's investigation to conclude that the investigation was inadequate, and Rogers cannot carry his burden of showing deficient performance by asserting a lack of evidence showing that an adequate investigation occurred.

2. Rogers fails to show that counsel did not have the "additional evidence" discussed in question 8 of the reference order

Related to Question 7, this Court asked the Referee to identify the "additional evidence" that would have been disclosed had an adequate investigation occurred. The Court further asked the referee to identify the investigative steps that would have led to the "additional evidence."

In particular, this Court asked:

> (8) If trial counsel's investigation was inadequate, what additional evidence would an adequate investigation have disclosed? How credible what that evidence? What investigative steps would have led to that additional evidence?

As discussed below, the referee's list consists of evidence that counsel, for the most part, already had in his possession at trial. The referee's finding therefore suggests that counsel may have conducted an adequate investigation after all. The record certainly does not support a finding to the contrary.

a. Counsel possessed most of the additional evidence, which suggests that counsel conducted an adequate investigation

The referee listed six pieces of "additional evidence" that counsel would have discovered had he conducted an adequate investigation. (Report at p. 17.)

The first piece of evidence, that "petitioner did not match Ms. Butler's description," was evidence counsel had with him at trial. The police report contained a summary of Butler's description of the assailant. In part, the report provided counsel with the following description of the assailant:

> TAMBRI BUTLER described the subject in this incident as being a white male, between the age of 45 to 48 and maybe close to 50. She further described him as 5'6" to 5'8" inches tall, 160 to 175 pounds, not fat and more filled out. She said that his chest was more filled than his stomach. She said that he had a thick bushy mustache. She said that the mustache was not too curly nor straight. She said that the subject had more hair on his sides and on the back of the head than on top. She said that the subject had moles across his back above the waist. She said that she noticed the moles because at point when he got out of the truck, that something had hit his foot and as he turned around and sat on the seat for just a minute, she saw dark little moles on his back. She said that this was just prior to her giving him oral sex. She also described him as not being scared of her at all. She also said that the subject had hair on his chest which was not too thick, but that it was spread across the front and around the belly. She said that the hair on his chest was not too thick because she could see the chest through it. BUTLER said that he had brown hair. She also said that the subject did not look quite so fat and that he did not have much of a stomach.
>
> BUTLER also said that she could not remember too well, but thought the subject on that particular evening was wearing a blue plaid shirt and that he may have had a tan jacket, but was not wearing it. She said that the subject also had a gold watch with a latex band and she described the band as having little pieces. She said that she also noticed that the subject was not wearing a necklace nor any rings.

(2 RH Exhs. 309-10.)

The third piece of evidence, that "petitioner had no access to the 1966 truck the jury associated with petitioner until almost a year after Butler was attacked (established through Toby Coffey)," was put before the jury during the guilt phase. (17 RT 4666-4668.) Mr. Coffey testified that he

sold the white pickup truck to Rogers in December 1986 and Rogers began driving the truck a couple weeks after it was sold to him. (17 RT 4668.)

Counsel possessed a portion of the fourth piece of evidence. He had news media coverage that he obtained in connection to the change of venue motion. It was also common knowledge around Bakersfield that Rogers's case was highly publicized, a fact that Lorenz mentioned during Butler's cross-examination. (22 RT 5803.)

The fifth piece of evidence, that "Ms. Butler could be impeached with a felony conviction of H&S 11351 (use Court conviction records)," was evidence counsel possessed. As already established, counsel had, at a minimum, Butler's "arrest record" and possibly a complete criminal history report from the prosecution.

b. An adequate investigation would have not necessarily led to the remaining evidence

As for the remaining evidence, the investigative steps the referee believes counsel should have taken do not necessarily lead to the evidence. In other words, the referee's findings on this question are merely speculative.

For the fourth piece of evidence, that Butler saw Rogers on television before identifying him, the referee suggested that counsel should have "checked and obtained from the local new media all of the TV coverage of petitioner's arrest, and then contacted the jail personnel and established that television sets were available in Ms. Butler's cell and that the coverage was essentially around-the-clock." (Report at p. 18.) There are several unreasonable aspects to the referee's finding. First, it appears unreasonable for counsel to go to such lengths to investigate whether a aggravating witness, whose identification was not disputed, saw Rogers on television some time before she identified him. Second, the investigative steps would not have necessarily led to evidence that Butler saw Rogers on television

before she identified him. Even if counsel could establish that there were televisions in the common area of the jail, and that the channel was covering the case "around-the-clock," counsel still could not affirmatively establish that Butler watched those televisions at the exact moment when Rogers was shown walking in handcuffs.

The referee further speculated, without evidence in support, that counsel would have obtained this evidence had he interviewed people who knew Butler. (Report at p. 18.) The only person who may have helped establish that Butler saw Rogers on television was Kay Davis[74] who likely would not have spoken to Rogers's counsel since counsel's sole purpose was to defend the person who assaulted her friend. Therefore, the referee's finding that evidence would have been discovered is not supported by the record.

The sixth piece of evidence, that Butler had a previous encounter with Rogers in 1985 when she was released from jail (Report at p. 17), also would not have been discovered had an adequate investigation occurred. A reasonably diligent counsel, whose strategy did not involve disputing a witness's identification of his client, would not scour police records in an effort to find any possible interaction between his client and the witness. The evidence may have been more likely found had it been an actual arrest report, the information this Court actually asked the referee to investigate. But as it stands, the evidence the referee identifies is a "notice to appear," which only shows that Butler and Rogers signed the same form at some point.

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[74] The referee also suggested an interview with William Wiese, Butler's boyfriend at the time, but could not confirm that one would even be possible since Wiese may not have been alive at the time (Report at p. 18), which emphasizes the extent to which the referee's findings are based on speculation.

c. Counsel is presumed to have conducted an adequate investigation, which includes obtaining the taped interview police had with Butler

Lastly, there is no evidence to show that counsel did not listen to the taped interview police conducted with Butler or that counsel did not read the transcript of the interview. The referee assumes, without any evidence, that counsel did not. As noted several times above, the burden is on Rogers to prove that counsel did not conduct an adequate investigation, which he has not established here. Thus, this Court can presume that counsel had information that Butler described the assailant as having "big hands." It can also be presumed that counsel, through Rogers, knew that Rogers's hands could be considered "small."

3. Substantial evidence does not support the referee's finding that counsel acted deficiently when he did not introduce evidence regarding Butler's assailant, whether Butler saw Rogers on television, Butler's criminal history, or any prior arrests involving Rogers

In Question 9, this Court asked:

> (9) After conducting an adequate investigation of the assault on Butler, would a reasonably competent attorney acting as a diligent advocate have introduced additional evidence regarding: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What, if any, rebuttal evidence would have been available to the prosecution?

As the People discuss above, counsel possessed most of the "additional" evidence discussed in Question 8, so it is reasonable to presume that counsel made a strategic decision to limit the amount of "additional" evidence presented because he did not want to ultimately

distract from the mental illness defense that relied on the jury's sympathy for the "good David Rogers" to avoid the death penalty. Counsel's decision was reasonable.

a. Under *Strickland v. Washington*, courts are required to defer to counsel's reasonable strategic decisions

In *Bell v. Cone*, the Supreme Court repeated what it first said in *Strickland*: "[j]udicial scrutiny of a counsel's performance must be highly deferential," with "every effort . . . b[eing] made to eliminate the distorting effects of hindsight." (*Bell v. Cone* (2002) 535 U.S. 685, 698, quoting *Strickland*, *supra*, 466 U.S. at p. 689.)

Related to *Strickland*'s principle that courts must defer to an attorney's decisions, and no less fundamental, is the Court's firm rejection of any kind of "checklist of judicial evaluation of attorney performance." (*Strickland*, *supra*, 466 U.S. at p. 688.) Any "set of detailed rules for counsel's conduct" could not account for "the variety of circumstances faced by defense counsel" and would both "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." (*Id.* at p. 688-89.) As the Supreme Court reiterated in *Roe v. Flores-Ortega*, "the Federal Constitution imposes [only] one general requirement: that counsel make objectively reasonable choices." (528 U.S. 470, 479.) Beyond this, "[m]ore specific guidelines are not appropriate." (*Strickland*, *supra*, 466 U.S. at p. 688.)

In four different cases, the Supreme Court found that counsel did not perform deficiently in deciding not to present evidence of a defendant's background at his capital sentencing. In each case, the Court concluded that it was reasonable for counsel to believe that the mitigating evidence could undermine the strategy that counsel had reasonably decided upon.

In *Strickland* itself, counsel's strategy for avoiding the death penalty was to rely on the defendant's "remorse and acceptance of responsibility" and to argue, based solely on statements made at the guilty plea colloquy, that the defendant had "committed the crimes under extreme mental or emotional disturbance." (466 U.S. at pp. 673-674.) Having settled on that strategy, counsel "decided not to present . . . evidence concerning [the defendant's] character and emotional distress state." (*Id.* at p. 673.) The Supreme Court held that counsel's "strategic choice to argue for the extreme emotional distress mitigating circumstances and to rely as fully as possible on [the defendant's] acceptance of responsibility for his crimes" was "well within the range of professionally reasonable judgment." (*Id.* at p. 699.) Indeed, the Court concluded that "there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." (*Ibid.*) The Court deferred to counsel's decision to rely on the defendant's acceptance of responsibility because the sentencing judge's "view on the importance of owning up to one's crime's was well known," and it deferred to counsel's decision not to present evidence because the tactic "ensured that contrary character and psychological evidence . . . would not come in." (*Ibid.*)

The Court has taken the same deferential approach in three subsequent cases. In *Darden v. Wainwright* (1986) 477 U.S. 168, the Court upheld the reasonableness of counsel's strategy "to rely on a simple plea for mercy from the [defendant] himself (*id.* at p. 186), and not to present mitigating evidence (*id.* at p. 184), concluding that counsel might reasonably have believed that any effort to suggest that the defendant was not violent and could not have committed the crimes at issue would have opened the door to devastating rebuttal with his prior convictions and psychiatric evidence. (*Id.* at p. 186.) In *Burger v. Kemp* (1987) 483 U.S.

