IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID KEITH ROGERS,

Petitioner,

No. S084292
CAPITAL CASE

On Habeas Corpus.
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PETITIONER'S OPENING BRIEF FOLLOWING REFERENCE HEARING

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INTRODUCTION

Tambri Butler was the principal witness for the prosecution in the penalty phase of Petitioner's trial. Ms. Butler testified to having been picked up by a man in a white pickup truck while working as a prostitute on Union Avenue in Bakersfield. She described for the jury how the man took her to a remote area south of town where he beat her, raped her, sodomized her, tortured her with a "taser," fired a gun in front of her face, robbed her, and finally tried to run her over after he threw her out of his truck. Ms. Butler identified petitioner David Rogers as the beast who had done these things to her – an identification the jury could readily accept, as it had already convicted petitioner of murdering two other Union Avenue prostitutes – one of whom petitioner had admitted shooting in his beige pickup truck, and both of whom were found, dead, in remote areas south of town.

Shocking in itself, Ms. Butler's testimony left the jurors to infer that Petitioner had inflicted similar cruelties on the other two women before killing them. According to the trial court, it was Ms. Butler's testimony that ensured petitioner would be sentenced to death. As the judge explained when he refused to modify the jury's death sentence:

> I think that his actions with Tambri Butler shocked me almost more than any other case I have ever heard. [¶] The use of a cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably influenced the jury, in my view, and the court more than any other because not only has it happened once with Janine Benintende, twice with Tracie Johann Clark . . . we know that it happened with Tambri Butler. [¶] How many more times did it happen?

(RT 5995).[1]

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[1]Citations will be as adopted by the Referee in his "Report of Proceedings: Finding of Facts Pursuant to Appointment as Referee" (henceforth "Report and Findings" or "R&F") at pp. 5-6, n.1, with these additions: The "Clerk's Record of Reference Proceedings" will be cited as "RHCT" and the Reporter's Transcript and Clerk's Transcript on Appeal in *People v. Michael Ratzlaff* will be cited, respectively, as "RTR" and "RCT."

It is now clear that, as this Court's Referee concluded, "**Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial.**" (R&F at 5). As the Referee further found, the evidence firmly "**support[s] the fact that another assailant other than the petitioner committed the assault on Ms. Butler.**"[2] (R&F at 11).

That evidence includes the detailed description of the attacker that Ms. Butler gave law enforcement: The perpetrator had a thick, bushy mustache, thick hair, a big, hairy chest; exceptionally large, rough hands ("you notice these things" she said), and no markings on his body other than a line of moles across his lower back. His white pickup truck had weathered sideboards on the rear; the interior was cluttered and "strewn with litter;" he had a "big, crowded key chain," a tool chest and "large silver thermos" – and, of course, the stun gun he used to torture Ms. Butler. During their friendly conversation, before things turned ugly, he confided that he had two children – a boy and a girl – a wife and a dog.

Not one of these telling details fit petitioner David Rogers: He never had a mustache, his chest is hairless and sunken, his hands are exceptionally *small,* and he has a quite visible tattoo – but no moles. At the time of the attack on Ms. Butler, he had two grown sons, no daughter, no dog. And at the time the attack occurred he did *not* own a light-colored truck. The truck in which he picked up Tracie Clark was purchased nearly a year after Ms. Butler was attacked; it had a camper and no sideboards and he always kept it neat. Although several guns (and much other incriminating or otherwise embarrassing evidence) was seized from petitioner after his arrest, there was no stun gun and no evidence he ever owned one. (See R&F at 5-6, 21).

But Ms. Butler's description did closely fit another man, named Michael Ratzlaff, who sported a thick, bushy mustache and drove a cluttered white pickup with weathered sideboards. Ratzlaff also corresponded to nearly all of the other specific descriptors given

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[2]In this introduction, the Referee's findings are set out in bold; in the balance of the brief they will be italicized.

by Ms. Butler: The large hairy chest, the exceptionally large hands, the thermos and tool chest, the family with a young girl, boy and dog – and he had a history of savage attacks on Union Avenue prostitutes, notably including the use of a stun gun and a pistol to torture and terrify his victims, and an obsession with anal sex. Just weeks after petitioner was sentenced to death, Ratzlaff was arrested for (and eventually convicted of) committing nearly identical crimes against yet another young woman working on Union Avenue. (See R&F at 10-11).

The fact that Ms. Butler nonetheless falsely identified Petitioner can be ascribed to a confluence of circumstances including the fact that – the night before she picked out his photograph – she had seen Petitioner on television described as the accused killer of other prostitutes; the improper photographic lineup used by the police; Ms. Butler's strong interest in currying favor with the authorities given her status as an inmate (both when she met with the police and when she testified) and a felon anticipating further charges; and the encouragement to do so she received from other inmates. (See R&F at 7, 8, 9).

In a series of sworn declarations in the 1990's, recanting her trial testimony, Ms. Butler admitted that portions of that testimony were false and that she was likely wrong when she named Petitioner as the person who had assaulted her. (See R&F at 6). Although Ms. Butler subsequently attempted to recant those recantations in several interviews with the district attorney's investigator over the following two decades, and ultimately at the reference hearing itself, her subsequent statements each contradicted those that preceded it and each contained significant admissions reflecting on the falseness of her trial testimony. By the time of the reference hearing, Ms. Butler's recollections had grown somewhat fantastical, all leading the Referee to conclude, bluntly:

"**The Court finds Ms. Butler not credible**." (R&F at 7).

The facts, as found by the Referee and demonstrated by extensive record evidence, lead ineluctably to several legal conclusions, each of which is sufficient to establish that petitioner is entitled to a new penalty phase trial. First, there is far more than a "preponderance of the evidence" establishing that "*[f]alse evidence* ... substantially material

or probative on the issue of guilt or punishment was introduced against [petitioner] at [the penalty phase] trial . . . ." (Pen. Code § 1473; see, *In re Richards* (2016) 63 Cal.4th 291, 307-09, 312 [*Richards II*]; *In re Hall* (1981) 30 Cal.3d 408, 424)). Indeed, the record is ample to satisfy the more demanding showing of "*newly discovered evidence*" . . . "'that undermine[s] the entire prosecution case and point unerringly to innocence or reduced culpability.'" (*Richards II*, 63 Cal.4th at 307; quoting *In re Clark* (1993) 5 Cal.4th 750, 766.)

Second, even the evidence potentially available to the defense at the time of Petitioner's trial would have been adequate to raise a reasonable doubt regarding the truth of Ms. Butler's accusations, but the *ineffective assistance* of the attorney representing Petitioner ensured that the jury never had a fair opportunity to assess her truthfulness. As the Referee's findings reflect, trial counsel did virtually nothing to investigate Ms. Butler or her story; did not use what information he did have to conduct an adequate cross-examination; did not adduce available evidence (including expert eyewitness identification testimony) that could have revealed the falsity of her supposed identification of Petitioner; did not request jury instructions that would have assisted the jury in evaluating Ms. Butler's testimony; and incompetently failed even to address her testimony in closing argument. (See R&F at 16-24).

Finally, the penalty phase of petitioner's trial was tainted by *prosecutorial misconduct.* The Referee specifically found that the prosecution failed to disclose the truth about Ms. Butler's criminal history to the defense (R&F at 14) – even after Ms. Butler materially misrepresented those facts while on the witness stand. (See *United States v. Bagley* (1985) 473 U.S. 667, 683; *Napue v. Illinois* (1959) 360 U.S. 264, 265–272). The Referee's analysis of that point also compels the conclusion that the prosecution never turned over the tape recording of the police interview in which Ms. Butler picked out petitioner's photograph – a recording that both (partially) contradicted the written report of that interview and supplemented the content of the written report in respects favorable to the defense. And (although the Referee concluded otherwise) Petitioner submits that the law enforcement authorities had a constitutional obligation to disclose what they knew about the activities of Michael Ratzlaff – something they failed to do even after successfully prosecuting

Ratzlaff for crimes nearly identical to the assault on Tambri Butler. (*Brady v. Maryland* (1963) 373 U.S. 83, 87). For these reasons the judgment of death should be reversed.

STATEMENT OF FACTS

I. BACKGROUND

A. The Crimes of Conviction

On the afternoon of February 8, 1987, two hunters discovered the body of a woman floating in the Arvin-Edison irrigation canal. (RT 4525-29). The Kern County Sheriff's Office was notified, and Detective John Soliz was put in charge of the investigation.[3] (RHRT 1707, 1731).

When the investigators arrived at the road next to the canal embankment, they found tire tracks, a puddle of blood, shoe tracks, marks indicating that someone had been dragged over to the canal, blood drops near the drag marks, and a condom and its wrapper.[4] (RT 4559-70). The victim had been shot several times with either a 357 magnum or .38 caliber gun, and had bled to death from her wounds.[5] (RT 4617-18; 4858; 4868).

The dead woman was identified as Tracie Clark, who had last been seen working as a prostitute on Union Avenue in nearby Bakersfield. (4594-96; 4643-47). Another woman, Connie Zambrano, testified that she was working on Union Avenue during the early morning hours of February 8, 1987 when she saw Ms. Clark get into a beige pickup truck with a brown camper shell and dark bubble window, which headed out of town. (RT 4643, 4647).

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[3] Detective Soliz was joined in the investigation by Detective Mike Lage, who had led (then-dormant) investigation into the killing of Janine Benintende. (RHRT 1731-32).

[4] Petitioner returned to the scene the following day, but did not attempt to cover up his tire tracks or other evidence. (RT 4698-99).

[5] A forensic pathologist testified that the victim had been shot twice in the front of her chest (4609-11); a third shot had grazed that same area (4611); a fourth shot entered on the right side of her chest, passed through several organs and eventually lodged below the skin on her left side (4611-12, 4615); a fifth shot grazed her abdomen (RT 4612); and the sixth and final shot entered through the victim's back (RT 4613).

Ms. Zambrano recognized both the truck and its driver, whom she had seen on Union Avenue.[6] (RT 4640-42). At trial, Ms. Zambrano identified the driver of the truck as the petitioner, David Keith Rogers. (RT 4640).

The investigators went to Petitioner's house and compared the tires on his truck with impressions found at the crime scene. (RT 4625-26). Satisfied that there was a similarity, the investigators drove Ms. Zambrano over to see if she could identify the vehicle she had seen Tracie Clark enter. She picked out the truck parked in front of Petitioner's house – a 1966 beige Ford pickup with a camper shell. (RT 4627-28; RHRT 2390).

Detective Lage composed a photographic lineup, consisting of a picture of Petitioner and pictures of five other Sheriff's deputies whom he believed looked similar to Petitioner. (RHRT 1852-55).[7] Ms. Zambrano was shown the photo lineup and picked Petitioner. (RT 4629-30). (The same lineup was later shown to the other witnesses asked to identify a perpetrator in the case. (RHRT 1855; see also, RHRT 1745)).

A check with the Department of Motor Vehicles showed that the beige truck identified by Ms. Zambrano was actually registered to one Toby Coffey, at an address across the street from Petitioner's house.[8] When subsequently interviewed, Mr. Coffey told investigators that he had sold the truck to Petitioner approximately two months earlier – *i.e.*, around the

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[6] In fact, Ms. Zambrano had once had a "date" with the driver; he had paid her $20 and they had gone to her motel where he masturbated while she lay nude on the bed. (RT 4641; 4654-57). After that, he had stopped and talked to her on the street on a number of occasions, once giving her some oranges as a present. (RT 4658; 4660-61). She did not know he was a Sheriff's deputy until after she had identified him. (RT 4652).

[7] The pictures were taken from the 1985 edition of "Behind the Badge," an annual compendium of photographhs and information regarding Kern County Sheriff's Department personnel. (*Ibid.*; see 5 RH Exhs. 1368; 1372-83; RT 4629-30).

[8] In addition to the beige truck, Petitioner and his wife owned a green Datsun pickup (with camper shell) and a Jeep. (RHRT 2390).

beginning of December, 1986.[9] (RHRT 2391-92).

In part because the suspect was a deputy Sheriff, a decision was made to bring in someone from outside the department, and District Attorney's Investigator Tam Hodgson was assigned to the case. (RHRT 2111-12). Mr. Hodgson prepared warrants for Petitioner's arrest and for the searches of his house, vehicles and work locker. (RHRT 2112).

Petitioner's house was staked out. On February 13, 1987, Petitioner and his wife got into their Jeep and started to drive away but were stopped, and Petitioner was arrested. Searching the beige truck, the investigators found three weapons: A .22 caliber handgun, a .25 Excam automatic pistol and the .38 Colt special that fired the shots that killed Tracie Clark. (RHRT 1780, 2119). They also found a bag of used women's panties, some lingerie and a bra in the truck, and in Petitioner's house and outbuildings they uncovered a large cache of pornographic videos and other material.[10] (*Ibid.*)

Following his arrest, Petitioner was interrogated repeatedly, over a number of days, by Detective Soliz and Investigator Hodgson.[11] (RT 4672-73; RHRT 2124). He immediately admitted killing Ms. Clark (RT 4673), and his statements to the investigators formed the crux of the prosecution's case regarding the Clark killing.[12]

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[9] Called as a witness for the prosecution, Mr. Coffey so testified during the guilt phase of Petitioner's trial. (RT 4666-67). As will be discussed, the critical significance of Mr. Coffey's testimony – which established that Petitioner did not own the truck at the time of the assault on Tambri Butler – was apparently lost on trial counsel. In any event, he made no effort to make that connection for the jury in the penalty phase.

[10] Significantly (as will be discussed) the investigators found no evidence that Petitioner owned or possessed a stun gun or false mustache, or that he had made any effort to disguise himself. (See, RHRT 1781, 2324, 2389).

[11] Detective Lage also participated in the first day of interrogation, at the end of which Petitioner indicated that he would not submit to more if Lage was present. (CT 181).

[12] On the last day of the interrogation (and four days after he was arrested), February 17, 1987, a series of photographs of Petitioner, wearing only jail-issue yellow boxer shorts, was taken at the request of Investigator Hodgson. (RHRT 2335-26; RH Exhs. 1384, 1580-87; see also RHRT 2123-24).

In those post-arrest statements, Petitioner said he had picked up a prostitute – Ms. Clark – on Union Avenue in the early morning hours of February 8, 1987. Petitioner was driving his (recently purchased) light-colored Ford pickup truck with a camper shell, and after they negotiated the price and terms of her sexual services, Petitioner drove Ms. Clark out into the countryside. (RT 4673-77). When they reached a spot where he thought they would not be seen, Ms. Clark partially undressed and began performing fellatio on Petitioner. (RT 4678-82).

Petitioner told the investigators that, during the sexual act, Ms. Clark stopped and demanded more money. (RT 4690). An argument ensued, and Ms. Clark physically attacked him, first with her hands, and then kicking him with her feet—all the while "yelling and hollering at [him]." (RT 4681-83; 4704). Petitioner reached under his seat and took out a gun that he kept there, thinking the sight of it would discourage Ms. Clark's attacks. Instead, she just kept coming, and the gun went off accidentally, wounding her. (RT 4681-83, 4685, 4701).

Petitioner told them that he then started to drive back to town, trying to persuade Ms. Clark to calm down. She kept screaming at him, though, so he stopped the truck, opened the passenger side door, and literally kicked her out of the cab. (RT 4683). Petitioner also got out, and again tried to convince Ms. Clark that he would take her back to town and help her get to a hospital, but she was very agitated and still screaming at him. (RT 4684).

Ms. Clark promised to report him. (RT 4685). At that point – Petitioner told the investigators – he panicked and shot her again; then, realizing that he would surely go to jail, he emptied the gun into her. (RT 4686). After determining that Ms. Clark was dead, Petitioner threw her body into the adjacent agricultural canal. (RT 4688, 4705).

A police ballistics test indicated that the .38 found in Petitioner's truck likely was also the weapon that killed Janine Benintende, and he was charged with her murder as well. (RT 4868). Ms. Benintende was another young woman who worked as a prostitute, and she had last been seen alive on Union Avenue, sometime in January or early February, 1986. (RT

4897-98; 4912-14). Her body was found floating in a different area of the Arvin-Edison irrigation canal on February 21, 1986. (RT 4733). She had died of penetrating gunshot wounds to her torso.[13] (RT 4798). On the strength of the ballistics evidence, Petitioner was also charged with Ms. Benintende's murder. There was no other physical or eyewitness evidence linking Petitioner to that crime, and (unlike the Clark killing, to which he immediately confessed) Petitioner vigorously denied killing Ms. Benintende. (RT 4930).

B. The Trial

In an information filed on April 1, 1987, Petitioner was charged with the first degree murders of Tracie Clark (Count 1) and Janine Benintende (Count2) in violation of Penal Code, section 187.[14] (CT 354). The information stated that Ms. Clark was murdered on or about February 8, 1987, and that Ms. Benintende was killed sometime between January 1 and February 21, 1986. It alleged that the multiple murders constituted a "special circumstance" rendering Petitioner eligible for the death penalty, pursuant to section 190.2(a)(3). (*Ibid.*)

Eugene Lorenz was appointed to represent Petitioner (CT 203, 356), and the prosecution was represented by Deputy District Attorney Sara Ryals. (CT 396). Presentation of evidence commenced on February 17, 1988. (CT 480).

1. The Guilt Phase

The prosecution's case in the guilt phase consisted essentially of Petitioner's confession, the identification testimony of Connie Zambrano, and the physical evidence tying Petitioner to the killings, in particular his ownership of the beige truck (established through the testimony of Toby Coffey) and the .38 Colt found in that truck. The prosecution also presented evidence to the effect that the murder weapon – which Petitioner claimed to have purchased from a bartender – had in fact been stolen from a convenience store while

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[13] A pathologist testified that Ms. Benintende had been shot once in the front of her torso, and apparently had been shot twice in the back – although there was only one entry wound in the back through which both bullets had entered. (RT 4793-96).

[14] All further statutory references will be to the Penal Code, unless otherwise indicated.

Petitioner was investigating an alleged robbery there. (See *People v. Rogers* (2006) 39 Cal.4th 826, 836-41.)

At the close of the prosecution's case in chief, trial counsel made a motion pursuant to Section 1118.1 for partial acquittal on Count 2 on the ground that the dearth of evidence regarding the events surrounding the death of Janine Benintende made it impossible to conclude that she was killed deliberately and with premeditation. (CT 502 *et seq.*) The trial court granted the motion and reduced that charge to second degree murder. (CT 584.)

The defense evidence consisted almost entirely of Petitioner's testimony and the expert evidence of three mental health professionals, who had examined or treated Petitioner in the year since his arrest.

Petitioner did not deny that he had killed Tracie Clark, although he gave an account somewhat different from his taped confession in regard to how and why that killing happened. (RT 5354-83). Specifically, his testimony tracked what he told the investigators, up to the point that the dispute broke out between Petitioner and Ms. Clark. What really happened then, Petitioner said, was that he was unable to sustain an erection. (RT 5358-59). Ms. Clark grew irritated and wanted more money. Petitioner, still unable to perform, felt "embarrassed, sort of crushed." (RT 5359-60). Ms. Clark became abusive, and accused him, in the most insulting terms, of being a homosexual. (RT 5364-67). At that point (*before* any shots were fired), Petitioner opened the passenger door and pushed or kicked her out of the truck. (RT 5381). Not wanting to leave her in the middle of nowhere, Petitioner got out of the truck as well, hoping to calm her down. (RT 5382). Instead, she kept coming at him, yelling, her finger pointed. (RT 5382-83). He pulled his gun out of the truck and pointed it at her, thinking she would stop, but she did not. (RT 5362-63). He was afraid of her, and (for reasons he did not understand) he felt threatened – and he shot her. (*Ibid.*, RT 5382-83). Ms. Clark backed up against the embankment and he shot her again, five more times, killing her. (RT 5367, 5375).

The mental health experts discussed in some detail the abuse Petitioner had suffered

at the hands of a succession of sadistic and perverted step-fathers and boyfriends brought into the house by Petitioner's alcoholic mother, and from his cruel and perverse stepmother. (RT 5464, *et seq.*). Based on his history, his account of the events surrounding the Clark killing, and their examinations of him, the mental health professionals concluded that Petitioner suffered from a "dissociative disorder, such that he was not in full control of his thoughts, feelings or behaviors." (RT 5255-57, 5500-01, 5520-21). They opined that he could not and did not plan the killing of Tracie Clark, and that he was simply unable at that point to premeditate or deliberate. (RT 5225, 5500-01, 5521-22, 5451). To the extent that Petitioner's confession suggested the contrary, it was (according to the treating psychiatrist) part of a calculated attempt on Petitioner's part to, in effect, commit suicide by admitting to capital murder. (RT 5250).

As for the Benintende killing, trial counsel did not present any evidence, nor did he advance any discernable theory of defense.

The prosecution's rebuttal case consisted almost entirely of evidence regarding events in 1983, when Petitioner was briefly removed from the Sheriff's department on the basis of accusations made by a prostitute named Ellen Martinez, but was reinstated following an appeal hearing.[15] (RT 5555-57). The apparent purpose of that evidence was to show that Petitioner harbored some generalized animosity toward prostitutes. Thus Investigator Hodgson read a transcript of portions of Petitioner's post-arrest interrogation in which he asked Petitioner about "a complaint filed against you by some girl who was a known prostitute and a hearing, I guess a termination hearing, was started from that." (RT 5562-63). Petitioner responded that he had been "fired." (RT 5563). Mr. Hodgson said that his "understanding" was that "the hearing didn't go or that the hearing was dismissed because she never came to the hearing." (*Ibid.*). Petitioner replied that "[t]he hearing went;" he explained that Ms. Martinez did not show up, but all of her statements were admitted as

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[15]The substance of Ellen Martinez's accusation is recounted, *post*, in the context of her testimony at the penalty phase of Petitioner's trial.

evidence anyway. (*Ibid.*).

In response to Mr. Hodgson's questions, Petitioner said that he had never seen Ms. Martinez again and that "for awhile I was really pissed at her, but ... I got to a point where I ... never believed a whore. ... That hearing just changed my outlook, I guess." (*Ibid.*). When asked if Tracie Clark reminded him of Ellen Martinez, Petitioner said "[n]ot at all;" when Mr. Hodgson attempted to press the point, Petitioner replied: "Just that she's a whore." (RT 5565).

On March 16, 1988, the jury returned its verdicts, finding Petitioner guilty of the first degree murder of Tracie Clark and the second degree murder of Janine Benintende, and sustaining the multiple murder special circumstance enhancement. (CT 596).

2. The Penalty Phase

The penalty phase commenced on March 23, 1988. (CT 682). Presentation of all penalty phase evidence was completed by the end of the next day, March 24, 1988. (CT 689-90). The prosecution presented a total of four penalty phase witnesses. (CT 682). The first was Ellen Martinez, who testified to the substance of her earlier complaint against Petitioner. She asserted that Petitioner, while on duty as a Sheriff's Deputy, had broken up an encounter she was having with a knife-wielding customer during an assignation in a cemetery outside of Bakersfield.[16] Ms. Martinez testified that Petitioner put her in the back seat of his patrol car in order to take her downtown, but when she said she could not find her underwear, petitioner returned to the cemetery to look for them. (RT 5766-5767.) Ms. Martinez testified that, after Petitioner's unsuccessful search for the underwear, he asked Ms. Martinez to take off her clothes and took a picture of her breasts and vaginal area. (RT 5767-68.) Ms. Martinez then dressed and got in the patrol car, and petitioner drove her to at a corner near her motel room. (RT 5768.)

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[16] On cross-examination, Ms. Martinez acknowledged that she also had a knife, which Petitioner had taken from her. (RT 5771). She admitted that she was nonetheless angry at Petitioner for not arresting her customer. (RT 5775-76).

The second prosecution penalty witness was Tambri Butler, who testified to suffering a brutal attack in which she was tortured, raped and sodomized in a field by an average-sized man with a bushy mustache who drove a white pickup truck and used both a stun gun and a handgun. She identified Petitioner as her assailant;[17] her testimony will be recounted in detail, below. She was followed on the stand by Deputy Jeannine Lockhart, called to corroborate Ms. Butler (which she did only partially); her testimony will be recounted as well. Finally, Investigator Hodgson was called yet again to testify about a stolen automatic pistol (not tied to either of the homicides) found in Petitioner's truck. (RT 5811-12).

Aside from adducing the testimony of Petitioner's former beat partner, who disputed some things Ellen Martinez said (see, RT 5945-46), defense counsel did not attempt to rebut any of the "aggravation" evidence presented by the prosecution. Instead, Mr. Lorenz focused solely on "mitigation," presenting evidence regarding abuse Petitioner suffered during childhood and his resulting mental and emotional difficulties (RT 5815-5903; 5934-37), and calling a series of character witnesses to testify (very briefly) to Petitioner's virtues as a friend, family member, and police officer. (RT 5905-31, 5941-49). The prosecution, in turn, made no effort to rebut the defense's mitigation evidence.

Closing arguments were exceedingly brief (RT 5949-66); they were delivered, along with the jury instructions, on March 28, 1988. (CT 692). The jurors began their deliberations that same morning; on the afternoon of March 29, 1988, they announced a verdict of death. (CT 692-93).

On May 2, 1988, the Court conducted an automatic penalty modification hearing, pursuant to section 190.4. (CT 729). Judge Davis confirmed the sentence of death to be imposed on Petitioner and explained his reasons for doing so, as follows:

I think that his actions with Tambri Butler shocked me almost more

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[17]As noted by the Referee, Petitioner had no mustache, and did not own a white (or light-colored) pickup truck at the time of the Butler assault; no stun gun was found in the extensive searches of his home, vehicles and effects, and he otherwise did not correspond to any of the specific descriptors Ms. Butler had given of her assailant. (R&F at 6, 7, 9, 10).

than any other case I have ever heard.

The use of a cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably influenced the jury, in my view, and the court more than any other because not only has it happened once with Janine Benintende, twice with Tracie Johann Clark; we know that it happened with Angela [*sic*] Martinez; we know that it happened with Tambri Butler.

How many more times did it happen? But even more importantly, how many more times in the future might it happen?

(RT 5995).

C. The Arrest and Conviction of Michael Ratzlaff

On May 21, 1988, less than three weeks after Petitioner was sentenced, Michael Ratzlaff – a large man with a bushy mustache and a white pickup truck – raped and sodomized Lavonda Imperatrice in a field outside of Bakersfield. Ms. Imperatrice was yet another woman working as a prostitute on Union Avenue. In the course of his attack on her, Mr. Ratzlaff used a stun gun to torture her and fired a hand gun to intimidate her. (RTR 10-12, 22-24). Mr. Ratzlaff was arrested shortly afterwards, and was convicted of his crimes against Ms. Imperatrice on February 14, 1989. The reporter's and clerk's transcripts from his trial were made part of the record of the reference hearing. The evidence concerning Mr. Ratzlaff's crimes, and the extent to which he matched Ms. Butler's primary description of her assailant, will be set out in detail below.

D. Post-Trial Proceedings In Petitioner's Case

An automatic appeal from the judgment was filed (case no. S005502), and this Court appointed counsel to represent Petitioner both on appeal and habeas corpus. On August 21, 2006, the Court filed its opinion denying the direct appeal *in toto*; that opinion is published as *People v. Rogers* (2006) 39 Cal.4th 826.

While the direct appeal was pending, on January 14, 1999, Petitioner filed the underlying Petition for Writ of Habeas Corpus, asserting dozens of constitutional and other defects in the conviction and judgment. On December 19, 2007, the Court issued its Order to Show Cause, limited to a cluster of claims related to the penalty phase testimony of Tambri Butler, including (*inter alia*) whether trial counsel had been constitutionally ineffective for failing to investigate and/or respond to that evidence; the significance of newly discovered evidence in regard to the assault on Ms. Butler; and whether the prosecution had withheld exculpatory evidence and/or put on false evidence in that regard.

While the responsive briefs – the Attorney General's Return, and Petitioner's Traverse – were being prepared Petitioner moved for leave to conduct "conditional examinations" of two fatally ill witnesses: Joyce Rogers and Dealia Winebrenner. The Court granted that request and the examinations (which have been made part of the record in this proceeding) were conducted on May 18, 2009.

In an order filed on June 24, 2009, and amended on July 15, 2009, the Court appointed the Hon. Louis P. Etcheverry, Judge of the Superior Court, Kern County to act as Referee and directed him to take evidence and preparation of findings of fact regarding some 14 enumerated questions (most of which contain several other questions).[18] The presentation of evidence at the Reference Hearing commenced on November 7, 2011, and was completed on December 9, 2011. Following a separate hearing regarding the admission of exhibits, extensive post-hearing briefing, and two days of oral argument, the Referee filed his Report and Findings on July 22, 2015.

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[18] The amended Reference Order is set out at 1 RH Exhs. 44-46.

II. TAMBRI BUTLER'S EVIDENCE[19]

In the thirty years since the assault which was the subject of her trial testimony, Ms. Butler has given more than a dozen different recorded accounts of that incident, several under penalty of perjury. As counsel for the State put it – and the as witness agreed – in those various versions, Ms. Butler "had contradicted [her]self so many times [and] said so many things that were inaccurate . . . ." (RHRT 1038-39; see also, RHRT 586 [". . . there is so many things I don't remember clear. And I have contradicted myself several times ...."]). In fact, nearly every version she gave was significantly different, in material aspects, from every prior account. The only exceptions were the sworn declarations she provided, exculpating Petitioner, which were at least consistent which each other – unlike all of her inculpatory averments.

Because Ms. Butler's statements regarding what happened to her – and the differences between those various statements – bear on every major issue before the Court, we'll begin by tracing them in chronological order, making note where appropriate of different and new material as it appears. In doing so, we will restrict ourselves to the accounts for which there is some contemporaneous record, beginning with the interview conducted while she was in the Kern County Jail at Lerdo – which will serve as the "baseline" to which her subsequent statements will be compared – and ending with her testimony at the reference hearing.