776, the Court sustained defense counsel's decision to rely on a strategy of showing that a co-defendant had exerted influence over the defendant's will (*id.* at p. 779) and to present any "mitigating evidence at all" (*id.* at p. 788), even though there was evidence that the defendant "had an IQ of 82 and functioned at the level of a 12-year-old child." (*Id.* at p. 779.) The Court deferred to counsel's judgment that presenting such evidence would have exposed the defendant to evidence of his lack of remorse, and that seeking to show that he had a "troubled family background" could have revealed his "violent tendencies" and brushes with the law, which were "at odds" with the chosen strategy. (*Id.* at p. 793.) In *Bell v. Cone*, the Court held that the state court was not "objectively unreasonable" under 28 U.S.C. section 2254 in sustaining counsel's strategic judgment not to present mitigating evidence at sentencing, and instead to rely on evidence adduced at the guilt stage that his offense could have been influenced by his military service and use of drugs. (535 U.S. at pp. 699, 702.) The Court held that sound trial tactics made it reasonable to do so, since the defendant himself might have "lash[ed] out" on the witness stand and calling other witnesses might have allowed the prosecution to elicit his criminal history. (*Id.* at p. 702.)

b. Defense counsel reasonably decided to focus on Rogers's mental issues as mitigating evidence and attack Butler's motive for testifying rather than conduct a mini-trial on the identification

Counsel decided that the best hope Rogers had for avoiding the death penalty was to argue that Rogers suffered from a mental illness—one that manifested itself as violence against prostitutes—resulting from extensive physical and sexual abuse as a child. So Lorenz's overall penalty phase strategy, as shown by the evidence he presented and his argument to the jury, was to show that there was a "good" David Rogers and a "bad" David Rogers; that the "bad" David's actions were the result of a horrible

childhood; and that the actions and character of the "good" David Rogers outweighed that of the "bad" and warranted a sentence of less than death. (22 RT 5957-5958, 5964-5966; 8 RH Exhs. 1459-1460, 1466-1468.) He noted that, in contrast to people on Death Row, his client did not have a long criminal record or lacked human feelings. (22 RT 5956-5957.) "We have an individual was in many ways a good man, a friend to his friends, a lover and companion to his wife, a grandfather to his children [*sic*]," Lorenz argued to the jury. (22 RT 5957.) He reminded the jurors that Rogers is "not a violent person by general disposition" and could defuse violent situations without using force himself. (22 RT 5958-5959.)

Below is counsel's argument to the jury at the sentencing phase:

> We have a man who has extreme emotional problems. We have a man who did good things in his life. We have a split personality. We have an individual who was in many ways a good man, a friend to his friends, a lover and companion to his wife, a grandfather to his children.
>
> We don't have someone who has been in and out of prison all his life and every time he is out he is on parole. It's another situation.
>
> . . .
>
> And although we talked about that before, I submit there is no competent evidence that somehow this is a cold, calculated type of individual that has some motive to do these particular crimes.
>
> This a person who is emotionally disturbed, deeply emotionally disturbed. That is why these things happened. There is no rational explanation. There is no rational reason why Mr. Rogers ever got involved in this.
>
> There are explanations of emotions. Clearly, the factors in mitigation outweigh the factors in aggravation.

(22 RT 5963.)

In the referee's opinion, a reasonable competent attorney would have introduced additional evidence regarding: (1) the identity of Butler's assailant; (2) whether Butler had seen petitioner on television before she identified him; (3) Butler's criminal history; and (4) whether Rogers had been involved in any prior arrests of Butler before she identified him as her assailant. The problem with the referee's finding is that it is considered in a vacuum; the referee never considered the possibility that counsel could have strategically decided not to present additional evidence.

Because counsel possessed this additional evidence for the most part, the referee was required to presume, under *Strickland*, that counsel had a rational tactical reason for not introducing this evidence, unless the record disclosed "no rational tactical purpose" for the challenged conduct. Here, the record reveals that counsel had a rational tactical reason for not introducing additional evidence to further challenge Butler's eyewitness identification of Rogers as the assailant: he did not want to distract from his chosen strategy that Rogers's conduct resulted, in large part, from a traumatic, violent childhood.

When asked during the reference hearing whether he recalled making a decision to go with mental illness defense as his focus of the penalty phase, Mr. Lorenz stated:

> A. As I recall, this case involved a taped confession that was given to, I believe, a Sheriff's officer, probably John Soliz. I just remember this because once in a while I see him when he is working out, I just happen to run into him. Although we don't talk about Rogers. But, I think there was a reasonably detailed confession, as I recall, probably even taped.
>
> Q. And so based on that, you went with the mental issues as your approach in the penalty phase?
>
> A. You know, probably in a general sense. But I just wanted to say it kind of like this, that if you have a defense of a case, hypothetically, that's -- say the defense is that my client

wasn't at the scene, then you want to present a defense of self-defense at the same time. You have to put you energy somewhere. So I believe that Mr. Rogers had deep psychological problems that probably would have been ferreted out in a modern Sheriff's Department with psychological testing. He had a very nice personality as well. Obviously some of these acts were another person. But, he had a very nice demeanor. But I think I saw it probably pretty much primarily as a psychological or psychiatric type of defense.

(8 RH RT 1426.)

The record therefore reflects that counsel made a strategic decision to focus on Rogers's mental illness and how it affected his behavior towards prostitutes. Butler's testimony that Rogers assaulted her was not inconsistent with counsel's theory. Indeed, Butler's experience with Rogers squarely fit counsel's description of Rogers's mental illness: Rogers is a decent person who becomes someone else when engaged with prostitutes. Thus, Butler's testimony was a double-edged sword: it implicated Rogers in another assault on a prostitute but further bolstered counsel's claim that Rogers was mentally unstable with prostitutes. Counsel's decision to proceed with a mental illness defense during the sentencing phase was reasonable under the circumstances.

At the reference hearing, Rogers's habeas counsel questioned Lorenz about his decision to not fully attack Butler at the penalty phase. Lorenz provided a possible explanation for his decision. Below is the exchange counsel had with Lorenz:

Q. In an effort to discredit -- to credit her description would you want the entire statement of detail in order to best describe -- best -- have the best description of what she said on February 18?

A. You know, maybe. But also when you are trying cases, if you make a super big deal out of something you may take emphasis away from what you are really trying to do. So, I would normally pick out highlights of things that didn't work

and go with that. But not make an entire mini trial over one witness where maybe you -- you know, maybe that's not going to be favorable.

Q. Was that your concern with Ms. Butler? Do you know?

A. Well, I don't really. You know, I don't have a clear memory of what thoughts were at the time. But I do recall basically thinking, you know, if we are going to go with a psychiatric type of defense, we are going to go with a psychiatric defense, we cannot totally dig a hole on some other aspect of the case. But, sure. I mean, if this was -- if it was her and he and that was a single case and that's what it is, you dig in more detail I would think.

Q. Okay. And the detail would be in the statement. Correct? Rather than --

A. Yeah. If this was like a robbery case and you had simple robber and one victim and that's what you had, you would probably put all your emphasis on that.

Q. I understand. And when you are going to -- you have a potentially very significant aggravation witness like Ms. Butler, wouldn't you want to do what you could to discredit her?

A. Yeah. I don't disagree with that. In retrospect I'm thinking well, maybe the jury relied on her a lot more than we may have thought at the time. I don't remember.

Q. Go ahead. I'm sorry.

A. I don't remember her being a particularly convincing or powerful type of witness. Maybe I'm wrong.

(8 RH RT 1517-18.)

The referee's findings fail to account for the possibility that counsel tactically decided to limit the evidence used against Butler. Rather, the referee took the position that if the evidence existed, then a reasonably competent attorney would have used all of it to fully attack Butler. (Report at p. 19.) But the record reflects Lorenz instead chose to launch more

limited, targeted attacks against Butler. For instance, Lorenz did not have to introduce testimony from Rogers's wife that he never had a mustache to be considered a diligent advocate because counsel effectively cross-examined Butler about the discrepancy in her description and his client's appearance. (22 RT 5798-5799.) On several occasions, Lorenz highlighted the fact that Butler said her assailant had a mustache, while his client had never worn one before trial. (22 RT 5798-5799.)

As for the other differences in appearance, counsel could have chosen to focus on the most obvious difference, one that would not require lengthy testimony to prove. Lorenz stated as much in the reference hearing. When asked whether it was a reasonable strategy to thoroughly undermine Butler's description, he answered,

> You know, maybe. But also when you are trying cases, if you make a super big deal out of something you may take emphasis away from what you are really trying to do. So, I would normally pick out highlights of things that didn't work and go with that. But not make an entire mini trial over one witness where maybe your -- you know, maybe that's not going to be favorable.

(8 RH RT 1514-15.)