A. The Interview at Lerdo Jail: February 18, 1987

Five days after arresting Petitioner, Detectives Soliz and Lage and Investigator Hodgson went to the Kern County Jail facility at Lerdo to interview Tambri Butler. (RHRT 1718-19, 1741; 4 RH Exhs. 886, *et seq.*). Before the investigators began recording that interview, they had some discussion with Ms. Butler about the sexual assault she had

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[19] Although she was known by various names in the past (including, notably, "Kay Baines"), and although she subsequently remarried and now goes by the name Tambri DeHarpport (under which she testified at the reference hearing) to avoid confusion we will refer to the witness by the name under which she originally testified: Tambri Butler.

suffered roughly a year earlier at the hands, she said, of a Deputy Sheriff.[20] (RHRT 1746-47; 4 RH Exhs. 866). Following some undetermined amount of conversation – but before obtaining a physical description of Ms. Butler's assailant – the investigators showed her the photo lineup they had prepared regarding the Clark homicide, comprised of Petitioner's picture and those of five other deputies.[21] (RHRT 1743-45; 1852-55). After Ms. Butler picked out Petitioner's photo,[22] they turned on the tape. (RHRT 1746-47, 2159).

Detective Soliz began the taped portion of the interview by asking Ms. Butler to "tell us exactly what happened on this particular incident about a year ago that you were discussing. Go into as much detail as you can." (4 RH Exhs. 886). Ms. Butler responded with a narrative synopsis of the attack she suffered (4 RH Exhs. 886-889), following which she gave meticulously detailed answers to the investigators's questions regarding the physical and other attributes of her assailant (4 RH Exhs. 889-94; 899-900; 908-09), and his truck (4 RH Exhs. 894-99), and then went back over the attack itself, addressing every aspect of those events. (4 RH Exhs. 901-919; 927-31). Finally, Ms. Butler talked about how and when she had recognized Petitioner, her conversation with Deputy Lockhart (4 RH Exhs. 919-26), and

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[20] Although it is clear that there was some substantive discussion (see, RHRT 747 [Det. Soliz]), it is impossible to know, now, what precisely was said and by whom during that unrecorded portion of the interview. Among other things, Ms. Butler later asserted that, during that interview, she told the investigators that she had seen Petitioner on television the night before (RHRT 1023-24). If that is true, it happened before the tape was turned on for there is no mention of the subject, one way or the other, in the taped portion.

[21] As eyewitness identification expert Dr. Kathy Pezdek testified, "strict guidelines" in effect at that time required that a photo lineup be composed to conform to the witness's description of the perpetrator. To use a photo array devised before obtaining such a description, and that did not correspond to the witness's description, was improper and grossly suggestive. (RHRT 650, 659, 689-90).

[22] As the Referee found, and as Ms. Butler herself affirmed (and then denied, and then reaffirmed, all under oath), she had seen Petitioner's face – the same face she picked out of the lineup – on television the night before, in a news story regarding Petitioner's arrest for the murder of two other Union Avenue prostitutes. (R&F at 8, 19; RHRT 1001-25, 1115, 1124, 1135).

the other contacts with her assailant after the attack took place. (4 RH Exhs. 931-35).

1. The Attacker

a. Physical Characteristics

Asked to describe her assailant, Ms. Butler immediately remarked on how her memory of that man was different from the picture of Petitioner, which she had just identified. Unlike the picture of Petitioner, the assailant had a mustache – "a thick one. Thick brush one." It also "seemed like he had more hair . . . [o]n his head. It seemed thicker."[23] Her attacker was also not "so fat. He didn't have as much of a stomach" as Petitioner apparently did. "He had a big chest" (4 Exhs 889); "[h]e was more filled out. . . . His chest seemed more fat than his stomach." (*Id.* at 892).

One physical characteristic of the perpetrator that made a big impression on Ms. Butler was that "[a]cross the back of his rear he had moles . . . [r]ight above his . . . fanny." At one point he had his back to her, and was doing "something down there at his feet." Ms. Butler was "looking at his back. And he had moles. Dark moles. . . . Little ones." (*Ibid.*) The man also had "hair on his chest" – not "real thick . . . [b]ut it wasn't just a little bit. Across the front and down the belly." It was "thick" – not as thick as Ms. Butler's "husband's,"[24] which completely obscured her view of the "husband's" abdominal area – but the attacker nonetheless "was covered with hair." (*Id.* at 889-90).

Ms. Butler said that her attacker was a "white guy," with medium skin tone. (*Id. at* 891). She estimated his height at between 5' 6" and 5' 9" (*id.* at 891-92), but when asked if she had ever stood up next to the man she said: "Not once." (*Id.* at 891, l. 19; see also, *id.* at 910, ll. 15-16 ["I never got out of the truck. Not once. Not from the time I got into it until

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[23] Asked to expand on that point a few minutes later, Ms. Butler said that the assailant's hair "was a little darker but it was brown. It was thin on top" – but thicker on the sides. (4 RH Exhs. 890). Still later, Ms. Butler reiterated: "He had a mustache and he had thicker hair." (4 RH Exhs. 923).

[24] Ms. Butler variously referred to William Wiese (known as "Pegleg" or "Peg") as her "husband," her "boyfriend" and her "common-law husband." Despite what her description implied, it seems they were never married.

he pushed me out. I never got out of the truck."]).[25] Ms. Butler also estimated her attacker's weight as "[a]bout 160, 175," but when asked to estimate Det. Lage's weight she similarly said "165, 170" – considerably less than the 190 pounds to which the detective admitted. (*Id.* at 892).

Although, at one point, Ms. Butler's attacker had his shirt off (*id.* at 911), she saw no "other markings on his body." (*Id.* at 892). The detectives reminded her that "before you came on the tape you said that he was strong," (*ibid*)., to which she affirmed:

"Yeah. He's strong. His hand were big. . . . His hands were rough, and big.

I mean you notice these things."

(*Id* at 893; Exh. 63A).[26] She also made special note of how clean his fingernails were. (4 RH Exhs. at 900).

b. His Clothing and Effects

Ms. Butler's assailant wore a plaid shirt – she thought it was blue – and pants that were not jeans. (4 RH Exhs. 893-94). He wore dark brown boots – "the short kind," not cowboy boots. (*Id.* at 900). When the man pulled down his pants, she thought he was wearing boxer shorts, not briefs. (*Id.* at 911). He had a "cowboy leather" belt with a large gold buckle (*ibid*), and wore a gold watch with a "latex" expansion band. (*Id.* at 893). He did not wear a ring. (*Id.* at 893). He had an old brown "fold over" wallet, which he kept in his back pocket, and later placed on the dash (*id.* at 900), "[a]nd he had a big set of keys." (*Id.* at 895).

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[25] Ms. Butler also stated that the man was shorter than she was, and gave her height as "5' 8 ½" (*id.* at 891) – although at the reference hearing she testified that she was 5' 9 ½" tall. (RHRT 417).

[26] The transcription included in the printed exhibits describes the words after "His hands were rough" as "(Inaudible"). A careful review of the recording itself reveals that, in fact, Ms. Butler reiterated the words ". . . and big."

c. Things He Revealed About Himself

Ms. Butler's assailant was "obviously drunk" and there was "[a] lot of booze smell in the car." (4 RH Exhs. 904). But before the dispute which precipitated the attack, the man was "nice as could be." (*Id.* at 912).

Ms. Butler asked if he had a family, and he told her that he lived in a residential area, and had "two kids, a wife and a dog." (*id.* at 908-09; see also *id.* at 886-87). He specified that one of the children was a boy, and the other a girl. (*Id.* at 908). "And he said, 'well, they're not babies.' And that's all." He did not say anything else about the children, and he said nothing at all about his wife. (*Ibid.*) Ms. Butler did not ask anything more about the dog. (*Id.* at 909).

When Ms. Butler asked him if he was happy, he replied: "'reasonably so.'" (*Id.* at 909). That prompted her to ask him why, then, he had picked her up, to which he said: "'well, shit, everybody needs a little variety.'" (*Ibid.*).

d. His Truck and Its Contents

Her assailant's vehicle "reminded [Ms. Butler] of a dealer truck. . . . it was a nice truck." (*Id.* at 897). It was definitely a "newer" one – not as new as that year's model ("not an '86") but (she specified) *not* from the 1960's or 1970's: "It wasn't old . . . [i]t couldn't have been more than a couple years [old] . . . " (*Id.* at 896-97).

On tape, she was not asked, and did not specify, the color of the vehicle, but she recalled that the tailgate of the truck said "Chevrolet" in red letters. (*Id.* at 896). She also recalled in some detail the weathered-looking grayish sideboards attached around the bed of the truck. (*Id.* at 898-99 ["That just sticks in my head. Those boards on the truck."]).

Inside there was a bench seat covered with a dark grey material with designs on it. The steering wheel was black, the gear shift was on the column (it was an automatic), the dash was light colored, and the floor mats were rubber. (*Id.* at 895-96). The truck had air conditioning ("he turned if off when I got in . . . He turned it down and turned it off later") and a radio. (*Id.* at 897). There was a big back window, and next to it was "[a] hook or a

light or something." (*Id.* at 899).

Ms. Butler noted that "[h]e had a lot of trash in the truck" – mainly papers, perhaps credit card receipts, but not bottles or cans. (*Id.* at 894). She also noticed a big box – perhaps a tool box – on the floor, which she kept bumping into with her feet, as well as a big silver thermos and a flashlight, which she described as a silver two-cell light with a red end. (*Id.* at 894, 904).

The attacker also had weapons in his truck – a pistol and a stun gun – which will be described presently.

2. The Attack

Ms. Butler recalled the incident as occurring at the beginning of 1986 – sometime between Christmas, 1985, and when she went to jail in February, 1986 – a little more than a year before she was interviewed at Lerdo in early 1987. (4 RH Exhs. 891, 926).

It was late in the evening, around 12:00. (*Id.* at 901, 904). Ms. Butler, wearing corduroy pants and a red corduroy jacket, was walking home on Union Avenue, near the corner of Chester, across from the Knight's Rest Motel where she was living. (*Id.* at 886, 900-01). As she was crossing the street, a truck turned off of Chester and pulled up past her; the driver stopped and flashed his tail lights. (*Id* at 901). The driver looked at her inquiringly, and she ran up to the truck. (*Id.* at 902). The driver asked Ms. Butler if she needed a ride or was looking for a "date." (*Ibid.*) She apparently hesitated, because "I already had my dope, you know, I really didn't need no money" – but she decided that "the extra money would help," and agreed to the "date." (*Ibid.*).

Ms. Butler got in the truck, and rolled down her window to throw out a cigarette she was smoking. (*Id.* at 903). The man asked her "how much," and they agreed to $20.00 for "a blow job." (*Id.* at 887). She told the man she know of a place "down Union, towards Pacheco." He said he knew a better place, off toward Cottonwood, which she felt was too far. They argued a little; she suggested that they go to a spot right behind her motel, but he replied that there were too many people there. She initially agreed, but objected again when they headed to his location, saying she didn't like it, it was too far. He asked if she wanted

him to take her home, or wanted a date. Ms. Butler thought: "You know. It's money. So I said sure." (*Id.* at 905).

Along the way they talked a little. (*Id.* at 886-87). Aware of the "booze smell in the car," Ms. Butler asked the driver if he had been to the clubs. He responded that he had been to a few bars, but they closed early because it was a week night – the (last?) one he had been to closed at midnight. (*Id.* at 904). The driver noticed that Ms. Butler had a tattoo and shined a flashlight on it to admire it. And – as reported above – they talked about his family, his children, where he lived, his dog and why he was out picking up prostitutes. (*Id.* at 886-87, 908-09).

The man drove south of town, turned onto a dirt road and into a "huge" field. (*Id* at 886, 905-06). During the events that occurred while they were parked in the field, Ms. Butler "never got out of the truck. Not once." (*Id.* at 910). The man gave her $20.00 from his shirt pocket (*id.* at 911-12) and pulled down his pants. (*Id.* at 887, 910). Ms. Butler took off her top, knelt on the floor of the truck between his legs, and "started to give him some head." (*Id.* at 887).

After about 45 minutes Ms. Butler told the man that it had been too long – he had to either give her some more money, or take her home. (*Id.* at 887). He agreed, and gave her another $20.00 which he extracted from his wallet, which he had placed on the dash. (*Id.* at 887, 912). The man said he did not want more fellatio, but instead wanted "sex" – *i.e.*, vaginal intercourse, and Ms. Butler complied, taking off her pants and straddling him as he remained on the bench seat. (*Id.* at 887, 912-13).

More time passed, and the man was still unable to finish; Ms. Butler got "mad" and said: "I've done all I can do. If you're not going to get off, take me home. I've been here almost an hour and a half, close to two hours. Take me home. This is too long." (*Id.* at 913). She started putting her clothes back on. (*Ibid*).

The man grew enraged: He slapped her, hard, and said, "you're going to do what I tell you you're going to do . . . you're going to take your clothes off and you're going to do what

I tell you." (*Ibid.*) Ms. Butler got off of him, and sat in the seat, trying to dress herself. (*Id.* at 914). The man got out of the truck and came around to the passenger's side. He told her again that she was to take off her clothes and do what he said, and then threw her down on the seat. (*Ibid*).

Ms. Butler sat back up, and tried to struggle with him, at which point he grabbed a stun gun and stuck it to her neck.[27] (*Id.* at 887, 914, 928). The man held the stun gun against her neck for "a good minute . . . [m]inute and a half;" she screamed and attempted to pull away his arm, but he shocked her "until I couldn't scream anymore." (*Id.* at 887, 917). Ms. Butler then agreed to do as he asked, and laid down on the seat, and they had more vaginal intercourse. (*Id.* at 887, 918).

At that point, the man was standing outside of the truck, and had dropped his pants and taken off his shirt. After a while, he turned her over onto her stomach, but she did not attempt to resist until it was clear that he meant to penetrate her anus. (*Id.* at 918). She sat up quickly and said: "You're not going to do that," to which the man responded by reaching into his glove compartment and pulling out a gun.[28] (*Ibid.*).

The man stuck the gun to her temple, but Ms. Butler, unafraid, said: "you're not going to pull that trigger;" "that motherfucker is not loaded." (*Id.* at 887, 919). The man responded by putting the barrel of the gun across the bridge of her nose and shooting it out the window. (*Id.* at 888, 919). At that point, Ms. Butler "was convinced." (*Id.* at 919). She laid back down and submitted to anal sex. (*Id.* at 919, 928). Finally, he ejaculated onto her back. (*Id.* at 928).

As Ms. Butler sat up and started getting dressed, the man got back in the truck and started driving. As he did, he went through her pockets. Before he got to it, Ms. Butler

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[27] Ms. Butler variously described the weapon as a "stinger," a "shocker," a "shotgun" [*sic*] and (later) a "taser." What she described in some detail (*id.* at 914-15) – and what she subsequently identified at the hearing – was a stun gun, and we shall refer to it as such.

[28] The gun was small, gray metal, and had a black handle. (*Id* at 933).

pulled out her "dope" – it was $30.00 worth of heroin, wrapped in tin foil – and said "you don't want this." He asked "why don't I want this?," and she replied: "'cause it's heroin, you don't want to do heroin." He replied: "How do you know?" It was clear to Ms. Butler that he knew what it was, by the way he handled it and sniffed it. (*Id.* at 906-07, 928). The man asked her "how bad do you want it," made her beg for it, and then threw it back to her. (*Id.* 907-08). He also took her money, but when she told him that she needed some to bring back to her pimp or she would get beat up (which was an invention – she did not have a pimp), he threw $20.00 of it back to her as well. Finally, he tried to take her gold watch, but she told him he would have to shoot her first, and he relented. (*Id.* at 888).

At some point, Ms. Butler told her assailant: "you realize I'm going to get you back like this. You know I'm going to get you back." (*Id.* at 895). He was unconcerned, replying: "What are you going to do – you're a hooker. . . . What can you do? Call the cops?" To which Ms. Butler said she replied: "yeah, you got a good point, you asshole."[29] (*Ibid.*).

As they drove back towards Union Avenue, the man slowed down and reached over to open the passenger side door. When she understood what he was doing, Ms. Butler opened it herself. He told her to get out; she said: "well, stop." In response he pushed her out of the moving truck. (*Id* at 929). Ms. Butler rolled into a ditch; when she looked up she saw the trucks rear brake lights, and "knew he was about to back up." (*Id.* at 930). She rolled off into a bush, and saw the man's face as the truck backed up until it hit something – perhaps a log. At that point, the truck slowly went forward and then took off, tires spinning and gravel flying. (*Id.* at 888, 930). About two hours had elapsed since the man picked up Ms. Butler. (*Ibid.*)

Ms. Butler got up and walked back to the Knight's Rest Motel, where she told her

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[29] Towards the end of the interview, Ms. Butler was asked to reiterate this exchange and gave a slightly different version, ending with her threatening the man: "I got friends. You know you won't get away with this . . . if I have to I'll follow you. I'll find out who you are. You won't get away with this." (*Id.* at 933).

boyfriend, "Pegleg," what had happened. (*Ibid.*).

3. The Aftermath

a. The Attacker Stalks Ms. Butler

About two days after the attack Ms. Butler was performing fellatio on another "date" from Union Avenue when she looked up. The man who had attacked her was standing, just a few feet away, "rubbing his self." The attacker had a gun in his belt. (*Id.* at 931).

Ms. Butler ordered her "date" to "drive, just drive this son-of-a-bitch." (*Ibid.*). He complied, and as they were pulling away Ms. Butler looked back and saw the attacker's truck, "parked off in the bushes;" the attacker was standing next to the driver's side, watching them. (*Id.* at 931-32). The man followed them; Ms. Butler's date dropped her at the motel and she ran in and told her boyfriend: "that son-of-a-bitch that raped me . . . last month [*sic*] is following me. . . . He's there. Go get him." (*Id.* at 935). Mr. Wiese ran to his own truck, but by the time he got it started, the assailant was gone. (*Ibid.*)

About a week later Ms. Butler was coming out of her motel and saw her assailant again: his truck was parked right across the street, and he was sitting outside of it, just watching her. (*Id.* at 932). Yet another time, Ms. Butler was on Union Avenue when she saw the attacker going down the street in his truck, in the opposite direction. He made a u-turn, and she responded by crossing the street. He parked his truck and said: "Come here," but she ignored him and went inside the building. (*Ibid*).

b. Ms. Butler's Encounter With Petitioner In the Jail

Ms. Butler told the investigators that, by the time of the interview, she had known for a while that Petitioner was the man who assaulted her. Investigator Hodgson inferred – apparently based on something Ms. Butler said before the tape started – that she had seen him while she was in jail, and he asked how that came about.[30] (*Id.* at 920).

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[30] Ms. Butler had been talking about having seen Petitioner's picture (in the "Behind the Badge" annual that Deputy Lockhart showed her) while she was in jail – but she had not said, on tape, that she had actually seen Petitioner himself in the jail, when Mr. Hodgson proposed asking how "she came about seeing him when she was in jail." (*Id.* at 920).

Ms. Butler explained that it happened when she was "going to visit my husband ... my boyfriend, Pegleg . . . ." She described the encounter as follows:

> "I had been out to visit him two or three times before and I kept seeing this cop, kept seeing this cop, kept seeing this cop. . . . I don't know why, but I kept wanting to say his name was Burch, which was not it. And I kept looking at him. . . . I even pulled him out two or three times. I said I know you. I know you from somewhere. He said no you don't. I said yeah I know you from somewhere. You drive a white truck. And he said yeah, I arrested you in Arvin . . . for under the influence. I've never been arrested in Arvin. He said I arrested you in my white squad car. I said no, you've never arrested me in Arvin. I've only been arrested in Bakersfield. He said something to me I don't remember. But like I say it was . . . like somebody lifted a sheet and I snapped. . . . I knew exactly where I seen him. It was the uniform kept throwing me off. . . . I had seen the man naked so I couldn't figure out what he looked like with clothes on. . . . When he said something to me . . . 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 I looked at him some more. But he said something else: Tape your fucking mouth shut or something. He got real nasty."

(*Id.* at 920-21).

Ms. Butler told the investigators that she had told someone about the encounter at the time, but she could not remember who but it was not a deputy, "not then." (*Id.* at 921).

c. The Conversation With Deputy Lockhart

During her then-current period of incarceration, Ms. Butler had told one of the guards, Deputy Jeannine Lockhart, that she had been raped by another deputy who worked in the jail.[31] (*Id.* at 921-22). The conversation had been initiated by Dep. Lockhart, who was curious about Ms. Butler's work as a prostitute. (*Id.* at 921). When Dep. Lockhart asked if Ms. Butler had ever been "hurt," Ms. Butler replied that she had been raped four or five times – and in fact had been raped in Kern County by "a cop." According to Ms. Butler, Dep. Lockhart asked if it was "a sheriff or a deputy?" to which Ms. Butler replied: "a sheriff ... [i]n this county. Right here. Right down stairs."[32] (*Id.* at 922).

Dep. Lockhart asked if Ms. Butler had "seen him," and Ms. Butler said that she had, but she would not tell the deputy who it was "cause I was still scared. . . . It's not something you talk about, you know." (*Ibid*). Deputy Lockhart asked: "if I asked you who it was would you tell me?" and then whispered in Ms. Butler's ear – "I think she said Lemski or Nowatski or something like that. Some name that started with an 'L' I think." Ms. Butler said: "no." Then Deputy Lockhart proposed showing her something with pictures in it, to which Ms. Butler replied: "I can't guarantee you nothing but I'll look." (*Ibid*).

Ms. Butler said that saw "his" picture, but when she gave the book back an hour or so later, she told Dep. Lockhart that she had not seen him, "but I saw somebody that looked a whole lot like him ... [b]ut I don't see him." That was because she was looking for someone named "Birch" – which she believed was her attacker's name – and "[t]here was no man in there named Birch." (*Id.* at 922-23). Even during the interview, Ms. Butler kept thinking that his name was "Birch" – "That's why I try to convince myself maybe it's not

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[31] At the time of the February, 1987, interview in Lerdo, Ms. Butler had been in custody continuously since October, 1986. (RHRT 1055). Deputy Lockhart testified at Petitioner's trial that the conversation took place "sometime between September and November of 1986." (RT 5805-06).

[32] As will be seen, Deputy Lockhart's testimony regarding this conversation (both in 1988 and in 2011) was substantially different than what Ms. Butler related.

him." (*Id.* at 923).

According to Ms. Butler, however, when she gave the book back she showed Dep. Lockhart a picture and said "that he looked a lot like this guy." But (Ms. Butler reported) Dep. Lockhart "didn't even look. She said well if you don't know who it was then I can't help you." (*Ibid.*).

Exactly *whose* picture Ms. Butler said she was pointing out is difficult to determine. Initially, she seemed to be indicating to the investigators that the picture she showed Dep. Lockhart was one of Petitioner. (*Id.* at 923, ll. 13-16). As she continued, however, she seemed to be talking about someone else entirely:

> "The guy that I showed her did look a lot like the guy that had, you know, taken advantage of me. Because he had . . . a mustache and he had thicker hair."[33]

(*Id.* at 923, ll. 17-19). Investigator Hodgson and Ms. Butler had the following exchange:

Q: "Did you show her or point out to or say that about this individual?"

A: "No. No. I did not."

Q: "Okay. But had you seen this individual in that book."

A: "Yes, I did."

Q: "And did you know who it was?"

A: "Yeah, I did."

Q: "So you . . . knew before you gave her back the book that you had seen the man who done this."

A: "Uh huh."

Q: "But you didn't want to tell her that."

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[33] Petitioner is not pictured with a mustache in any of the "Behind the Badge" books, and the uncontroverted evidence is that he never wore one. (JR RT 23-24). And when she said to the investigators that "he had thicker hair," Ms Butler is clearly referring to the perpetrator and comparing her memory of him to the photograph of Petitioner they had just shown her, taken from "Behind the Badge."

A: "Huh uh. In fact I had my finger on the page. And I flipped it back. I said he looked like this guy but it, it wasn't him. . . . I said something to the effect there's another guy in here that doesn't have a mustache that could be him but I don't think so. She said well you have to be sure. And she was real busy doing chow and stuff. She didn't pay a lot of attention when I gave her the book back. I sat it on her desk."

Q: "Were you kind of down-playing the incident or were you asking her to do a report? Or what was happening along those lines?"

A: "I was down playing it at that point. . . . I was trying to go ahead and drop it. Because I didn't think she'd go this far. She said she'd help me to try to, you know. That the guy didn't even need to be a cop. Well I didn't want to get off into that, you know. . . . She said that, that we could do things, you know, to take care of this. . . . When I told her about it I kind of realized that I had made a mistake, . . . [b]ecause there was nothing I could do. . . . She even told me . . . there's not a whole lot you can do but we can be aware of the situation . . . [a]nd keep this from happening again. And I was really sorry at that point when I got the book that I'd said anything at all."

(*Id.* at 924-25).[34]

Ms. Butler went on to say that she wished she had actually shown Deputy Lockhart who it was, "but I didn't because I was scared . . . ." (*Id.* at 925). But there was "no doubt in [her] mind at all" that the person she had identified at the beginning of the interview – the Petitioner – was her attacker. (*Id.* at 925).

B. Ms. Butler's Trial Testimony

Ms. Butler testified at the penalty phase of Petitioner's trial, on March 23, 1988. (RT 5778-5804).

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[34] As will be reviewed presently, Deputy Lockhart's report of their conversation diverged significantly from Ms. Butler's.

At the outset, she acknowledged that she was in custody, and was asked what she was in custody for, to which she replied:

"For possession of heroin."[35]

(RT 5778-79). Next, she identified the Petitioner; asked where she had seen him before, she said: "On Union Avenue and on A Deck . . . of the Kern County Jail," and she specified that, when she saw him on A Deck, Petitioner was in uniform and was working.[36] (RT 5780).

Ms. Butler then repeated her account of the assault she had suffered, some two years earlier. While her testimony accorded generally with what she had told the investigators,[37] various details – some insignificant, and some important – were quite different.

In every significant way in which Ms. Butler's testimony diverged from what she had said the year before at Lerdo, it had become more inculpatory of Petitioner. While, in the interview, the only name that had surfaced for Ms. Butler was "Birch," but when she testified she asserted for the first time:

"I think he told me his name was David, but I don't remember if I asked him or not." (RT 5782).[38]

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[35]As the Referee found, "*[t]hat testimony was false. It is undisputed that, in fact, Ms. Butler was in jail for felony possession of narcotics for the purpose of sale, in violation of Health and Safety Code Section 11351. [T]hat is a completely different – and far more serious – offense than simply possessing heroin (Health and Safety Code Section 11350). The latter crime is generally just a misdemeanor, while . . . possessing narcotics for sale a crime of moral turpitude.*" (R&F at 9-10).

[36]"A Deck" housed the intake and booking area of the jail. (RHRT 2075).

[37] Some points that she reaffirmed – such as that she definitely recalled her attacker having a mustache, and that the gun was aimed out the window, rather than at her temple, when it was fired – will become of particular interest when her subsequent statements are reviewed.

[38] On cross-examination, Ms. Butler admitted giving Deputy Lockhart the (last) name "Birch," and said: "I didn't know the name. I didn't know the man's name at the time." She had thought it was "Birch." (RT 5796-97).

In the taped interview, Ms. Butler had never specified the color of the attacker's vehicle, but she had clearly recalled it having the word "Chevrolet" painted in red on the tailgate. However, when examined regarding what she had said to the officers, she testified:

A: "I told them it was a white pickup truck."

Q: "What brand?"

A: "Didn't – closest I could figure, I don't know my trucks, but the closest I could figure was a Ford."

Q: "Are you sure you didn't say Chevrolet?"

A: "I really don't remember what I said. I know I told them it was a pickup truck. I know what a truck is. I don't know Chevy, Ford, but it was white."

(RT 5794).[39] The assault ascribed to Petitioner became worse as well: Ms. Butler added the particularly shocking assertion that, after he had penetrated her anus, he had forced her once again to orally copulate him. (RT 5788).

Asked about the jury's reaction to Ms. Butler's testimony, prosecuting attorney Sara Ryals testified at the reference hearing that:

> "Most of the people, with the exception of what I called the little old lady who was in the center of the back row, they were all leaning forward, listening. Very, very focused on what Ms. Butler was saying. The little lady in the back seat was obviously distraught at some of the testimony because she was dabbing her eyes with a Kleenex. But she was listening."

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[39] Notably, this exchange occurred on direct examination; defense counsel did not follow up by examining Ms. Butler about having told officers the truck was a Chevrolet, and neither counsel asked her about the vintage of the vehicle (which, she had told the detectives, was recent), nor about the gray sideboards. The jury was thus left with the impression that the attacker's truck corresponded to the description of the one Petitioner owned when he killed Tracie Clark – a white 1960s' Ford pickup with a camper shell.

(RHRT 1957-58).[40]

Almost as significant as the deviations in Ms. Butler's account were the things that were not included. Thus while Ms. Butler mentioned characteristics of her attacker that were mutable – the mustache, the gold belt buckle, the boxer shorts – she was neither asked about nor did she describe the several unchangeable aspects that did not match Petitioner: the abdominal hair, the big hands, the thick hair, the large chest, the moles across the bottom of the back, the absence of other body markings (such as Petitioner's tattoo).

There was also some variation regarding what Ms. Butler reportedly told Deputy Lockhart about the identity of her assailant. At trial she testified that, after looking at the "Behind the Badge" book, "I never pointed a face out to her. I told her I saw the face in it. I was afraid. . . . 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?" (RT 5793; compare, 4 RH Exhs. 924 ["In fact I had my finger on the page. And I flipped it back. I said he looked like this guy but it, it wasn't him."]). Similarly, in describing her encounter with Petitioner inside the jail, Ms. Butler no longer said (as she had told the investigators) that it occurred while she was visiting Mr. Wiese; rather, she testified, it occurred while *she* was incarcerated, and her "husband" was visiting *her*. (RT 5802).

On cross-examination, defense counsel made a few efforts to impeach Ms. Butler, beginning with this exchange:

Q: "And its true that you saw photographs of Mr. Rogers on television or in the newspaper before you talked to the police, did you not."