Perhaps another reason for why counsel decided to not cross examine Butler vigorously on her identification is that counsel had an alternative strategy: attack Butler's motive for testifying. Counsel's cross-examination provides important clues about counsel's strategy to deal with Butler's testimony. He portrayed Butler, for instance, as a desperate heroin addict trying to get out of jail by concocting a story about being assaulted by his client. His client's case is an obvious target because it was highly publicized and involved a sheriff's officer who worked in the jail. At the penalty phase, Lorenz attacked Butler's motive for testifying in the following manner:

Q. Well, this incident back in '85 or '86, if it happened, were you using a lot of heroin at that time?

A. Between 120 or 160 a day.

Q. A day, so that meant you shot up several times a day?

A. Three time a day.

Q. Did you feel some kind of effect from that drug?

A. At that point I wasn't really getting loaded. I was just getting well. I was maintaining.

Q. So, the 120 to 160 a day, that was just maintain type of stuff?

A. Exactly, not to get you under the influence or anything. That was just to keep me well. If I got any more, then I got loaded.

Q. You were trying to clear up basically, is that what it was?

A. No, I was just surviving.

Q. Well, isn't it true that when you go into custody that you go through, that you go through some painful withdrawals, physically painful symptoms?

A. Yes, sir.

Q. It hurts?

A. Very much.

Q. Can't sleep, throw up, everything else?

A. Un-hmm.

Q. Is that right?

A. Yes, sir.

Q. You had been through that experience a few times?

A. Yes, I have.

Q. You have had your arrests and you have done your time, that sort of thing, correct?

A. Yes, sir.

Q. Well, isn't it true that although perhaps no formal promises have been made to you that you, you hoped to get out of jail as soon as possible?

A. No, I don't get out of jail until August the 9th.

Q. Unless somebody helps you out a little bit?

A. I don't expect any help.

Q. You know you are not going to go to prison.

A. I have already been sentenced to county.

(22 RT 5800-01.)

Thus, the record supports a finding that Lorenz made a strategic decision to focus on Butler's motivation to testify, rather than on the accuracy of her identification. This way, trial counsel could discount Butler's testimony without overly distracting from counsel's broader strategy to focus on his client's psychiatric issues to mitigate the punishment. That decision was objectively reasonable.

c. Counsel questioned Butler on whether she saw Rogers on television

The referee also faults counsel for not introducing evidence on whether Butler had seen Rogers on television before she identified him. (Report at p. 19.) Counsel asked Butler directly on cross-examination whether she had seen Rogers on television or newspapers before she identified him; Butler said no. (22 RT 5795.) Additional evidence about televisions in jail would not have done anything to change or undermine Butler's answer, and would have only served to distract from counsel's chosen strategy. There is no evidence to suggest that counsel acted

unreasonably by not introducing more evidence about television watching in jail.

d. Counsel's method of impeaching Butler was prior arrests was strategically reasonable

The referee further presumed that counsel did not know about the offense for which Butler was in custody. (Report at p. 19.) But there is no evidence presented to show counsel did not have this information. Using the proper burden of proof, the referee's finding is not supported by substantial evidence because the referee had to presume, absent evidence to contrary, that counsel conducted an adequate investigation.

Moreover, counsel could have chosen to focus on the numerous arrests for drug and prostitution-type of offenses to show Butler was a habitual offender looking for early release from jail, rather than to focus exclusively on one offense. In fact, counsel impeached Butler with the "three, maybe four" prostitution-type arrests, also crimes of moral turpitude, and the "eight, nine" heroin arrests. (22 RT 5801.) Counsel could reasonably have believed that this was enough to thoroughly damage Butler's credibility.

e. The record shows there were no prior arrests

The referee further faults counsel for not introducing evidence of Butler's "notice to appear" when she was leaving the jail in 1985, to show that Butler may have had some contact with Rogers before she identified him. (Report at p. 19.) As the referee found, there is no evidence to indicate that Rogers was involved in any of Butler's arrests.

Moreover, counsel had a reason for not doing an exhaustive search of Butler's prior arrests to find anything indicating that she may have had some interaction with his client before she testified: counsel had chosen to focus on the mental illness defense, and to address Butler's testimony by

focusing on her motivation for testifying, rather than how accurate her identification may have been. Counsel's chosen strategy was reasonable.

4. Counsel had tactical reasons for not challenging the admissibility of Butler's testimony

In response to Rogers's argument that his trial counsel was constitutionally deficient because he did not seek to exclude Butler's penalty phase testimony through a *Phillips*[75] motion, this Court asked:

> (10) Did trial counsel have tactical or other reasons for failing to challenge the admissibility of Butler's testimony? If so, what were those reasons? After conducting an adequate investigation into the 1986 assault, would reasonably competent counsel have moved to exclude Butler's testimony?

The referee found that counsel made a tactical decision and that counsel was not required to bring the motion simply because he had nothing to lose, as Rogers argued. (See *People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51.) The referee's finding precludes relief on this particular issue.

a. Counsel was not required to bring a *Phillips* Motion simply because he had nothing to lose

In *Phillips*, a three-justice plurality commented, "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes under Penal Code section 190.3, subdivision (b). As held in *People v. Clair* (1992) 2 Cal.2d 629, 677-678, the *Phillips* plurality did not attempt to impose any requirement for a hearing and, in any event the comment "was clearly dictum." In *People v. Boyer*, *supra*, 38 Cal.4th at p. 477, fn. 51, the Court noted that *Phillips* did not suggest that the hearings it must include live testimony. In *Boyer*, the Court declined to decide whether the trial court was required to hear live

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[75] *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25 (*Phillips*).

testimony, finding that an identification which was weaker than that in the instant case was not excludable as the tainted produce of flawed live lineups and, in any event, the evidence was legally sufficient to permit its presentation to a jury. (*Id.* at p. 477.)

Although Rogers notes that Lorenz stated no tactical reason for not making such a motion (POBR 171), he apparently ignores the presumption that Lorenz acted for valid tactical reasons. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) In any event, Lorenz testified that, at the time of Rogers's trial, he was aware of *Phillips*, which discussed a motion to "test the sufficiency" of evidence of other crimes. (8 RH RT 1500-1501.) The fact that he did not make one raises the presumption that Lorenz had tactical reasons for not doing so.

Rogers further argues that, if Lorenz had made a "*Phillips*" motion, he could have had the benefit of examining Butler at the hearing had "little, if anything, to lose." (POBR 171-172.) However, as held in *Boyer*, a hearing on such a motion did not require live witnesses. In that case, the motion was decided based on the prosecutor's offer of proof. The same would likely have occurred at Rogers's trial, given the judge's interest in moving the case along. (10 RH RT 1950.) If the report on Butler's statement had been presented in connection with the motion, the court would not have abused its discretion in deciding not to require live testimony. Butler's report of the assault and her identification of Rogers were clearly sufficient to support a denial of such a motion. These circumstances provided a valid and proper reason not to make the motion. As held in *Knowles v. Mirzayance* (2009) 556 U.S. 111, 126-127, an attorney is not required to pursue an inapplicable defense even when there is "nothing to lose."

It is presumed then that trial counsel had a valid reason for failing to challenge the admissibility of Butler's testimony. The reason was that he could reasonably predict that such a motion would be denied, with no

benefit to the defense. After conducting an adequate investigation into the 1986 assault, reasonably competent counsel would not have moved to exclude Butler's testimony.

5. Counsel Made a tactical decision to limit the attack on Butler's testimony because he did not want to distract from the psychiatric defense

In Question 11, this Court asked:

> 11. Did trial counsel have tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony? If so, what was/were the reason(s)? What impeaching or rebuttal evidence was available to counsel upon reasonable investigation? Would a reasonably competent attorney acting as a diligent advocate have impeached or rebutted Butler's testimony? If so, in what manner?

Since Lorenz did impeach and rebut Butler's testimony at the trial, the principal issue is whether the evidence shows he acted incompetently in not doing more. The People will answer Question 11 in that light.

a. Counsel's tactics

The crux of Rogers's claim is that Lorenz should have mounted a comprehensive attack on Butler's testimony. (POBR 162-169, 172-174.) However, that was not the only valid tactical choice. Another would be to make targeted attacks on the major weak points in Butler's testimony without giving her more opportunities to explain apparent inconsistencies and tell more of the story of the assault. Lorenz testified that he usually approached cases in that way.

During the reference hearing, Lorenz was asked if he would want Butler's "entire statement of detail in order to . . . have the best description of what she said on February 18" in order to discredit her description. Lorenz answered:

> You know, maybe. But also when you are trying cases, if you make a super big deal out of something you may take

> emphasis away from what you are really trying to do. So, I would normally pick out highlights of things that didn't work [apparently, in an opposing witness' testimony] and go with that. But not make an entire mini trial over one witness where . . . maybe that's not going to be favorable.

(8 RH RT 1514-1515.)

He was next asked, "Was that your concern with Ms. Butler? Do you know?" He said:

> Well, I don't really. You know, I don't have a clear memory of what [sic; my?] thoughts were at the time. But I do recall basically thinking, you know, if we are going to go with a psychiatric type of defense, we are going to go with a psychiatric defense, we cannot totally dig a hole on some other aspect of the case. But . . . if it was her and he and that was a single case and that's what it is, you dig in more detail I would think.

(8 RH RT 1515; cf. 8 RH RT 1512 [he would do what he could to impeach and minimize Butler's testimony if that was his "main emphasis"—a comment which should not be taken too literally].) Lorenz said he would want to do what he could to discredit her, but he did not say he would do it by raising every possible point, regardless of its significance. (8 RH RT 1516.)

If Butler's testimony was like that at the reference hearing, her presentation was very sympathetic when she described being shocked with the stun gun and having a gun fired on the bridge of her nose, begging for her heroin (22 RT 5784-5786, 5787-5789; 2 RH Exhs. 367-369, 370-372), being pushed out of the truck, avoiding being run over (22 RT 5790-5791; 2 RH RT 373), and concluding there wasn't much the police would do since she was "a working girl and a junkie" (22 RT 5792-5793; 2 RH Exhs. 375). Ryals testified at the reference hearing, "She was visibly shaken, she was afraid, but she still answered the questions. She was unlike the other prostitutes that I had put on [*sic*] the trial." (10 RH RT 1973.) Ryals also

said that the jurors were "all leaning forward, listening, [v]ery, very focused on what Ms. Butler was saying," except for a "little lady" in back who was "dabbing her eyes with a Kleenex," "[b]ut she was listening." (10 RH RT 1975-1976.)

However, Butler did not remember everything she had told the investigators over a year earlier. For example, she testified she could not tell a Ford from a Chevy and did not remember what she told the investigators, except that the pickup was white. (22 RT 5794 [2 RH Exhs. 377].)[76] This was consistent with her interview (6 RH Exhs. 1647) as well as with her testimony at the reference hearing (3 RH RT 548; 6 RH RT 1087, 1146). Butler evidently forgot seeing "Chevrolet" in red lettering on the tailgate, something she had told investigators. (6 RH Exhs. 1647.)[77]

On cross-examination, Lorenz elicited Butler's testimony that she had been in custody about a month when she spoke to investigators in February 1987; that she was released in April; that she was in custody again but was not sent to prison although she had "several arrests for heroin." (22 RT

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[76] Thus, it is not true that the jury was left the impression that the assailant's truck corresponded with the beige 1966 Ford pickup petitioner bought from Toby Coffee in late 1987. (See POBR 29, fn. 39.)

[77] Lorenz could have raised the point on cross-examination, but it would not have provided a significant benefit. Coffey had already testified that he sold the 1966 Ford pickup to Rogers no earlier than December 1987, which was supported by a December 1987 smog test form signed by Coffey and a registration slip in Coffey's name. (17 RT 4666-4668; Tr. Exh. 78; see 2 RH Exhs. 324, 327.) Moreover, the interview tapes had not been transcribed, which would mean they would have to be played if there were any controversy about what Butler had said. Butler's voice on the tapes was quiet, calm, and matter-of-fact, although she had had no prior warning she would be asked about the year-old assault. Competent counsel would have wanted the jury to hear little or none of those tapes. Asking about minor points such as Butler's recollection of the make of the truck would make that more likely.

5796 [2 RH Exhs. 379].) As this Court has pointed out, Butler, as well as Martinez, "were examined and cross-examined on their criminal histories and their possible motives for testifying against defendant." (*People v. Rogers* (2006) 39 Cal.4th 826, 904.)

Lorenz raised the point that Butler associated her assailant with the name "Burch" while she thought Deputy Lockhart had suggested the name "Lenski" or "Loski." (22 RT 5796-5797 [2 RH Exhs. 379-380].) She said, "I didn't know the man's name at the time." (22 RT 5797 [2 RH Exhs. 380].) She had testified on direct examination, "I think he told me his name was David, but I don't remember if I asked him or not." (22 RT 5782 [2 RH Exhs. 365].)

Butler testified she told Lockhart she had seen her assailant's face in the "Behind the Badge" book but did not tell Lockhart who it was. (22 RT 5793 [2 RH Exhs. 376].) She did not tell Lockhart who it was because he was below her in the jail and she was frightened. (22 RT 5799 [2 Eh Exh. 382].)

During his cross-examination of Butler, Lorenz repeatedly referred to the fact that that Butler thought her assailant had a mustache. (22 RT 5797-5799, 5801, 5802 [2 RH Exhs. 380-382, 384, 385].) Butler testified, "I recall a mustache" and said that she had told investigators her assailant had a mustache. (22 RT 5798-5799 [2 RH Exhs. 381-382].)

Lorenz asked Butler about her heroin use and going through withdrawal when she has been arrested. (22 RT 5799-5801 [2 RH Exhs. 382-383].) He then asked the following series of questions:

> Q Well, isn't it true that although perhaps no formal promises have been made to you that you, you hoped to get out of jail as soon as possible?
>
> A No, I don't get out until August the 9th.
>
> Q Unless somebody helps you out a little bit?

A I don't expect any help.

Q You know you are not going to go to prison.

A I have already been sentenced to county.

(22 RT 5801 [2 RH Exhs. 383].)

Lorenz then elicited Butler's testimony that she had about eight or nine heroin arrests and about three or four prostitution arrests. Next, he asked:

Q Well, don't all these incidents kind of cloud together for you sometimes?

A Not when a man holds a gun to your head, no. sir.

(22 RT 5801 [2 RH Exhs. 383].)

Lorenz then asked what she did about it. Butler said she just went home to her "common-law husband" and "fell apart." (22 RT 5801-5802 [2 RH Exhs. 383-384].) Next, Lorenz questioned Butler about how she was visited her common-law husband when saw Rogers in the jail. (22 RT 5801-5802 [2 RH Exhs. 383-384].)

Lorenz then questioned Butler about being in custody (again) when Hodgson and the others came to show her photographs after Rogers's arrest. (22 RT 5802-5803 [2 Exhs. 386-387].) He then asked if the prostitutes in jail discussed the details of Rogers's case. Butler answered, "*I* didn't discuss it with a whole lot of people. It's not something I really wanted to discuss." (22 RT 5803.) Lorenz asked three more questions about discussions among the female prisoners. Butler would only answer with respect to her own assault, saying she had not discussed the details. (22 RT 5803 [2 RH Exhs. 386].) She then would not name her heroin "connection." (22 RT 5804.) Next, she said did not get out early, but said, "I want to do my time." (22 RT 5804.) He then asked if she was "totally cleaned up this time." She answered, "I can't say I am totally cleaned up. I

can't ever say I will quit doing drugs. I hope to. I have got a job. I have got plans too." (22 RT 5804; [2 RH Exhs. 387].) Lorenz had no further questions for Butler.

However, in cross-examining Lockhart, Lorenz elicited testimony that Butler did not give her the name Birch (22 RT 5807) and that she did not suggest any names to Butler (22 RT 5809). Lorenz also elicited testimony from Rogers's wife Jo that Rogers never grew a mustache. (22 RT 5909-5910.) Jo also showed the jury three family photo albums. (22 RT 5908-5912; Penalty Exhs. B, C, D), which presumably showed pictures of Rogers without a mustache.

Lorenz testified at the reference hearing, "I am the type of attorney that watches the jury." (8 RH RT 1452.) Presumably, he was also watching Butler and listening to her answers. Butler was intelligent, spoke well, generally presented herself well, and was evidently sincere. She remembered some details incorrectly, which could be attributed to various factors, including that she did not pay much attention to them at the time or heroin use. Lorenz would have known from her interview statement (whether from the report or the audio tape) that she remembered the important details consistently. In particular, she remembered the sequence of events during the assault, that her assailant grabbed the stun gun off of the dash board and the gun from the glove compartment. (4 RH Exhs. 887; 22 RT 5784-5785; 2 RH Exhs. 367-368.) In contrast, Imperatrice had far more trouble with more important facts than Butler. That Butler had trouble with more details in later interviews and at the reference hearing is not surprising given the twenty-five years that had elapsed since the incident, and has no tendency to show, as the referee found, that her initial story was false. (Report at p. 7.)

Lorenz could reasonably have believed he accomplished what he wanted by making his points about Butler's criminal record, drug addiction,

mustache description, names of her assailant, and likely reasons for bias against Rogers. He could reasonably have thought he had adequately suggested that Butler had lied in saying that her assailant was Rogers. (POBR 174.) Although Lorenz testified he thought it was a possibility that Butler had identified Rogers from seeing him on television (8 RH RT 1524), his actions in the trial showed that he pursued an alternative theory that Butler was lying in her identification, perhaps motivated by a desire for an early release, a theory about which he also testified. (8 RH RT 1512). Either theory would require to the jury to find, or at least suspect, that Butler had lied. As to the former possible defense theory, the jury would have to doubt Butler's testimony that she had recognized Rogers on A Deck. (22 RT 5780, 5791-5792 [2 RH Exhs. 363, 374-375].) The former theory had the further disadvantage that it could lead the prosecutor to introduce Butler's testimony that she had seen Rogers in the Union Avenue area following her within days after the assault. This evidence would both bolster Butler's identification and show consciousness of guilt as an implied threat, as did Rogers's actions when Butler confronted him in the jail.

Regarding the latter possible defense theory, Lorenz could have believed the jury would find it implausible that Butler had not discussed the assault on her by Rogers with other prostitutes in jail. Rogers had been arrested four days before she was interviewed, had been arraigned only the day before the interview, and there were television news stories of the arraignment the evening before the interview. (22 RT 5803; 2 RH Exhs. 386.) He may also have thought it implausible that Butler only wanted to "do [her] time" (22 RT 5804; 2 RH Exhs. 387), but wanted to avoid having her give a convincing explanation, such as the one given in Butler's declaration (1 EH Exhs 221 [¶ 8], 247) and reference hearing testimony (3 RH RT 507-508). Butler had implied the explanation and also appeared

sympathetic when she said she was not sure she would quit using drugs but that she wanted to have a normal life. (22 RT 5804; 2 RH Exhs. 387.)[78]

In short, there were some useful points to be made by cross-examination and contradiction, but Butler was potentially a very harmful witness. As a result, a competent attorney could have chosen to make his points and otherwise get her off the witness stand as quickly as possible. That is exactly what Lorenz did.

b. Sheila Bilyeu and other additional aggravating evidence

In addition to the assault on Butler, other aggravating evidence was available to the prosecution had counsel decided on a more extended attack on Butler.