A: "No sir, none whatsoever."[41]

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[40] Petitioner's trial counsel similarly opined that "Ms. Butler's testimony had an enormous effect on both the judge and the jury." (RHRT 1468-71; 5 RH Exhs. 1414).

[41] As the Referee found again, "*This testimony was false.*" (R&F at 8). Reviewing several of the occasions on which Ms. Butler subsequently admitted seeing Petitioner on the television news the night before, the Referee found as a matter of fact that *"she saw petitioner on TV before she identified him."* (*Ibid.*; see also R&F at 19 [finding that "*Butler saw petitioner on television in jail clothes . . . .*"]).

(RT 5795). Counsel later brought up that when Ms. Butler was interviewed at Lerdo, and picked out Petitioner's photograph, she was "in custody with other girls [*sic*] charged with prostitution and heroin . . . related offenses." (RT 5801-03). He then asked:

Q: "And it's true, is in not, that this case was discussed amongst other people in jail, the details of it?"

A: "Not really. I didn't discuss it with a whole lot of people. It's not something I really wanted to discuss."[42]

(RT 5803).

Counsel also asked about Ms. Butler's level of heroin consumption at the time of the attack; she replied that she was using "[b]etween 120 and 160 a day," and "shot up" three times a day. (RT 5799-5800). That, she said, was just enough to keep her from getting sick. (RT 5800). She had gone through a painful withdrawal when she went into custody, before talking to the investigators. (RT 5790).

Finally, Ms. Butler testified on direct that she had not received any promises of leniency or "any type of deal" – rather, she had "been told I have nothing coming." (RT 5794). Defense counsel pursued the matter, briefly, on cross-examination:

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 prison.

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[42] The Referee found – based on her own subsequent admissions – that in fact, "*Ms. Butler talked with other inmates extensively about the case and she testified falsely when she denied talked to other inmates about the case.*" (R&F at 7 [record citations omitted]).

A: "I have already been sentenced to county."[43]

(RT 5801).

C. Ms. Butler's Sworn Recantations, And An Intervening Conversation With the District Attorney's Investigator

1. The Defense Makes Contact With Ms. Butler

Early in 1998, post-trial defense investigator Melody Ermachild located Ms. Butler in rural LaPine, Oregon, where she was living under her married name, Tambri DeHarpport. On May 31st of that year, Ms. Ermachild went to Ms. Butler's home and introduced herself as an investigator working for David Keith Rogers, and attempting to get him off of Death Row. (RHRT 98-99; see, RHRT 514). Ms. Butler recognized Petitioner's name, and replied that she did not want to talk and that Ms. Ermachild should get off her property. Ms. Ermachild asked Ms. Butler to just hear her out; she said that there may have been a mistake in Ms. Butler's identification of Petitioner, and that she had photographs of a different man that she wanted to show Ms. Butler. (RHRT 100-01; 514-15). According to Ms. Butler, "it wasn't like she was being aggressive. She seemed like a nice enough person, she was just doing her job." (RHRT 515). Ms. Butler invited her in. (*Ibid.*)

The two women talked for two or three hours. (RHRT 101). Ms. Ermachild asked Ms. Butler to recount everything she remembered, or (as Ms. Butler described it) her "side of the story." (RHRT 516). According to Ms. Butler, Ms. Ermachild never said that she (Ms. Ermachild) thought Ms. Butler had misidentified Petitioner, but did say that it was possible that had occurred. (RHRT 517-18). Ms. Ermachild gave Ms. Butler Detective Soliz's detailed summary of the Lerdo interview, which Ms. Butler reviewed. (RHRT 306-07). Ms. Ermachild told Ms. Butler (accurately) that Petitioner had never had a mustache, had not

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[43]The Referee found (again, relying on Ms. Butler's own admissions) that this was yet another lie. Quoting Ms. Butler's subsequent remarks to Investigator Hodgson: "*'I'm not stupid. I knew if I testified I'd get to go home. I knew that,'*" the Referee found, "*she knew that she would get out if she testified," and testified falsely when she said otherwise.* (R&F at 9).

been associated with a stun gun, and did not own a pickup truck at the time of the attack on her.[44] (RHRT 1170). Towards the end of their conversation, Ms. Ermachild showed Ms. Butler pictures of Michael Boyd Ratzlaff, and described his attack on Lavonda Imperatrice.[45] (RHRT 235-36, 520).

Throughout the interview, Ms. Ermachild took notes – 12 pages in all. (RHRT 102-03; 1 RH Exhs. 204-216). At the end, she asked if Ms. Butler would sign a declaration, and explained that it would be filed with the California Supreme Court along with a habeas corpus petition, and would remain a public record. (RHRT 104-05). Ms. Butler agreed, and Ms. Ermachild hand-drafted a declaration for Ms. Butler's signature. (*Ibid*). Ms. Ermachild asked Ms. Butler to review the written copy, and she also read the entire draft declaration aloud to Ms. Butler. (RHRT 106). Ms. Butler asked Ms. Ermachild to make approximately a dozen specific changes to different parts of the declaration, initialed several of them, and then signed it.[46] (RHRT 107, 110-11; see, 1 RH Exhs. 218-25). Ms. Butler understood at the time that she was signing under penalty of perjury, and that it was a criminal offense to do so if the declaration contained false statements. (RHRT 578-83).

At the reference hearing, Ms. Butler testified she was comfortable with Ms. Ermachild, and that she spoke freely. Ms. Ermachild ended up staying through the afternoon – some five or six hours, according to Ms. Butler. (RHRT 1197). At some point, Ms. Butler's husband joined them, and chatted with Ms. Ermachild. (RHRT 105-06). Still later, guests arrived, wine was opened and some was offered to Ms. Ermachild, who declined.

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[44] According to Ms. Butler, Ms. Ermachild also told her that Petitioner's family was "destitute," that his wife was "bankrupt" and that "one of them had an illness." Ms. Butler says she was unmoved by this information, and "I told her I could care less." (RHRT 520).

[45] At the reference hearing, Ms. Butler recalled that Ms. Ermachild showed her mug shots of Petitioner, as well. (RHRT 520). Ms. Ermachild, however, testified that she did not bring pictures of Petitioner when she interviewed Ms. Butler. (RHRT 233-34).

[46] At the reference hearing, Ms. Butler repeatedly insisted that she had just "just kind of glanced" at the document. (RHRT 988).

(RHRT 106). Ms. Butler asked Ms. Ermachild to stay for dinner, but she declined that invitation as well. (RHRT 1197).

2. The First Sworn Declaration – May 31, 1998

Ms. Butler's declaration begins by reaffirming her account of the assault in early 1986 by the man with "a thick bushy mustache that hung over his lower lip," driving a white pickup truck – which she specifies was "without a camper on it." (1 RH Exhs. 218). She recalls him showing her "photos of his children, a boy and a girl," and how he followed her during the period after the attack. (*Ibid.*). She similarly reiterates her encounter with a Sheriff's deputy while being booked into jail; how she thought he looked like the man who assaulted her; the exchange in which she said she knew him from somewhere, his reply that he had arrested her in Arvin, her determination then that he had attacked her, for which she cursed at him; his response "to the effect of turn around and be quiet." (*Id.* at 218-19).

Ms. Butler also recounts her later conversation with Deputy Lockhart, whom she said showed her the book of photographs but "did not leave the book with me, nor did I turn the pages." (*Id.* at 219). In this account, Ms. Butler told the deputy that she had seen the man's picture on one of the pages, at which point Deputy Lockhart "whispered the name 'Birch' to me, and she might have said Lenski or Laski, I can no longer remember." (*Id.* at 219-20). Ms. Butler could not remember whether or not the man in the picture she thought was her attacker had a mustache. (*Id.* at 220).

Ms. Butler reveals that, when she was back on the streets working as a prostitute in 1986, there was a "a lot of talk among the women I knew about attacks by a man driving a white pickup," and also says that she had been friends with Tracie Clark, "who was killed by David Rogers." (*Ibid*).

Then, in direct contradiction to her trial testimony, Ms. Butler avers as follows:

> "When Tracy [*sic*] Clark was killed and David Rogers was arrested, I was in the Lerdo jail. It came over the TV in the jail and I saw David Rogers. Right away, I ~~thought~~ knew he might have been the man who attacked me. All the prostitutes in the jail were saying the same thing. Everyone knew that if

they could testify against him, it was a sure and fast way to get out of jail." (*Id.* at 220-21 [strikeout and interlineation in original]). Ms. Butler goes on to explain that, on the other hand, she was reluctant to testify because she "wasn't a rat," and because her boyfriend (Wiese) was also in jail, thus she was more interested in staying in, where she would get healthier and stay off drugs. (*Id.* at 221).

The investigators – apparently alerted by Deputy Lockhart – nonetheless came to interview her, and showed her a photo lineup. According to Ms. Butler:

"I picked out David Rogers, who I had just seen on television the day before.

I am not certain that my mind was not influenced by this."

(*Ibid*).

Ms. Butler recalls being contacted by various district attorneys during the months after that, before Petitioner's trial started, and that – during the trial itself – "six men in suits, three of them D.A.s" came to see her in jail. She reports that they told her that Petitioner had in fact "killed nine women they knew of, and probably more," that Tracie Clark had been pregnant at the time she was killed, and her body mutilated: "When I asked if the baby had been cut out of her, one man said, 'Use your imagination.'" (*Id.* at 222).

These men convinced her "to testify to put Rogers on death row to protect other women prostitutes." Ms. Butler declares, however, that the authorities made no promises to her, but rather "made it clear I would have nothing coming to me, no reward for testifying. I told them I did not want felony probation, which I had coming, because I knew if I had that I'd come back to jail or prison for a long sentence. They didn't promise me anything." (*Ibid.*).

Nevertheless, Ms. Butler says, she testified – and in doing so, did her best to ensure that Petitioner would get the death sentence:

> "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. I knew there were some things it wouldn't be good to say if I was going to help put Rogers on death row."

(*Ibid*). Ms. Butler avers that she was coached: "the men who interviewed me from the D.A.'s office indicated a lot of things it wasn't going to be good to say." (*Id.* at 222-23).

Not long afterwards, Ms. Butler says, she was released from jail – five months early. (*Id.* at 223). When she asked why, a jailer explained that Petitioner had been convicted the day before, "and they had been told to 'cut me loose.'" (*Ibid.*). Ms. Butler returned to the streets, on felony probation, and was promptly arrested again; she knew that she was facing "a substantial sentence." However, when she was out on bail, "Ms. Ryals' 'right hand man'" – "fairly young, good-looking, perhaps with light hair" – found her on Union Avenue.[47] He told her that some police officers might have thought she had "done a bad thing by testifying against Rogers," and that she should "leave California and never come back or I might wind up in a ditch, dead. He said a file would just drop behind a file cabinet and my name would never be mentioned in California again." (*Id.* at 223). Ms. Butler left the state (jumping bail on her pending case) and moved to Oregon, where she gave up drugs and married. (*Id.* at 224).

In the intervening years, Ms. Butler avers, she had:

> " . . . often worried 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 ~~me~~ my husband that I am now uncertain and it weighs on my mind."

(*Ibid.* [strikeout and interlineation in original]).

Ms. Butler goes on to say that she had learned of Michael Ratzlaff's attack on another prostitute, Lavonda Imperatrice: that he drove a white pickup; that he had used a stun gun and fired a gun at her; that he had forced her to have anal sex "and to take off her clothes and drove off and other details that are the same as those in the attack on me." (*Ibid*). After

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[47] Ms. Butler subsequently confirmed that she was describing District Attorney's investigator Tam Hodgson. (RHRT 40).

looking at pictures of Mr. Ratzlaff,[48] Ms. Butler concluded that "he does resemble my attacker. I cannot be certain he was not the man who raped me." (*Ibid.*)

3. Phone Call With District Attorney Investigator Hodgson: October 27, 1998

Not long after their first interview, Ms. Butler and Ms. Ermachild spoke again by phone. In that conversation, Ms. Butler said that she thought Petitioner was "where he needed to be," but she nonetheless confirmed that she would stand by her declaration and testify in his habeas case. (RHRT 128).

In the meantime, however, Ms. Butler contacted the Kern County District Attorney's Office. Investigator Hodgson returned the call, and, after talking for some unspecified amount of time, taped the remainder of their conversation, which continued for nearly 40 minutes (3 RH Exhs. 672, *et seq.*).

Ms. Butler testified at the hearing that she contacted the District Attorney because she "knew what the bad guys were doing, and wanted to know what the good guys were doing." (RHRT 1168-69). What she said during the phone call suggested a more pragmatic motivation: She was worried because she had left the state while on felony probation. She understood from Ms. Ermachild that she could be forced to return to California to testify, and was "really scared" that she would have to face the consequences of her earlier flight. (*Id.* at 699, 704). Investigator Hodgson assured her that, in the intervening years, the County had gone over to a computer system and thousands of names had been purged from the records. (*Id.* at 704).

Ms. Butler also wanted to know if she should hire an attorney, and was very concerned about being charged with perjury. Investigator Hodgson responded that she only needed to worry about that if she had lied when she testified that Petitioner was the person who attacked her. (*Id.* at 698-99). Ms. Butler asked:

"On that right there, say I made a mistake, a completely left-handed mistake?"

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[48] The pictures Ms. Ermachild showed Ms. Butler were entered in evidence at the reference hearing as Respondent's Exhibit C. (5 RH Exhs. 1344-47).

(*Id.* at 699-700). Inspector Hodgson replied: "But that's not intentional. A mistake is not an intentional act. The issue is whether or not you took the stand and intentionally lied when you testified." (*Id.* at 700).

Not surprisingly, Ms. Butler tried to reassure Investigator Hodgson that she was still convinced that Petitioner was the culprit, and that she was still on the prosecution's side. But in doing so she repeatedly betrayed her continuing uncertainty about the accuracy of her identification testimony.

Thus Ms. Butler told the investigator that, when she saw Petitioner in the booking area of the jail, and when she testified, she had been sure he was the man who raped her. (*Id.* at 682, 700). However, three things she had learned from Ms. Ermachild had led her to question her "judgment" as to whether she had correctly identified Petitioner as the attacker: The fact that he never had a mustache; that he had not been associated with a stun gun; and that he did not have a white pickup. (*Id.* at 680, 681, 687, 700). She explained:

> ". . . all those things were major, major deals with the fact that the night I was raped he was driving a white pickup, white to cream, you know, but he was driving this pickup truck and he had a stun gun and he [had] a very bushy mustache . . . ."[49]

(*Id.* at 680). Ms. Butler said that, since Ms. Ermachild had told her that those things were not true of Petitioner, she had "questioned just about everything I've done in my life. . . . If I was wrong on it and put a man on death row for no good reason."[50] (*Id.* at 682).

Ms. Butler's "confidence" was shaken further when Ms. Ermachild showed her pictures of "another man who was very close in description to David Keith Rogers" (*id.* at

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[49] Inspector Hodgson pressed her whether it was her "recollection that the person who raped you definitely had a bushy mustache?" Ms. Butler responded that it was. (*Id.* at 698).

[50] Ms. Butler went on to add, however, that there was still a good reason for Petitioner to be on death row, "'cause he did admit to killing two women is what Ms. Ermachild told me . . . . I said wait a minute, he's a Kern County cop, if he killed one women [*sic*] he deserves death row." (*Id.* at 682-83).

672), but who did have a "bushy mustache." (*Id.* at 698, 700). According to Ms. Butler:

> "The pictures that she showed me were a young man with a bushy mustache and it was like ... oh *my God she's pulled him out of the past and that's him* .... It was like, okay, this is David Keith Rogers eleven years ago.... It took me to the point to where, I mean I got chill bumps on the back of my neck because I was looking at David Keith Rogers eleven years ago..... It was that close."

(*Id.* at 700 [emphasis supplied]).[51]

Ms. Butler described changing a passage in the declaration Ms. Ermachild had drafted, to make clear that she was not convinced that she had misidentified Petitioner, but rather "I was still unsure. . . . *I am sure but I'm not sure.*" (*Id.* at 686-87 [emphasis supplied]). Ms. Butler confirmed that, when Ms. Ermachild called her back and asked if she was still "questioning [her] judgment," she responded that she continued to harbor those same uncertainties: "I said yeah, and, you know, *I still am kind of messed up in my head, you know, to where I am questioning my judgment . . . .*"[52] (*Id.* at 687 [emphasis supplied]). Ms. Butler returned to this point, more emphatically, later in the conversation:

> "Yeah I questioned it and I'm still kind of, you know, I know Mr. Rogers is the cop that I was supposed to testify against because of the fact that he did get in

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[51]Ms. Butler contrasted these with other pictures – "family" pictures, not mug shots (*id.* at 685, 689) – that she said Ms. Ermachild showed her of the actual petitioner David Keith Rogers. Those, she said, portrayed a man who was "older and stabler looking, with no mustache." (*Id.* at 696, 700). Given that Petitioner has been in custody continuously since the beginning of 1987 (and on death row since 1988), the only "family pictures" of him that Ms. Butler could have seen *were* the *actual* "David Keith Rogers eleven years ago." For her part, Ms. Ermachild (who took detailed notes of her meeting with Ms. Butler) testified that she did not show her any pictures of Petitioner at all.

[52] Ms. Butler seemed to blame Ms. Ermachild for her uncertainty, and her accompanying agitation, but did not cite anything that Ms. Ermachild said or did that was improper or untruthful. The only exception was a tentative (and fanciful) suggestion she floated: "I'm not gonna, don't quote me on this, I know it's going on tape, but I even kind of think she told me that Mr. Rogers wasn't even in the state at this time. But I think that's what she told me, but I'm not positive." (*Id* at 697). That assertion was never repeated.

my face, that did confirm it for me and the wife is the same wife, but *he doesn't match the description that I remember in my head.*"[53]

(*Id.* at 697 [emphasis supplied]).

One thing that Ms. Butler was very clear about was that she had indeed seen Petitioner on television that night before she was shown the photographic lineup from which she identified him:

"I was in Lerdo when I saw that night the news, my cop, the cop that I knew as David Keith Rogers and I heard that night that he had killed women and it was like Oh my God! That's my cop!"

(*Id.* at 678). She expanded on this later:

"Actually I found out he had done the murders, it was at Lerdo. It was like 10:00 at night and the news came on and they flashed his face and said that he was responsible for 'x' amount of murders. I don't remember the number for sure. . . . But I saw his face that night 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."

(*Id.* at 702).[54]

Inspector Hodgson attempted to lead Ms. Butler through her earlier description of events, but her memory was different in some respects – each of which tended to be more

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[53] Ms. Butler's recollections regarding Petitioner's wife, and the significance of those recollections, will be described presently.

[54] Ms. Butler had the idea that "eight or nine" women had been murdered – a notion that, in her declaration, she ascribed to the "district attorneys" who interviewed her. Investigator Hodgson attempted, fruitlessly, to determine where Ms. Butler had heard that. (See, *id.* at 683-84, 702). Ms. Butler was uncertain, and could only cite hearing "rumors" that nine prostitutes had been killed and that "one of the nine women was mutilated and the baby was cut out of her bag." (*Id.* at 683). She was clear, however, that Ms. Ermachild was *not* the source of that dubious intelligence; rather, it was something Ms. Butler had heard long before, and told Ms. Ermachild. (*Id.* at 684).

inculpatory of Petitioner. This time Ms. Butler said that the attacker had shown her a picture of his wife and two children, and she now was "pretty sure it was two sons" – as opposed to the boy and girl she had previously recalled. (*Id.* at 692). Her recollection of the conversation with Petitioner in the booking area of the jail had grown darker: Petitioner supposedly – in response to Ms. Butler asserting, "I know who you are you son of a bitch" – got very close to her face and said: "yeah, and you got five months to do and I'm still here." (*Id.* at 676). And Ms. Butler now recalled telling Deputy Lockhart that "[t]here's [a deputy sheriff] downstairs that likes to rape prostitutes, basically." (*Id.* at 677). In this telling, Ms. Lockhart showed her the "police annual" and Ms. Butler "flipped through until I saw his face which was on one of two pages of maybe 12 pages, I think there were six per page. I'm not positive and I told her that he was on one of these two pages." (*Ibid*).

Ms. Butler also asserted, for the first time, that she knew Petitioner was the perpetrator because she recognized his wife from a photo that he purportedly showed her prior to the attack. She said that she knew Joyce Rogers from the truck stop where Mrs. Rogers worked, and where Ms. Butler sometimes plied her trade; according to Ms. Butler, the truck stop maintained a "hot sheet" of prostitutes and called the police when they came around, but Mrs. Rogers had kindly kept her name off of it. (*Id.* at 693-94). But, Ms. Butler said, she did not actually make the connection until she saw Joyce Rogers sitting behind Petitioner in court at the penalty phase, some two years later. (*Id.* at 692). Ms. Butler had never mentioned any of this before, she said, because no one had asked.[55] (*Id.* at 695).

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[55]Joyce Rogers testified that she was not in the courtroom when Ms. Butler testified at the penalty phase of Petitioner's trial – as a penalty phase witness herself, Ms. Rogers was required to wait in the hallway outside of the court. (JR RT 6-7). Mrs. Rogers also testified that, although she did indeed work at a truck stop, the business did not maintain a "hot sheet," nor did they call the authorities on prostitutes unless there was a fight, or something of that ilk. Shown pictures of Ms. Butler from that period, Mrs. Rogers did not recognize her. (JR RT 75).

4. The Second Sworn Declaration: November 14, 1999

The following year, Ms. Ermachild called Ms. Butler and asked for permission to come back with an amended declaration. Ms. Butler agreed, they set up an appointment, and Ms. Ermachild again came to Ms. Butler's home in LaPine, Oregon. (RHRT 133-35).

Ms. Ermachild brought two documents. One was the original of the handwritten declaration that Ms. Butler had signed in 1998, but with a new signature page so that it could properly be dated.[56] (RHRT 135-36, 242-43). As before, Ms. Ermachild read it to Ms. Butler aloud, and then Ms. Butler read through it herself, this time initialing every page; she dated it and once again signed it. (RHRT 137-38).

The other document was a typed version of Ms. Butler's declaration, incorporating all of the changes Ms. Butler had made, but with changes in language, and some additions of material that Ms. Ermachild noted in their original interview but that had not been included in the handwritten declaration. (RHRT 136-39). Specifically, the typed declaration stated Ms. Butler had been working on Union Avenue to support her drug addiction (a fact implied but not flatly stated in the earlier version), and that the attack in 1986 was the only time Ms. Butler had been raped during her work as a prostitute (which was inaccurate, and later excised). It reiterated that the rapist had a "thick, bushy mustache that grew long over his lower lip," and added: "I remember this because he wanted to kiss a lot and I found it disgusting." (1 RH Exhs. 253).

Similarly, the new declaration said again that the attacker had shown Ms. Butler photos of his children, and (contrary to what she suggested to Investigator Hodgson) Ms. Butler reiterated that they were "a boy and a girl" – to which she added that "maybe the girl was a little blond girl." (*Ibid.*) The new version also filled out Ms. Butler's description of the attacker's vehicle with the details set out in Det. Soliz's report of the interview at Lerdo: That it was a white, "1960s or 1970s model" truck, grayish sideboards, no camper shell, large

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[56]Ms. Butler had not dated the initial declaration, but rather had signed her name twice, once in the line reserved for the date.

back window, bench seat, cluttered with litter; that the man had a large silver thermos, a lot of keys, a tool box and a valise or suitcase, *etc.* (*Id.* at 253-54).

Once again, Ms. Ermachild read the draft declaration aloud and then Ms. Butler went through it. In doing so, Ms. Butler made corrections – both to some of the original material and to the new material that had been interpolated. She struck out the sentence saying that she had never otherwise been raped (*id.* at 253), changed the number of months early that she had been released from custody (from "about five" to "as least 3") (*id.* at 257), wrote in the year in which she had achieved sobriety, and corrected some syntax in her description of Tam Hodgson. (*Id.* at 258).

Ms. Butler also added several sentences that she believed were important to the accuracy of the declaration. In regard to the attack, she interpolated: "I wanted to go to my motel room. He was the one who wanted to drive on down White Lane into the field." (*Id.* at 254). And more generally, she added:

> "I have reviewed the report of my interview on 2-18-87 with Det. Soliz. The account I gave of my attacker, his truck, and what happened is accurate."

(*Id.* T 256). Ms. Butler initialed each correction and interpolation (some of which had been written in Ms. Ermachild's hand, some in Ms. Butler's), initialed each page of the typed declaration and dated and signed the declaration, affirming "under penalty of perjury and the laws of the State of California that the above statement is true and correct." (*Id.* at 259; RHRT 1092-93).

5. The Supplemental Sworn Declaration: November 23, 1999

After Ms. Ermachild returned from her second visit to Ms. Butler, one of Petitioner's attorneys pointed out to her that Ms. Butler had never mentioned seeing Petitioner's tattoo, even though Ms. Butler had told the police about seeing her attacker with his shirt off, and had described other markings on his body. Ms. Ermachild called Ms. Butler on the phone and asked about it, and Ms. Butler agreed to sign a supplemental declaration regarding those facts. (RHRT 143-47).

On November 15, 1999, Ms. Ermachild mailed Ms. Butler a draft declaration along

with a stamped, self-addressed envelope. (*Ibid.*). The substantive content of the declaration read as follows:

> "When I was raped and assaulted in 1986, I tried my best to notice and memorize everything I could about the man and his truck, so that I could identify him later. Because of this, I know that I would have noticed if the man had an identifying mark like a tattoo. As I recall, the man took off his shirt, so I saw most of his upper body. I did not see a tattoo anywhere on his body."

(1 RH Exhs. 267).

Ms. Butler read the declaration, signed it (again certifying under penalty of perjury that it was true and correct) and mailed it back to Ms. Ermachild. (RHRT 146-47).

D. Ms. Butler's Subsequent Recorded Statements

After this Court ordered the State to file "informal briefing" in regard to the habeas petition in 2001, the District Attorney's investigator, Tam Hodgson, contacted Ms. Butler and arranged to meet with her. Some (though not all) of that meeting between Mr. Hodgson and Ms. Butler was recorded, as were several more conversations that occurred between them over the following decade, up until a month before the reference hearing. The Referee admitted the records of those conversations as evidence both of Ms. Butler's state of mind and of the investigative techniques employed by both by the State and the defense. Taken together, in order, her many accounts provide a vivid chronicle of the degradation of Ms. Butler's memory over the decades, the concomitant process of confabulation, and the manipulation of that process by the State's investigator.

1. The Visit From Tam Hodgson: April 12, 2001

After the Court issued its "informal briefing" order, Investigator Tam Hodgson journeyed to Palestine, Texas, to interview Ms. Butler at her mother's home. At some point in their conversation, Mr. Hodgson turned on his tape recorder,[57] and a transcription of the

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[57] It is clear that some undetermined amount of substantive conversation regarding the case occurred both before and after the tape was made. Thus at the first point that there

taped portion of that interview was admitted into evidence as Petitioner's Exhibit 63(b). (3 RH Exhs. 708-65). The tape and its transcription are significant not only because of the specific points at which Ms. Butler's statements are inconsistent with her other accounts but also as a record of Investigator Hodgson's vigorous efforts to change and shape Ms. Butler's "recollection," and of Ms. Butler's shifting state of mind as those efforts bore fruit.[58]

As the recording begins, Investigator Hodgson is showing Ms. Butler a "physical description of Mr. Ratzlaff" stating that he is 6' 3" tall and weighs 205 pounds, and another listing him at 220 pounds. (*Id.* at 709). Investigator Hodgson is "concerned," he says, and Ms. Butler understands: the document shows that Mr. Ratzlaff was "bigger," than the perpetrator as she remembered him. (*Id.* at 710).

Mr. Hodgson reminds her that, in the Lerdo interview, she said her attacker was

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is any discussion of the rapist's mustache, Mr. Hodgson refers to a point "earlier when we were talking" when (he says) Ms. Butler told him that Ms. Ermachild's information about Petitioner not having a mustache had "made you second guess . . . ." (*Id.* at 716, ll. 20-26). And just before the tape recorder was shut off, Mr. Hodgson promised Ms. Butler that he would "address" her concerns that Michael Ratzlaff would find out that she had identified *him* and would come after her. (*Id.* at 764, ll. 24-25).

[58]As such, this case presents a particularly vivid demonstration of what leading experts in the science of eyewitness identification refer to as "the misinformation effect":

> Over the past three decades, a large body of research has provided strong evidence that human eyewitness memory is not fixed or indelible but rather is malleable and subject to substantial alteration over time. Although there are myriad reasons for such alterations, one particular etiology of memory distortion has been well studied and is referred to as the "misinformation effect". The term refers to the errors in recalling the details of a past event made by individuals who were subsequently exposed to false or erroneous information about the event. The misinformation effect appears to operate largely outside a person's awareness. That is, when people claim erroneously that they have seen the misinformation details, they seem to truly believe that they did.

Morgan, Southwick, Steffian, Hazlett & Loftus (2013) *Misinformation Can Influence Memory*, International Journal of Law and Psychiatry 36 at 11.

shorter than her but that "you never really stood next to him . . . . Do you think you would have missed him by six to eight inches?" (*Ibid*). Ms. Butler agrees that "[h]e couldn't have been that tall." (*Id.* at 710-11). Mr. Hodgson asks:

> "So would you agree that it's a little tough to . . . change your physical appearance by making yourself ten inches, or I mean six inches taller?"

(*Id.* at 711). Ms. Butler does agree – and observes that Ms. Ermachild had "never brought up the height. The only thing that she was bringing up to my confusion was the mustache and the white pickup truck."[59] (*Id.* at 711-12).

A few minutes later Mr. Hogdson reminds Ms. Butler that " . . . when Ms. Ermachild indicated to you that he never had a mustache, earlier when we were talking you said it made you second guess that either you had misstated that he had a mustache or that caused . . . ."[60] (*Id.* at 717). Ms. Butler responded that it had "caused confusion" for her to hear that Petitioner "never had a big handlebar brushed over the lip mustache"; that she had started to question whether her memory was correct about the mustache; and that:

> ". . . this other man [*i.e.* Ratzlaff] had a mustache. He was close enough in appearance just by the face, that with or without a mustache there could have been that much confusion, but then the white pickup truck was mentioned, that there was never a pickup truck with Rogers, then I was like, I know there was a white pickup truck."