On October 14, 1987, Ryals had filed a notice of evidence in aggravation. In addition to violent criminal incidents involving Clark, Benintende, and Butler, the notice included:

> 3. The incidents which occurred sometime in 1982 in which the defendant forced Sheila Bilyeu to engage in sex using a handgun. . . .
>
> 5. The incident in 1983 in which the defendant took Ellen Martinez to a cemetery, forced her to dress in flimsy underwear and took pictures of her.

(2 CT 360-361.)

After Rogers's arrest, Sheila Bilyeu met with investigators at a restaurant. (11 RH RT 2175.) The referee excluded any evidence as to what Bilyeu had said. (11 RH RT 2175-2176.) Hodgson had used Bilyeu

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[78] Ellen Martinez, whose report had led to Rogers's firing, testified she quit prostitution after the incident with him, two incidents with customers, and three or four arrests in a month or two. (22 RT 5772, 5776, 5778 ["I am lucky I guess."].) She went to Arkansas with outstanding warrants. (22 RT 5776, 5778.)

as an informant when she was a prostitute in the Union Avenue area and he was a patrol officer in the Bakersfield Police Department. (11 RH RT 2174-2175, 2178-2179.) Bilyeu later gave a tape-recorded statement to Detective Lage. The report of the interview was in Lorenz's file (4 RH Exhs. 1045-1048) immediately after the report of the Butler interview (4 RH Exhs. 1037-1044).[79]

The report stated in summary that in the summer of 1983, Rogers, in uniform, handcuffed Bilyeu, placed her in his patrol car, and drove her to a cemetery near 8th Street. There, he told her to put on several items of new clothing, including a short "Teddy" nightgown and a bra. While holding his duty revolver, he directed her to give him oral sex and then had vaginal intercourse with her. He let her put her clothes on and left her in the cemetery, forcing her to walk about two miles to get back to Union Avenue. (6 RH Exhs. 1589-1590.) Bilyeu's story closely resembles the incident involving Ellen Martinez, which the jury heard at the penalty phase.

Rogers had spoken to Bilyeu regularly while on patrol. (6 RH Exhs. 1590.) After the incident involving the nightgown, there were two or three occasions on which Rogers picked her up on Union Avenue, handcuffed her, took her to the cemetery, had sex with her, gave her $20—although he knew that "she always charged $40.00 to $50.00"—and left her at the cemetery. (6 RH Exhs. 1691.)

Bilyeu said she had told Deputy Ray Lopez and then Sergeant Ross about the incidents, but said she would not testify. (6 RH Exhs. 1591.)

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[79] The report on Bilyeau (6 RH Exhs. 1589-1592, Exhibit BB) was admitted in evidence as Soliz's past recollection recorded. (9 RH RT 1857-1868.)

Then-Lieutenant Ross knew Bilyeu but denied that she had told him about any misconduct involving Rogers. (6 RH Exhs. 1500.) Deputy Lopez also denied that such a report had been made to him. (6 RH Exhs. 1501.) Ross was the sergeant of Squad 7, which included Rogers, Ulysses Williams, Alberta Dougherty, and "probably" Lopez. (11 RH RT 2102-2103, 2171.)

Ryals had Bilyeu on her witness list, but decided not to use Bilyeu after speaking to her. (10 RH RT 1974-1975.) Ryals "felt" that the evidence of the two charged murders was sufficient. (10 RH RT 1947-1948.) She decided to use Butler after speaking to her. (10 RH RT 1948-1951.)

Rogers argues that the Bilyeu evidence would not have been damaging and that Lorenz should not have been concerned about it, principally because Lieutenant Ross would have denied that Bilyeu had reported it to him, as she told Detective Lage three years later. (POBR 169-171; see POBR 144-149 [Statement of Facts].) However, since Bilyeu said she told Ross she would not testify, it would be plausible that Ross would not remember it. In addition, it would be easier for Bilyeu to remember an event than whether she had described it to someone. Further, if the jury had concluded that the Squad 7 sergeant—like squad members Ulysses Williams, who did not forward Winebrenner's report for investigation; and Alberta Dougherty who let Martinez's rapist go—had no interest in taking in assault or rape reports from prostitutes, the on-the-job performance portion of Rogers's good-character defense would have collapsed.

Moreover, it would be expected that if the Bilyeu evidence were presented, the Martinez evidence would be presented as aggravating evidence, rather than just as evidence of the motive for the charged murders. (10 RT 5331-5533, 5538-5539; 3 CT 797-980.) The offenses of false imprisonment (Pen. Code, § 236) and false arrest under color of authority (Pen. Code, § 146) would have constituted "criminal activity"

"which involved" "the express or implied threat to use force or violence" under Penal Code section 190.3, factor (b). For that purpose, the Bilyeu and Martinez evidence would be mutually supportive because both showed a common design or plan, although not similar enough to meet the "signature" test to show identity.

As a result, the Bilyeu evidence fits within Question 11, "tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony" in a comprehensive way.

Trial counsel had valid tactical or other reasons for failing to further impeach or rebut Butler's testimony. Those reasons were that it would probably have led the prosecution to introduce more damaging evidence for little or no additional benefit to the defense. The impeaching or rebuttal evidence available to counsel upon reasonable investigation included matters shown by Butler's interview and her criminal record. An attorney acting as a diligent advocate could reasonably have decided not to further impeach or rebut Butler's testimony.

While the referee found that counsel had no tactical reason for failing to impeach or rebut Butler's testimony, substantial evidence does not support his finding. Had counsel not attempted to impeach or rebut Butler's testimony in any way, the referee's findings may be supported by the record. The record, however, reveals that counsel attacked certain areas of Butler's testimony, which he felt highlighted the inconsistencies without distracting from his chosen strategy. The record also reveals that counsel chose to attack Butler's motive for testifying, rather than conduct a mini trial on one witness's story.[80] (See *People v. Rogers*, *supra*, 39 Cal.3d at p.

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[80] This Court, on direct appeal, recognized that Lorenz "cross-examined [Butler] on her criminal history[y] and their possible motives for (continued...)

904 [this Court recognized that Bulter was cross-examined for possible motives to testify against Rogers].)

In fact, the referee notes various ways counsel rebutted and attacked Butler's testimony and motive for testifying. For instance, the referee stated, "Lorenz brought out Butler's drug problems with the use of heroin, her prostitution problems, and that she associated her assailant to the name 'Burch' while she thought Deputy Lockhart had suggested the name 'Lenski' or 'Loski'. During the cross-examination of Lockhart by Lorenz, Lockhart testified that Butler did not give her the name 'Burch,' and that she did not suggest any names to Butler." (22 RT 5807.) Despite this evidence, the referee still found no apparent tactical reason for counsel's decision to selectively attack Butler testimony. The record does not support the referee's finding.

The record reveals that counsel decided on a limited cross-examination focused on Butler's motives for testifying, rather than creating a mini trial on Butler's eyewitness identification of his client. Counsel stated as much during the reference hearing. In short, counsel said that "he did not want to make a super big deal and make a mini trial over one witness and detract from his psychiatric defense." (8 RH RT 1460-1461.) Thus, even though counsel may have had other evidence to further discount Butler's identification of Rogers as the assailant, the fact that counsel instead chose to follow an alternative strategy does not make counsel's representation deficient.

(...continued)
testifying against defendant." (*People v. Rogers*, *supra*, 39 Cal.3d at p. 904.)

6. Counsel made a tactical decision to follow a mental issues defense and attack Butler's motive for testifying; expert testimony on eyewitness identification was not needed

In Question 12, this Court asked:

> 12. Did trial counsel have tactical or other reasons for failing to present expert testimony on eyewitness identifications? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have presented expert testimony on eyewitness identifications? What would such an expert witness have said?

Although Lorenz did not state any specific reasons in his testimony as to why he did not use an identification expert, he did not remember that he or anyone else he knew had ever used one. (8 RH RT 1454-1455.) He knew "numerous cases were either dismissed or won based on faulty identifications, faulty lineups, things like that." (8 EH RT 1455.) Thus, he obviously did not believe that such testimony was going to be generally helpful in this case. (See POBR 174-176 [Rogers's argument].)

The expert testimony at the reference hearing relied on assumed facts about the nature of the identification made by Butler which were, or could be, contradicted by the evidence. The nature of Butler's identification, as shown by her testimony at the penalty phase, was that she recognized Rogers on A Deck within a few weeks after the assault, which had occurred over a year before the interview with investigators and over two years before Butler testified at the penalty phase. As a result, the crucial issue was not the "reliability" of Butler's "identification" of Rogers by picking him out of a set of six photos in the interview, but the credibility of her story about how she recognized him on A Deck.

The opinion of psychology professor and researcher Kathy Pezdek (4 RH RT 612-614) was addressed to the "[p]hotographic lineup" that was shown to Butler on February 18, 1987, because it was the first "documented

identification." (4 RH RT 631, 638, 650-651, 763-773). In her opinion, the most important factors in the reliability of an identification were the extent to which the person identified fit the witness's description and whether everybody in the lineup fit the description given by the witness. (4 RH RT 650-651.) Detective Soliz, testified that it was not unusual to do a lineup with only a suspect but no description. (9 RH RT 1774.)