(*Id.* at 717).[61] She went on to confirm that she had seen her attacker several times after the

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[59] The Court will recall that, in their 1998 conversation Ms. Butler had also included the fact that Petitioner did not have a stun gun in the list of things that made her doubt the accuracy of her identification of him.

[60] Again, this "earlier" portion of the conversation was not recorded, and was otherwise never referred to on the record.

[61] A few minutes later, Ms. Butler seemed to have resolved any uncertainty about whether her attacker had a mustache: "I remember a mustache because I remember. I've always liked mustache and beards, my boyfriend had one, but this one came down over his lip, and that disgusts me. Trim that sucker up, you know." (*Id.* at 723-24).

attack, each time with the same truck – "white pickup truck with I think the boards on the side." (*Ibid*).

To that, Investigator Hodgson replied: "All right, and that's something . . . for us to work with, whether he had one or not. I did talk to Deputy Soliz before I came over to talk to you and *he has a picture, he said, in his file of David with a white pickup truck."*[62] (*Ibid* [emphasis supplied]). Ms. Butler wondered if perhaps Petitioner could have borrowed a white truck (*id.* at 718), a notion addressed by the investigator a little later: ". . . yes, you can borrow a white truck, yes, you can, although John *Soliz indicated to me he has a picture of his truck, at that time it was a white truck.*" (*Id.* at 724 [emphasis supplied]).

The implication – that Petitioner owned a white truck "at that time" of the assault on Ms. Butler – was false and very misleading. As Investigator Hodgson knew very well, Petitioner did not purchase his white pickup truck until December, 1986 – nearly a year after Ms. Butler was attacked and raped – and just a few weeks before his arrest. Investigator Hodgson had been told this directly by the man who sold the truck to Petitioner, Toby Coffey. The investigator had personally interviewed Mr. Coffey after Petitioner was arrested and it was established that the truck was still in Mr. Coffey's name. (RHRT 2390-93). As Investigator Hodgson admitted on the witness stand, he *never* connected Petitioner with a truck that matched Ms. Butler's description – and did not make much effort to do so. (RHRT 2393). In short, he lied to Ms. Butler.

The investigator similarly went to work on the other point that had Ms. Butler "confused" – the fact that her attacker (like Michael Ratzlaff) had a bushy mustache, while Petitioner had none at all. Mr. Hodgson conceded that, at the time of his arrest, Petitioner did not have a mustache, but said he did not know whether Petitioner had one 18 months earlier. (3 RH Exhs. 723). He suggested that it really did not matter, however, because: "... if you're a peace officer committing crimes disguising yourself by either adding a mustache and that's not that difficult to do. There are a lot of the shops and stuff have very, very good ones." (*Id.* at 718). Thus, he concluded, "I have no way of knowing if he had one, if he

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[62] So far as Petitioner has been able to discover, no such photo exists.

stuck on a phony one, whatever." (*Id.* at 724). Investigator Hodgson reiterated the observation that one can change "certain things" including "facial hair," but not one's height – and Ms. Butler enthusiastically agreed. (*Id.* at 724-25).

The investigator certainly did have "a way of knowing" whether Petitioner had a mustache in 1986: Petitioner was a Deputy Sheriff, well known to any number of people with whom Mr. Hodgson had regular contact, including the detectives investigating the case. There were pictures of Petitioner in the Behind the Badge annual dating back several years – none showing a mustache. There had already been sworn testimony that Petitioner had never worn a mustache. (RT 5909-10). As for whether Petitioner had a "phony" mustache: the investigator had significant information on that score as well. He had personally been involved in the searches of Petitioner's home, cars and locker – searches that had turned up vast amounts of highly incriminating material (including a gun used in two killings, one more than a year prior) and other things (a huge amount of pornography, women's undergarments) that anyone who was trying to hide something would have disposed of. (RHRT 2118-21). But there was no indication of a fake mustache. (RHRT 1780-81).

To resolve any lingering question as to why Ms. Butler's attacker looked so much like Michael Ratzlaff, and why the assault on her so closely resembled Ratzlaff's attacks on others (including the nearly identical assault on Lavonda Imperatrice), Investigator Hodgson offered Ms. Butler an ingenious explanation: Petitioner, he suggested, had learned about Ratzlaff from his friends on the force, and was copying him. (3 RH Exhs. at 712-13, 725-26). Referring to one of the documents regarding Ratzlaff that he had just shown Ms. Butler – apparently the report of Dealia Winebrenner's encounter with Ratzlaff – the investigator told Ms. Butler that:

> Hodgson: . . . the report in '86 was done by Deputy U. Williams, badge D169, which part of it means nothing to you, but I will tell you that Deputy Ulysses Williams was David Keith Rogers' best friend, they ran together they worked together on shifts, they basically, the only picture in his house when we went there was of Deputy Williams, as far as

family pictures. There was one of them on the t.v. They called each other big brother and little brother. So they're very very close and Deputy Willams did this . . .

Butler: That's just too coincidental.

Hodgson: Yeah. Deputy Williams does this report in 1986 . . . January of '86 that this report is made, okay? You're indicating after Christmas of '86, so a year later January of '87, maybe February of '87 . . . .[63]

Ms. Butler: So she really got me messed up.

(*Id.* at 712-13).

After (again misleadingly) suggesting that Petitioner had an identical white pickup truck when Ms. Butler was attacked, and that he had purchased a "phony mustache," the investigator finished this thought:

Hodgson: See, we've got reports in '86, this report in '86, and this guy's activity with prostitutes, so he's out there at the same time frame as David Rogers.

Butler: Mm-hmm, Melody Ermachild told me that, too.

Hodgson: But the other half of this is, David was in a unique place to, I guess, a funny way of putting it is, know how this guy was doing it, 'cause he's in the Sheriff's Department his friends are taking the reports.

Butler: Yes, so he could have just fallen into his pattern and that guy could have got blamed.

Hodgson: I have no idea, see?

Butler: But it could have worked. I understand.

(*Id.* at 726).

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[63] The investigator was apparently referring to the attack suffered by Ms. Butler – but that attack occurred in January or February of 1986 (*i.e.*, within 6 weeks after the Christmas of *1985*), meaning that it would have been at nearly the same time as (and perhaps even before) Ratzlaff's partial strangulation of Ms. Winebrenner. (See DWRT 6).

As Investigator Hodgson was well aware, his suggested theory was not just misleading, but absurd. Michael Ratzlaff's "activity with prostitutes" in 1986 (at least insofar as the Sheriff's Department was aware) consisted of Dealia Winebrenner's report that, in the course of an argument, Ratzlaff had choked her into unconsciousness – after which she calmed him down with the suggestion that they get some beers. (Pet. Exh. 45). There is nothing in Deputy Williams' report regarding firearms, or a stun gun, or a demand for anal sex or any of the other specific details that made the assault on Ms. Butler particularly horrifying and memorable. Those details did not surface until after Michael Ratzlaff committed the nearly identical assault on Lavonda Imperatrice in May, 1988 (see, 4 RH Exhs. 1096, *et seq.*) – after Petitioner had already been convicted of murder and long after *his* "activity with prostitutes" had come to an end.

There was, in short, no way that Petitioner could have patterned an attack on Tambri Butler to resemble any known activity by Michael Ratzlaff – even if one accepts the baseless and utterly slanderous suggestion that Deputy Ulysses Williams was somehow a willing enabler of Petitioner's criminal activities. Investigator Hogdson was perfectly aware of all of these facts, but it did not stop him using this frankly dishonest technique to enlist Tambri Butler, and persuade her to recant her recantations of her trial testimony.

In any event, it worked. Ms. Butler emerged apparently furious at Melody Ermachild for having misled her (see, *id.* at 725, 738) and she abandoned the uncertainties that she had expressed in her previous post-trial statements (including those to Investigator Hodgson).[64] Ms. Butler's new commitment to the prosecution's cause was evidenced by an immediate drift in her recollection.

Thus, toward the beginning of the interview, Ms. Butler had reaffirmed yet again that she had seen Petitioner on television the night before she picked him out of the photographic lineup at Lerdo, and that she lied on the witness stand when she said otherwise:

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[64] Ms. Butler did, however, confirm that the declarations Ms. Ermachild presented to her were in Ms. Butler's own language, that she had read them, and that she had changed a number of specifics in them, initialed and signed them. (*Id.* at 742-43).

Butler: No one knew who I was referring to and did not come into the picture until after I saw the news and then I was like, Oh my God, you know, that's . . . .

Hodgson: Well let's note that. There's a transcript that I pulled from your trial testimony where you testify at trial that you did not see him on TV. That's not true then. Is that right?

Butler: Yes.

Hodgson: Yes, it's not true or . . . .

Butler: Not true.

Hodgson: Okay. So you had seen him on TV?

Butler: That very night, I seen it on the news . . . .

(*Id.* at 714). Investigator Hodgson then explained to her why that could be a problem: "Obviously the concern that we have, the defense, everybody has is that you're in jail and you see the this news coverage of the deputy killing prostitutes . . . and all of a sudden you thought, yeah, that must be him or that gotta be the guy." (*Id.* at 715).

Then, after he had made his case for why Petitioner, and not Michael Ratzlaff, must have been the culprit, the investigator returned to the problem that "other than in court saying that you hadn't seen him on tv when in fact you had, you saw the incident on tv." Ms. Butler responded, for the very first time:

"Well, they didn't show his picture."

(*Id* at 727). Mr. Hodgson replied that "at one point I think on tv they did . . . [n]ot initially, at the time of arrest, I don't think that they did."[65] Ms. Butler said that "no, when they showed it, they just said . . . Kern County officer convicted of double homicide . . . ." The investigator corrected her: "Arrested," and Ms. Butler said:

"Arrested. And it was like, I heard it and I looked up from my book,

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[65] In fact, the local television news coverage of Petitioner's arrest and trial was ubiquitous, and the reports prominently featured his face. (See, RHRT 1528).

and it was almost, it was already over. So I really don't even think I glimpsed the picture. . . . My girlfriend, Kay Davis, was standing at my [bunk] and she goes, that was him dude, like that, and I go, how do you know? And she goes, well, from what you told me, what you described to me, that had to be him."

(*Ibid*).[66]

A similar migration occurred in regard to Ms. Butler's asserted connection with Petitioner's wife, Joyce Rogers. In this version, Ms. Butler was moved to help Petitioner – or at least to hear out Ms. Ermachild – because Mrs. Rogers was "a friend" who had protected her, and was now facing hard times.[67] (*Id.* at 744-45). She had known Mrs. Rogers from when she used to solicit customers at Jay's Truck Stop, and Mrs. Rogers worked in the "gift shop" in the back. (*Id.* at 761-62). She thought Mrs. Rogers' name was "Carol," but Mr. Hodgson suggested other names: "Debby, Susy, Jo, Mike," and then noted, helpfully: "When I said Jo you kind of mouthed Jo and started thinking. . . ."[68] (*Id.* at 763).

According to Ms. Butler, Mrs. Rogers kept a picture of Petitioner behind the counter. While at first, "it didn't click," at some point Ms. Butler realized that the nice woman behind the counter – her "friend" – was married to the man who had raped her:

"I remember at one point looking at her and thinking, this poor woman, she has no clue. No clue. And she needed to know, but I wasn't going to be the one to tell her . . . . I do remember at one point feeling very sad for her because she was such a nice woman and she really did like me and I had a real bad guilt feeling that this man did these things to me and I was, almost to the

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[66] This version of course posits that Ms. Butler had given her friend such a precise and detailed physical description of her attacker that Ms. Davis was able to recognize his face on television.

[67] The Court will recall that, when she spoke to Investigator Hodgson in 1999, she had reported that she had been unmoved by Mrs. Rogers' hardships, and when Ms. Ermachild told her about them,"I told her I could care less." (RHRT 520).

[68]"Jo" was Joyce Rogers' nickname.

point of, you know, what he did, you know, this kind of thing, but I couldn't do that."

(*Id.* at 759-60). Ms. Butler went on to specify that she had thus recognized Petitioner as being the man who raped her – and knew at least who he was married to – before he was arrested *and even before she saw him in the jail.* (*Id.* at 760).

As such, Ms. Butler flatly contradicted both her earlier statement to Mr. Hodgson that she had not realized that Mrs. Rogers was Petitioner's wife until she saw Mrs. Rogers in court (3 RH Exhs. 694-95), and her repeated assertions that she did not realize that Petitioner was the man who had raped her until she saw him in the booking area of the County Jail. (*E.g.*, 3 RH Exhs. 675-76; 4 RH Exhs. 920). These new contradictions joined the other inconsistent statements she made in the course of the interview: Her assertion that – contrary to what she had sworn in her declaration and previously confirmed to Mr. Hodgson – she never saw Petitioner on television; and that – contrary to what she told both Ms. Ermachild and Mr. Hodgson – she had been very moved to hear of Mrs. Rogers' plight.

Unsurprisingly, toward the end of the interview (and in response to the investigator pointing out that she had contradicted herself about seeing Petitioner on television), Ms. Butler wanted to know if there would be consequences to her changing her story. (3 RH Exhs. 754). When Investigator Hodgson assured her that she could retract anything and everything, Ms. Butler responded that she was absolutely certain that Petitioner was the man that raped her. (*Id.* at 754-55).

Ms. Butler voiced one other thing that worried her: That Michael Ratzlaff could find out that she had implicated him, and come after her. (*Id.* at 764-65). The investigator replied: "Ok. Well I'll address that issue, I guess that's a valid concern" – and turned off the tape recorder. (*Ibid*).

2. Phone Call With Tam Hodgson: August 4, 2008

In 2008, after the Court issued its Order to Show Cause, Investigator Hodgson traveled to Ms. Butler's home in Oregon but she was not there. (*Id.* at 768). After he returned to Bakersfield, Mr. Hodgson spoke with Ms. Butler on the telephone. (*Ibid.*).

In the call, Ms. Butler went back over the critical events of her 1986 rape and its aftermath. In doing so, she contradicted significant aspects of all of the previous statements she had given, beginning with what she told the detectives in the initial interview at Lerdo and including what she said in her earlier meeting with Investigator Hodgson.

The most dramatic of those revisions had to do with the very first descriptor she had given to the detectives at Lerdo 20 years earlier: that her assailant had a mustache – "a thick one. Thick brush one." (4 RH Exhs. 889). She had reiterated this point many times in the interim, describing the mustache in vivid (and sometimes repellent) detail. (See *e.g.* 1 RH Exhs. 253 [sworn declaration: "The man who assaulted me had a thick bushy mustache that grew long over his upper lip. I remember this because he wanted to kiss a lot and I found it disgusting."]; 3 RH Exhs. 698 [2001 meeting with Tam Hodgson: same]).