Pezdek first testified that Butler was shown a "biased photographic lineup" based on the premise that the lineup shown to Butler had names written next to five of the photographs, but not Rogers's—a premise that was proven false at the reference hearing. (4 RH RT 673, 683-684, 718-721; 5 RH Exhs. 1368 [Exhs. F and Tr. Exh. 70]; see 2 RH Exhs. 465; 1 Pet. Exh. at p. 309 [the lineup with names written].) She then testified that the lineup would be biased even without the writing, but stated nothing that would bias the viewer toward identifying Rogers. (4 RH RT 684-691, 721-723, 756.) As a result, the latter opinion made no sense and would not have been persuasive.

Pezdek agreed that if an identification had been made from the entire Behind the Badge book, rather than only six photos from the book, it would not be subject to the same objection. (4 RH RT 771-772.) Butler testified she made such an identification after Lockhart showed her the book.

Pezdek said that an identification could occur "any time she thought she saw him." (4 RH RT 745.) She agreed that multiple exposures could be a factor in favor of the identification. (4 RH RT 744, 763.) However, when she was asked about seeing the person a "month" after the assault, Pezdek said the identification would "not be especially reliable." (4 RH RT 744-745.) In explaining that opinion, she said that "time delay particularly would apply to her ability to identify anyone after a passage of time 'months' after the incident occurred." (4 RH RT 746; see 4 RH RT 636-637.) She never explained the disparity, but instead appeared to be

changing her opinion to ensure that any time period after which Butler made her identification was too long. In addition, her opinion that an identification would be unreliable after a "month" or "months"—regardless of how many times Butler had seen Rogers—flies in the face of common experience and would be rejected by a reasonable jury.

Pezdek later agreed that if Butler identified her assailant in jail when she was being booked, closer in the time to the attack, it would make the identification more reliable than the lineup "if . . . proper police procedures" were being used. (4 RH RT 748.) A reasonable jury would conclude that Pezdek was placing unreasonable restrictions on the types of identifications she would find acceptable.

Pezdek also stated that it "would be typical of how memory works" for a witness to think she had seen a person before on one occasion and not "place him until the third" time. (4 RH RT 798-799, 800-803.) She said, whether that happened with Butler "depends on which version of the story you rely on." (4 RH RT 798-799.) Pezdek thus confirmed that Butler's account of having recognized Rogers was supported by research but the crucial issue was Butler's credibility.

When she was asked about a threat to a witness by the person she recognized, Pezdek said that it went into the area of credibility, which was outside of the area of her expertise. (4 RH RT 777-779, 786.) But she said if it had actually happened, it would be "confirming information." (4 RH RT 778.)

Although Pezdek's belief that Butler's identification was "unreliable" was weakly supported and subject to several reasons to reject it, Pezdek noted several factors which would likely have convinced the jury that Butler's identification was "reliable," such as her opportunity to observe and remember her assailant, her multiple observations before she went to

jail, her recognition of Rogers in jail, within weeks of the attack, and his implied threat against her when she expressed her recognition of him.

Pezdek pointed out that people can miss some details, but tend to remember the more salient details (4 RH RT 735-736) or the ones they noticed (4 RH RT 662).[81] She noted that people can miss whether a person is wearing glasses because glasses are common, but declined to give an opinion based on the premise that mustaches were common in the 1980s. (4 RH RT 736.)

Pezdek testified that people tend to remember things they experience better than if they did not experience them. (4 RH RT 742.) She concluded that Butler had a good opportunity "to perceive, attend to, and remember her attacker." (4 RH RT 640-641, 743-744.)

Pezdek's testimony showed that what was important to her as a researcher was that it was "documented" that the preferred procedures had been followed. (4 RH RT 763-764.) While such documentation would be important to support a research project, a lack of documentation would have little or no tendency to show that an identification made in the real world was inaccurate. As the instant case shows, documentation may not be possible, such as where the witness is confined and subject to the control of the person she identified.

She noted, "the research that I have been testifying to speaks at when those memories are more likely to be reliable and when they are less likely to be reliable. That's exactly what I study." (4 RH RT 783.) While reliability factors could theoretically be useful in a proper case, the

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[81] Butler testified at the reference hearing that Rogers's photo was on a two-page spread with twelve photos on each side. (6 RH RT 1186-1189.) In fact, his photo was on a page with twelve photos. (6 RH Exhs. 1705.) There is no evidence that she was shown a Behind the Badge Book after Lockhart showed her one.

evaluation of Butler's identification of Rogers depended primarily on assessing the credibility of Butler's account of her observations of Rogers at the time of the assault, and her interactions with him in jail. The assessment of Butler's credibility controlled any conclusion as to whether her identification or identifications of Rogers were "reliable" based on factors shown by academic research.

Thus, the most reasonable view was that the issue was primarily one of credibility. This view is supported by Lorenz's testimony at the reference hearing that he did not recall thinking Butler had been assaulted by a different person and that "basically probably [Rogers's] body weight and everything was similar," but not the mustache (8 RH RT 1443), but that there were reasons for someone in Butler's position to lie. (8 RH RT 1509-1510, 1512).

As noted in the previous subdivision, the evidence shows that Lorenz made a tactical decision that the best approach was credibility. With respect to an identification expert, that approach was clearly superior to theories that did not fit the facts, or at best, depended on conclusions as to what the facts were, based on a determination of credibility.

In addition, expert testimony on identification factors would likely have led the prosecutor to ask Butler about the times she had seen Rogers following her, and possibly about the number of times she had seen him in jail. The result would not have been favorable to the defense.

a. The referee correctly found that counsel had a tactical reason for not presenting expert testimony on eyewitness testimony

The referee found that counsel had tactical reasons for failing to present expert testimony on eyewitness identification. The referee wrote:

> Mr. Lorenz had never used an eyewitness identification expert. Petitioner had give a detailed confession to the Tracie Clark murder, and Mr. Lorenz was of the opinion that the

> descriptors given by Ms. Butler were similar to that of the petitioner. Mr. Lorenz's main focus was on the psychiatric defense, good cop/bad cop defense, and had already called and put on lengthy expert medical psychiatric witnesses. He never mentioned a specific reason, but based on what he was faced with, the Court presumes he had a tactical reason for not using an expert eyewitness expert.

(Report at p. 22.)

Whether to call certain witnesses is ordinarily a matter of trial tactics unless the decision results from an unreasonable failure to investigate. (*People v. Bolin* (1998) 18 Cal.4th 297, 334; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["[t]he decisions whether . . . to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess"].) While the record does not disclose the specific reasons Rogers's counsel chose to forego expert eyewitness testimony, the record does not affirmatively demonstrate the absence of any rational tactical basis for counsel's decision. Indeed, the referee found, based on the record, that counsel probably had sound strategic reasons for not calling an expert. In addition to the stated reasons the referee found, Rogers's counsel may have also concluded that he could more effectively attack the accuracy of the witness's identification of his client through cross-examination. He also may have concluded that an attack on the witness's motive for testifying would have more adversely affected the credibility and identification in this case.

Because the record sheds no light on why counsel acted in the manner challenged and this Court can hypothesize a reasonable tactical basis for counsel's conduct, Rogers cannot support a claim of ineffective assistance of counsel.

7. Counsel Did Not Request CALJIC No. 2.92 Because the Factors Listed in the Instruction Supported the Witness's Identification

In Question 13, this Court has asked:

> 13. Did trial counsel have tactical or other reasons for failing to request CALJIC No. 2.92? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have requested CALJIC No. 2.92?

As with an identification expert, Lorenz did not state any specific reasons in his testimony as to why he did not request CALJIC No. 2.92 on identifications. (8 RH RT 1456-1458.) Since the evidence fails to show that Lorenz had no valid reason for not requesting CALJIC No. 2.92, any valid reason shown by the evidence must be presumed.

a. The record demonstrates that counsel made a tactical decision to not request CALJIC No. 2.92 because his focus was on Butler's credibility, not her identification

As with his failure to call an identification expert, the reason shown by the record is that the issue was one of credibility rather than whether the identification was reliable. As discussed, a potentially persuasive attempt to show that Butler's identification was unreliable would require showing that Butler was not credible. Thus, the unreliable identification theory would merely introduce an unproductive complication at the end of a trial which already lasted five weeks, when defense counsel wanted to focus the jury on mitigating evidence—much of which had been presented at the guilt phase some time earlier. (See POBR 176-178 [Rogers's argument].)

The factors listed in the then-current version of CALJIC No. 2.92 (1984) were as follows [with letters added as Rogers has done at POBR 177]:

> [A] [The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

[B] [The stress, if any, to which the witness was subjected at the time of the observation;]

[C] [The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

[D] [The extent to which the defendant either fits or does not fit the description of the, perpetrator previously given by the witness;]

[E] [The cross-racial or ethnic nature of the. identification;]

[F] [The witness' capacity to make an identification;]

[G] [Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

[H] [Whether the witness was able to identify the alleged perpetrator in a. photographic or physical lineup;]

[I] [The period of time between the alleged criminal act and the witness' identification;]

[J] [Whether the witness had prior contacts with the alleged perpetrator;]

[K] [The extent to which the witness is either certain or uncertain of the identification;]

[L] [Whether the witness' identification is in fact the product of his own recollection;]

[M][_____
_____.]

(2 RH Exhs. 462-463.)

A, B, C, D, E, F, H, and K, favor the reliability of Butler's identification. A is admittedly strong (4 RH RT 634, 743); B—Butler was not under stress for a large portion of the time; C—Butler provided a detailed description which D—Rogers largely fit well; E—the identification was not cross-racial; F, H, and K were not contested at the trial. G did not

apply because there were no other perpetrators. I and L would have required assessments of the evidence of Butler's contacts with Rogers, whether she saw his face on television, and the effect of that viewing—which would be determined by her credibility. J apparently does not apply, unless the 1985 notice to appear is counted, in which case the wording of the instruction would make that contact favorable to the identification. Under M, it would be appropriate to add the witness' contacts with the alleged perpetrator soon after the criminal act as a factor in favor of the identification. Thus, none of the factors is unfavorable to the identification, eight are favorable, two or three depend on Butler's credibility and one or two are inapplicable. A competent attorney would see the danger that the jury would be directed to the plethora of factors favoring Butler's identification and likely would not want it given. If it were given, a competent attorney would understand that it would require an extended discussion of the factors to focus on the main factor or factors, such as I (delay) and L (product), which would likely be more confusing than merely arguing about "taint" from television viewing (an argument which would depend on credibility).

As discussed, Lorenz chose to focus on credibility, an approach that was supported by the version of CALJIC No. 2.20, which was given at the guilt phase. (See *People v. Rogers, supra,* 39 Cal.3d at p. 904.) This Court has stated, "Having heard nothing to contradict the earlier instructions on evaluating witnesses' credibility, etc., we believe a reasonable jury would correctly assume those 'generic' instructions continued to apply. [Citation.]" (*People v. Brown* (1988) 46 Cal.3d 432, 460.) Rogers thus fails to prove that Lorenz's presumed decision constituted incompetence.

The referee similarly found that Rogers's counsel had a tactical reason for failing to request CALJIC No. 2.92. The referee specifically found:

> Most of the factors in CALJIC No. 2.92 did not favor the petitioner. Mr. Lorenz had not developed in petitioner's case the evidence to support the factors favoring the petitioner; but as the record existed, most of the factors favoring the Butler identification exceed those for the petitioner, so the instruction would most likely have hurt rather than benefited the petitioner's case.

(Report at p. 23.)

Whether a reasonably competent attorney acting as a diligent advocate would have requested CALJIC No. 2.92, the referee found that a "reasonably competent attorney acting as a diligent advocate would not have requested CAJLIC [*sic*] No. 2.92." Based on these findings, Rogers fails to prove his counsel was deficient for not requesting CALJIC No. 2.92.

b. Roger's argument that Lorenz merely left the jury instructions to the trial judge is not supported by the record

Contrary to Rogers's suggestion, the evidence does not prove that Lorenz merely left the instructions to Judge Davis. (POBR 177.) In the declaration he provided to defense counsel Alan Sparer (8 RH RT 1604-1609), Lorenz said, "Judge Davis . . . tells you what instructions he is going to give and that it that." (5 RH Exhs. 1414.) However, Lorenz's statement, "I did not submit any proposed jury instructions prior to or at the conference," referred to *guilt* phase jury instructions. (5 RH Exhs. 1414.) The only evidence on point is Lorenz's testimony that he did not remember submitting or requesting any penalty phase instructions. (8 RH RT 1456.)

Moreover, Lorenz has never said that he did not submit or request any instructions *because* he thought the judge would simply reject them. The evidence shows that, on the contrary, Judge Davis did consider requests by counsel. First, if the judge's practice was simply to reject all requests for

instructions, there would be no reason to have a conference on jury instructions, as the judge did. (8 RH RT 1456.)

Second, Lorenz stated that if he had waived or objected to any instructions, "Judge Davis would have insisted that it be put on the record." (5 RH Exhs. 1414.) Such conscientiousness is inconsistent with a practice of summarily rejecting proposed instructions. In addition, the trial record shows that Judge Davis had a consistent practice of courteously listening to counsel and considering their arguments before making a decision, even if he had definite ideas about how he should handle his own role in the case. One example is the manner in which Judge Davis dealt with a hearsay objection by Ryals to a question posed to defense expert Joan Franz. (20 RT 5398-5399.)

Third, in the same discussion during Joan Franz's testimony, the judge sustained the hearsay objection but then asked if the hearsay was going to be the basis of the witness's opinion. (20 RT 5399.) Lorenz said it was, and suggested, "then we can give the instruction," referring to an instruction explaining that her testimony was admitted as the basis for her opinion and not for the truth of the matter. (20 RT 5399.) Judge Davis said there would be such an instruction. (20 RT 5399.) Thus, not only did Judge Davis consider the positions of both counsel, he agreed to give an instruction suggested by Lorenz. The event also shows that Lorenz requested instructions when it could benefit his client—in this situation it facilitated the admission of hearsay as the basis for an opinion by a defense expert. Thus, the record does not support Rogers's arguments that Lorenz acted deficiently by not requesting CALJIC No. 2.92. Instead, the record supports the conclusion that counsel made a tactical decision to pursue a strategy that did not require the instruction.

8. Counsel made a strategic decision to present a short closing argument that highlighted the mental issue defense to garner sympathy from the jury

This Court's last question asked:

> 14. Did trial counsel have tactical or other reasons for failing to address Butler's testimony in closing argument at the penalty phase? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have addressed Butler's testimony in closing argument at the penalty phase? If so, in what manner?

Consistent with Lorenz's decision not to use an identification expert and his presumed decision not to request CALJIC No. 2.92, he did not mention Butler in his penalty phase argument to the jury. (See POBR 178-181 [petitioner's argument].) As Rogers recognizes, Lorenz was "concentrating on the mitigation and psychological aspects of the defense." (POBR 179.)

At the reference hearing, Lorenz testified, "if you make a super big deal out of something you may take emphasis away from what you are really trying to do." (8 RH RT 1515.) He thought, "if we are going to go with a psychiatric type of defense, . . . we cannot totally dig a hole on some other aspect of the case," by which he meant digging down into great detail. (8 RH RT 1515.) Lorenz therefore approached Butler's testimony in a calculated manner.

In his declaration, Lorenz said his "goal" was to obtain a manslaughter verdict as to Benintende and that his primary theory as to Clark was that Rogers "lacked premeditation and deliberation" and therefore only committed second-degree murder. (5 RH Exhs. 1413.) As Lorenz noted, Rogers's statement showed that his murder of Clark was premeditated. (8 RT 1439.) The jury returned a verdict of second-degree murder as to Benintende with the intentional use of a gun and first-degree

premeditated murder as to Clark with the use of a gun. At that point, it must have been apparent to Lorenz that his guilt phase strategy had not persuaded the jury, and that a death verdict was highly probable in light of the jury's conclusions there were no extenuating circumstances for intentionally firing of three shots into Benintende or the premeditated murder of Tracie Clark with six shots.[82] As the jury knew, Rogers killed Benintende and Clark—almost exactly a year apart—with multiple shots fired from a .38-special revolver he had stolen while on duty in March 1982 (18 RT 4902-4904, 4919-4924, 4930; Tr. Exh. 108 [Rogers's report]; see 4 CT 863-865 [same])[83], which was loaded with expanding hollow-point ammunition (18 RT 4855, 4858, 4863-4864; 4914-4916, 4918).

Therefore, one likely consequence of a thorough argument on Butler would be that the jury would think about Rogers's practice of victimizing prostitutes, including Ellen Martinez; Janine Benintende, Katherine Hardie, and Tracie Clark—even if the jury was not convinced he had victimized

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[82] Benintende had been shot once in the front near the sternum. The bullet exited on her left side. (22 RT 4793.) There was a single entry wound in her back, just below her left shoulder blade, through which two bullets had been fired. (18 RT 4795; 6 RH Exhs. 1545) After hitting the thoracic spine, one bullet went sharply upward into the cervical spine, where it "was found firmly lodged." (18 RT 4795-4796; 6 RH Exhs. 1537.) The other bullet continued straight. (18 RT 4796.) No soot or power was found around the entry wounds, which normally means that the shots were fired from a distance of more than sixteen inches. (18 RT 4793, 4797.) The body was clothed with a jacket, sweater, blouse, bra, blue jeans, briefs, socks, and boots. (18 RT 4791-4792; 6 RH Exhs. 1534-1535.) The cause of death was exsanguination. (6 RH Exhs. 1547.) There was no evidence of trauma to the genitalia or anus. (6 RH Exhs. 1535.) The fact that petitioner fired a second shot through the entry wound of a previous shot indicates that Benintende was down when he fired the shots, similar to an indication in the Clark shooting.

[83] Rogers falsely told investigators he had purchased the gun. (18 RT 4924.)

Tambri Butler, and this would undermine Lorenz's attempts to create sympathy for his client. So Lorenz targeted certain aspects of Butler's testimony for impeachment, as he normally does, and other evidence that showed additional "things that didn't work" in Butler's testimony in an effort to discredit Butler's motive for testifying. (8 RH RT 1515; see above, at pp. 203-206.) In all other regards, Lorenz effectively attempted to avoid Butler's testimony.

Lorenz considered the prosecution's closing argument when he crafted his own response. Deputy District Attorney Ryal's argument was very brief, extending over only seven pages. (22 RT 5949-5956 [5 RH Exhs. 1449-1456].) Her discussion of the assault on Butler as evidence of other criminal activity involving force or violence was also very brief, covering seven lines of transcript, addressing Rogers's willingness to use violence and Butler's fear. Lorenz testified that if Ryals had placed far greater emphasis on Butler, it would have been a different situation. (8 RH RT 1461.) However, Lorenz's experience was that shorter arguments are more effective. (8 RH RT 1459-1461.)

In his short argument, Lorenz emphasized that the jury's duty was to "consider all of the sympathy factors," and the evidence of "his reputation and character." (22 RT 5957-5958, 5960, 5962.) He noted the guilt phase evidence of "sodomy and physical abuse and things that happened to David Rogers when he was a child." (22 RT 5960.) Lorenz noted the factor of age, arguing that it was mitigating because, at Rogers's age he had not lived a life of crime. (22 RT 5962-5963.) He also noted Rogers's lack of a prior felony conviction and that he had lived most of his life as a responsible individual. (22 RT 5963.) He noted that Rogers was a "public servant" and did not know why "the fact that he did it well should somehow be held against him." (22 RT 5959.)

Lorenz argued that any emotional disturbance could fall under two factors in mitigation. (22 RT 5963.) He argued that there was no motive (22 RT 5963), explaining, "This is a person who is . . . deeply emotionally disturbed. That is why these things happened. There is no rational explanation" (22 RT 5963; cf. 22 RT 5959-5960).

Quoting one of the concluding paragraphs of CALJIC No. 8.88, Lorenz stressed that each juror must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is warranted. (22 RT 5961.) Counsel asked the jury, "think about this, really weigh it, because it's a matter of your personal conscience, it's a matter of what is right in your heart, what is right in you heart and in your mind." (22 RT 5963-5964.) He argued that the factors clearly favored the factors in mitigation (22 RT 5963, 5964), which would result in a sentence of life in prison without the possibility of parole (22 RT 5964).

Counsel argued that if the jury voted for death it would "kill the good part of David Rogers," a friend, fellow officer, husband, father, and grandfather. (22 RT 5957, 5964-5965; see also above at p. 174.)

Counsel concluded:

> You look at these albums, they show him with his friends. They show him with his grandchildren. This is not the kind of a case where there is justice having small children say later on, my grandfather was executed. He was a deputy sheriff. That is a good David Rogers that is . . . being killed.
>
> The verdict in this case, . . . what you do with Mr. Rogers' vote for death or not, the moral verdict, the ethical verdict, the verdict that is consistent with the law is a vote for life without possibility of parole.
>
> This is not the kind of individual that belongs with the people on death row.

(22 RT 5965-5966.)

Interestingly, the argument that Rogers suggests Lorenz should have made was almost entirely focused on Butler's *credibility*, which would distract from Lorenz's ultimate strategy. The People have argued that focusing on credibility was a valid tactical reason not to attack Butler's identification of Rogers on other theories, pointing out that the other theories depended on credibility questions. As to Butler's identification, he only suggests an argument that it was "unreliable by any objective measure." (POBR 181.) Of course, Lorenz would understand that it was impossible to apply any standard of "objective" reliability to the complicated sequence of Butler's viewings of her assailant and Rogers. Identification expert Pezdek essentially said as much. (4 RH RT 744-748, 763-773, 783; see above at pp. 213-216.) Lorenz would likely expect the jurors to be highly practical with little susceptibility to elaborate arguments or expert opinions that did not comport with their common sense. (See 8 RH RT 1414-1415 [Lorenz noting conservative juries in Kern County].)

Under the facts of this case, it is difficult to conceive of an argument substantially more likely to be effective than the one Lorenz gave.

Thus, trial counsel had tactical or other reasons for failing to address Butler's testimony in closing argument at the penalty phase and his performance was not objectively unreasonable. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531 [failure to argue an alternative theory on closing argument is not objectively unreasonable as a matter of law].) The reasons included: avoiding further calling attention to Rogers's pattern of abusing and killing prostitutes when there would be little or no benefit to the defense; focusing the jury on the mitigating evidence, most of which was presented at the guilt phase; and not excessively tiring the jury when counsel wanted the jury to emotionally connect with his most powerful argument for a verdict of less than death, which would necessarily come at the end of his argument. A reasonably competent attorney acting as a

diligent advocate would not necessarily have addressed Butler's testimony in closing argument at the penalty phase.

V. BUTLER'S TESTIMONY DID NOT HAVE A PREJUDICIAL EFFECT ON THE PENALTY DETERMINATION

Finally, the People argue that relief is not warranted because there was no reasonable probability that a different result would have been reached in the absence of the claimed errors. (*People v. Richards, supra,* 63 Cal.4th at pp. 312-313; *In re Roberts, supra,* 29 Cal.4th at p. 742; *People v. Watson, supra,* 46 Cal.2d at p. 836.) When counsel fails to find or offer mitigating evidence, *Strickland* explains that in a habeas corpus proceeding alleging ineffective assistance of counsewal, the petitioner has the burden of showing a reasonable probability—a probability sufficient to undermine confidence in the outcome—that but for counsel's error the result would have been different. (*Strickland, supra,* 466 U.S. at p. 693.) "When a petitioner challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would not have concluded that the balance of aggravating and mitigating circumstances did not warrant death." (*Strickland, supra,* 466 U.S. at p. 695 [ineffective assistance of counsel]; *In re Cordero* (1988) 46 Cal.3d 161, 180 [state uses same standard].) In these circumstances, the relevant question is whether the balance of aggravating and mitigating circumstance would not have warranted a death sentence had Butler not testified at the sentencing phase. Viewed as a whole, this case, which presented no compelling mitigating evidence, still would have resulted in a death sentence.

Ignoring that Rogers could not establish counsel's alleged failure to investigate or present further evidence was not done pursuant to a reasonable strategic or tactical decision, Rogers has failed to prove prejudice under the *Strickland* standard.

It is inconceivable that either the jury or the judge would have reached a different decision under the circumstances of case. Rogers was a deputy sheriff who had previously been in the patrol division and had been assigned to the Union Avenue prostitution area of Bakersfield. There was evidence that he had abused a prostitute who had been assaulted by a customer (Ellen Martinez) (22 RT 5764-5774), was fired when she reported his conduct (RT 5556-5558) and later was reinstated by the civil service commission (21 RT 5556-5558), and he had a negative opinion of prostitutes (21 RT 5562-5564). Several years later, he picked up two prostitutes a year apart, drove them to a remote area, and shot both of them to death in a manner indicating calculation, and dumped their bodies in the same canal. In addition, he picked up both victims on their first nights in town, minimizing the chances that their disappearances would be noticed or reported. Rogers had stolen the gun he used in both murders from a closed convenience store while on duty and wrote a false report on the incident. (18 RT 4919-4923, 4930; Exh. 108.) Evidence was presented that, midway between the murders of Janine Benintende and Tracie Clark, Rogers picked up another prostitute (Katherine Hardie) and started to drive to a remote location, but she jumped out of the truck after he refused to let her out. (18 RT 4914-4916, 4918; Exhs. 64-66 [photographs of the truck].) He hired another prostitute he knew (Connie Zambrano) and completed the transaction without incident. (17 RT 4640-4641, 4654-4658, 4662-4663.) Thus, Rogers brutally murdered two young prostitutes with a gun he had stolen on duty, under circumstances showing a similar pattern of calculation. He had a history of abusive conduct with prostitutes which shed light on the circumstances of the murders and provided a reason for his hostility toward prostitutes. Tambri Butler's testimony did no more than partially fit the same pattern.

In mitigation, Rogers relied on evidence of an emotional disturbance[84] and good character under circumstances not involving prostitutes—which applied equally to the charged murders and the uncharged Butler assault. The jury rejected during the guilt phase Rogers's contention that mental illness affected his capacity to appreciate the criminality of his conduct or prevented him from conforming his conduct to the requirements of the law. In other words, the only mitigating circumstances Rogers had to extenuate the gravity of the crimes was the testimony of his family and friends saying he was not a "bad guy." On balance, the aggravating circumstances far outweighed the mitigating circumstances and Rogers's crimes warranted a death sentence.

Rogers argues that Butler's testimony was the deciding factor as to whether he received the death penalty or not. He points to the judge's comment that Butler's testimony "shocked [him] more than any other case [he] ha[d] ever heard" (22 RT 5995) as proof of the impact Butler's testimony had on the sentence. While the People do not contest that Butler's testimony was impactful, the record does not support Rogers's claim that it was the deciding factor. Indeed, the only stated circumstance in mitigation the judge acknowledged was that Rogers had no previous criminal record. (22 RT 5995.) The judge flatly rejected Rogers's other mitigating claim that he acted under the influence of extreme mental or emotional disturbance. (22 RT 5995.)

On the other hand, the judge identified the following aggravating circumstances: (1) the multiple murders (aggravating factor (a)), which

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[84] During the guilt phase, the jury viewed Rogers's videotaped confession of the Clark murder, where he casually described to police—with his feet propped up on the tabletop—how and why he murdered Clark. This image of Rogers was in stark contrast with his account at trial that he unwittingly killed Clark under extreme mental or emotional disturbance.

involved a "high degree of callousness"; each victim was shot multiple times (22 RT 5996); (2) Rogers's "pattern of violence" towards women (aggravating factor (b)), which included, in addition to Tambri Butler, Janine Benintende, Tracie Clark, and Angela (Ellen) Martinez. Thus, even if Butler's testimony was impactful, the almost complete lack of mitigating circumstances, combined with several substantial aggravating circumstances, made it not reasonably probable that had Butler's testimony not been included in the penalty phase that the jury would have decided against a death sentence. Simply put, the aggravating circumstances in this case, even without Butler's testimony, far outweighed anything Rogers presented in mitigation; there was nothing saving Rogers from these murders. The jury would have sentenced him to death regardless of whether Butler testified or not because the aggravating circumstances far outweighed the mitigating circumstances. Rogers has failed to establish prejudice under *Roberts, Watson,* or *Strickland.*

CONCLUSION

Accordingly, respondent respectfully requests that the judgment and sentence be affirmed.

Dated: September 20, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 69,073 words.

Dated: September 20, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Keith Rogers**
No.: **S084292**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 20, 2016, I served the attached **EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 20, 2016, at Sacramento, California.

Laurie Lozano
Declarant

Signature

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