In 2008, however, Ms. Butler was adamant that *there had not been any mustache*. First she said that she could not remember having seen one: "I do not recall the mustache whatever. . . . David Keith Rogers did not have a mustache that I recall." (3 RH Exhs. 791-92). The investigator reminded her that he was specifically asking about her attacker. (*Id.* at 792). Ms. Butler responded:

> The person that assaulted me, I don't believe had a mustache. I do not recall a mustache at all. And the reason why I say that is because he was all over me, kissing me.

(*Ibid*). Mr. Hodgson asked her: "So where did the mustache come from?," to which Ms. Butler replied that the whole notion of the mustache came "from Melody Ermachild telling me about Mr. Ratzlaff who wore a very, very prominent, I don't even want to say a brush mustache, I want to say a broom mustache to where it kind of really pushed over your lip and where you comb that sucker." But Ms. Butler was sure that Ratzlaff was not her attacker; hence the mustache was a false diversion, used by Ms. Ermachild to confuse her. (*Ibid*). Ms. Butler did not remember saying anything about her attacker's mustache when she testified: "In fact, I don't remember anything about a mustache in any form, until Melody Ermachild brought it up to me." (*Id* at 795).

Similarly, in recounting the moment when her assailant produced a gun, Ms. Butler no longer recalled – as she had said to the detectives and repeated at the hearing – that, after first putting it to her temple he had placed it on or in front of the bridge of her nose before firing it. (4 RH Exhs. 888, 919). In this version he had simply put it to her head and fired, but she somehow knew to back up just before it fired, and so saved herself. (3 Exh. 774).

Contrary to her repeated assurances to the detectives at Lerdo that she never stood next to the rapist and "never got out of the truck. Not once."(4 RH Exhs. 910) – Ms. Butler asserted in this 2008 conversation that she was standing up, outside the truck when the attacker sodomized her. (3 RH Exhs. 774). In this version, he bent her over the seat and clamped his chin down on her shoulder to keep her from moving. (*Ibid*). This was significant to Ms. Butler because it demonstrated that Ratzlaff could not have been her attacker: someone that tall (she said) would have had to squat down to hold her in that way. (*Id.* at 784).

Perhaps the most confusing variations involved her supposed recognition of Joyce Rogers, for what she said about that was not only different than what she had said before, but changed significantly in the course of the same interview. Ms. Butler first asserted that, when the rapist showed her a picture of his wife and two children, "something about her looks familiar but . . . [Ms. Butler] didn't put it together until . . . I recognized her at the truck stop where I work. And I knew that woman . . . ." (*Id.* at 783). A few minutes later, however, Ms. Butler said that "it didn't click until much later of who she was [*sic*]. Actually, it didn't click until I was in the courtroom and I saw his wife sitting behind him when I realized exactly who his wife was and that really upset me because I liked this lady."[69] (*Id.* at 785). Of course, the latter version was also inconsistent with what she told Mr. Hodgson

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[69] Another variation had to do with the children in the picture – she said they were two boys who were about nine and ten when the photo was taken; however, the man had told her the picture was a few years old, meaning that the boys were "15ish." (*Id.* at 784). When originally interviewed twenty years earlier, Ms. Butler had described the children as a boy and a girl, and recounted that the *only* thing the man had said about them was " well, they're not babies. And that's all." (4 RH Exhs. 908).

in 2001: that, when she saw Mrs. Rogers at the truck stop *before* Petitioner was arrested, she realized who the "poor woman behind the counter" was married to and felt as though she should tell the woman about what had been done to her. (*Id.* at 759-60).

The deviations continued in Ms. Butler's report of events that took place in the jail. In this version, it was Petitioner himself who booked her – which is when she learned his name. (*Id.* at 788; *compare id.* at 676-77 ["Actually he was not even concerned with me. He was booking somebody else entirely and I stopped him walking by 'cause I thought I knew him . . . ."]). Thus, at the point that Deputy Lockhart showed her the Behind the Badge book and suggested some names to her (in this telling, the suggestions were "Burke or Burgess"), Ms. Butler actually knew the name of the officer who had assaulted her, but withheld that information from Ms. Lockhart. (*Id.* at 790).

This is notably different from what Ms. Butler told the detectives at Lerdo – that, when she was given the Behind the Badge book she was looking for someone named "Birch," and even during the interrogation kept thinking that was his name (4 RH Exhs. at 922-23); different from what she said on the witness stand – "I didn't know the name. I didn't know the man's name at the time." (RT 5796-97); and even different from what she had said in her first interview with Mr. Hodgson in 1998: that she had truthfully told Deputy Lockhart, "I don't know the name, but I do know the face." (3 RH Exhs. at 678).

Ms. Butler was clear, however, about one point on which she had vacillated in her previous interview: She definitely *had* seen Petitioner on television the night before she was shown his picture by the detectives at Lerdo, and first identified him to the authorities as her attacker. (*Id.* at 790, 806, 807). Indeed, in one somewhat confused statement, she indicated that seeing Petitioner on television was the first time she fully realized who he was:

> "I didn't know David Keith Rogers was a police officer until I was in Kern County Jail, Lerdo, sitting on my butt, when it came up on the news that he killed so many women. I knew that this man raped me and I knew that he was a cop but I didn't know he was in trouble."

(*Id.* at 786).

Ms. Butler also added a detail about that first interview in Lerdo: She recalled that she had turned away the investigators when they first came to interview her because she did not want to be a "rat," but had relented when they returned because, in the interim "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 . . . ."[70] (*Id.* at 807).

Also new was her explanation as to why she signed declarations under penalty of perjury stating things that she now denied. In this telling, Ms. Butler had confronted Ms. Ermachild about things she said that had been changed in the typed version of the declaration, but Ms. Ermachild "said she needed to do it that way in order for [it] to be signed and I said but its not correct. And I pretty much washed my hands of it then."[71] (*Ibid*). But, contrary to what she previously said to Mr. Hodgson, Ms. Butler confirmed that, when she signed the declarations and for some time afterwards she was concerned about the likelihood that she had falsely identified Petitioner as the man who attacked her: "by this point, I am very upset because now not only I have testified against the wrong guy, he has been in jail for so long, and this other guy is out on the street, where the hell is he, and what's going on with that?" (*Id.* at 797-98).

Investigator Hodgson seemed taken aback by some of the inconsistencies in, and additions to, Ms. Butler's account, asking (after one clearly mistaken statement): "How much [do] you remember because its kind of like you've told yourself over and over?" (*Id.* at 781). Towards the end of the conversation, he observed: "I know you know you start repeating stuff and *it kind of takes a life of its own*." (*Id.* at 800 [emphasis supplied]).

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[70] This later became "175 kites." (*Id.* at 836). In any event, her statements indicated that Ms. Butler had perjured herself at Petitioner's trial by denying both that she had seen him on television and that she had discussed the case with other inmates.

[71] Notably, Ms. Butler did not specify what she believed had been altered, except to complain generally that "all my possibles, maybes, could of, would of, were changed to were and are and was. They changed to definite." (*Ibid*).

3. Phone Call With Tam Hodgson: October 17, 2008

A little more than two months after the conversation just reviewed, Investigator Hodgson called Ms. Butler again. In the interim, he had mailed her copies of her signed declarations and a transcript of the testimony she had given. (3 RH Exhs. 814). Ms. Butler promptly announced that "a lot of it is not accurate," and said that she wanted "to go through [it] page by page . . . ." (*Ibid*). In the conversation that followed, Ms. Butler did repudiate parts (though by no means all) of the critical contents of her declarations – but also repudiated much of what she had previously said on the witness stand and to law enforcement.

To begin, Investigator Hodgson announced that "we have to deal with the fact that you signed this," and asked her whether she was saying that she did not have a chance to read her declaration. (*Id.* at 815). Ms. Butler replied that the whole thing had been "written in pencil" and she only knew what she had read when that written version was shown to her. (*Id.* at 816). Mr. Hodgson pointed out that the version they were looking at was typed, and that things in it had been crossed out and her initials affixed. Ms. Butler admitted that she had been the one who did the cross-outs, and that those were indeed her initials – but again tried to insist that "that is when it was still in pencil and then I sent it back to her and then I didn't see it again." (*Ibid*). Mr. Hodgson patiently led her through the obvious facts: that the declaration they were looking at was typed and that it contained her strike-outs accompanied by her initials. (*Id.* at 816-17). Ms. Butler admitted all of those points, but said that she had not read the document carefully. (*Id.* at 817). The investigator asked her "how it is you came to sign this? Was it mailed to you or did she bring it back in person." Ms. Butler replied that she thought it had been mailed, that she had signed it, quickly read it, initialed it and sent it back.[72] (*Ibid*). Much later in the conversation, however, Ms. Butler recalled that Ms.

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[72] In fact, as Ms. Ermachild testified and as Ms. Butler admitted elsewhere, Ms. Ermachild had set up an appointment, brought the declaration to Ms. Butler's house, read it to Ms. Butler, had Ms. Butler read it, and then made numerous corrections pointed out by Ms. Butler – all of which Ms. Butler then initialed. (RHRT 136-40, 987-95)

Ermachild had indeed come back to her house with the typed declaration, "and we went through it, just like you and I are, line for line."[73] (*Id.* at 831).

Ms. Butler's first substantive objection was to her declared statement that, at that time, she "believe[d] the identification of David Rogers was wrong." Ms. Butler claimed never to have said that – though she did readily agree that, at the time she signed the declaration she was "questioning my identification . . . ." (*Id.* at 815, 817-18). But that was only because Ms. Ermachild "had me doubting myself." (*Id.* at 818). Later in the conversation, Ms. Butler was asked about the statement in her declaration that she had "often worried over the years that I might have testified against the wrong man," that she had been sure of her identification while in the courtroom, but since had "always questioned how accurate my identification of Rogers was," and that she had "told my husband that I am now uncertain and it weighs on my mind" (see 1 RH Exhs. 253, ¶ 21), Ms. Butler responded:

> Granted, where it says I told my husband that I'm now uncertain and it weighs on [my] mind – yes I will admit that that's true but that was true after Melody Ermachild came and reinterviewed me and got me questioning about this Radcliff [*sic*] over Rogers.[74]

(3 RH Exhs. 845).

Ms. Butler next denied that she had said "[t]he man who assaulted me had . . . a bushy mustache that grew long over his lip. I remember this because he wanted to kiss a lot and

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[73] Even later, in the course of discussing parts of the declaration that Ms. Butler did not like but could not deny, she said something quite different: ". . . I skimmed it. I didn't really read it line for line 'cause they typed what I wrote, what I said. . . . I didn't feel the need to go through it line to line like we're doing." (*Id.* at 845).

[74] Ms. Butler's disclaimer is impossible to square with the fact that she had said the exact same thing in the original, handwritten declaration – and had even corrected and initialed that passage. (1 RH Exhs. 250, ¶ 18). As that declaration was written and executed on the very first day she ever talked to Melody Ermachild, her conversation with Ms. Ermachild could not have been the basis for comments she said she had *already* made to her husband about her uncertainties regarding the identification of Petitioner.

I found it disgusting." (*Id.* at 818-19). She never would have said that (she claimed) because it never could have happened – she "never ever kissed any of my tricks, ever." (*Id.* at 819). If he had tried to kiss her "would have stopped the whole procedure right then." (*Ibid.*) Ms. Butler apparently forgot what she had said, just two months earlier: that the reason she knew her attacker did *not* have a mustache was "because he was all over me, kissing me." (*Id.* at 792).

Ms. Butler did hold to another thing she had said on the subject in August, however – she reiterated that: "The thick bushy mustache, I don't think I said anything about it .... I don't believe he had a mustache, but she [Ms. Ermachild] kept putting it in my head that he did." (*Id.* at 819). Investigator Hodgson then patiently led her through a review of her trial testimony, in which she explicitly affirmed that her attacker did have a bushy mustache, and affirmed that she had said as much when questioned at Lerdo. (*Id.* at 820-21, *discussing*, RT 5798). Even then, however, Ms. Butler's recollection was not refreshed:

> Butler: Really don't remember a mustache at all. But that's just, you know, 27 years later.
>
> Hodgson: Ok. Or 21 anyway. 21 years, ok. All right. Well, let's proceed forward.

(3 RH Exhs. 821).[75]

They proceeded to discuss several other inconsistencies[76] before turning to Ms. Butler's encounter with Petitioner in the jail. In this iteration, she had not just thought he

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[75] Ms. Butler returned to this point at the end of the conversation, opining that some parts of her trial testimony did not "sound accurate, but . . . it has to be accurate 'cause this is the trial." Asked for an example, she said: "Well, the mustache part . . . I still to this day do not remember a mustache." (*Id.* at 850).

[76] Among other things, Ms. Butler insisted that – contrary to what she told the detectives at Lerdo – her attacker's truck had been an older model, and she had never seen a hook, flashlight or valise in the cab. (*Id.* at 822-23; compare 4 RH Exhs. 894, 899; RHRT 1086-87, 1748-49).

was the man who assaulted her – she knew it, immediately. And what Petitioner supposedly said to her was more sinister (and more inculpatory) than what she reported in her declarations – or indeed ever before: "although nothing he said was actually threatening or indicated that he was the man who attacked me, he did get up in my face and told me that you know and I know and we need to keep our mouth shut 'cause we got five months to do here." (*Id.* at 826).[77]

Regarding her conversation with Deputy Lockhart, Ms. Butler reiterated that the deputy had left the copy of "Behind the Badge" with her; Ms. Butler also asserted that, when she returned it, she in turn had left the book open to pages 12 and 13, and had told Deputy Lockhart that the man's picture was on page 12. (*Id.* at 827).

They next turned to the statement in Ms. Butler's declaration that she had seen Petitioner on television the day before she picked his photo out of the lineup, and that she could not be sure she had not been influenced by seeing him. (*Id.* at 828). Ms. Butler was adamant that she had *not* been influenced by seeing Petitioner on television – but was equally adamant that she had indeed seen him. (*Id.* at 828-29 ["I had seen him on TV. . . . when I saw him on TV, I was like, 'Oh, my God. . . . I had seen him that night on television. And I did recognize him as the cop in question."]; *id.* at 830 [asked: "did you see him on TV after you talked to us or before?," Ms. Butler responds: "Before."]; *id.* at 840 ["I was at Lerdo two or three weeks and then I saw the whole thing on TV."]). In fact, Ms. Butler recalled that she had told that to the detectives when they did the photographic lineup:

> "I pretty much remember telling you guys I just seen it last night on TV . . . I even told you guys while you were there that day, that I'd seen him just last night."

(*Id.* at 838, 841).

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[77] In her earlier versions of this encounter, Ms. Butler's realization did not "click" until Petitioner told her he had arrested her in Arvin (something missing from this telling), while her later additions of "you know and I know" and the business about the "five months" were not mentioned or suggested.

Investigator Hodgson appeared to be very concerned about the statement in Ms. Butler's her declaration that he came out to find her on Union Avenue, after Petitioner's trial was over and she had been released early from custody. Investigator Hodgson read that portion aloud, including, "'. . . [h]e said some police might think I'd done bad things testifying against Rogers. He said I should leave California and never come back or I might wind up in a ditch, dead. He said . . . .'" At that point, Ms. Butler interjected:

Butler: This is the truth.

Hodgson: Pardon?

Butler: This is all true.

Hodgson: Okay. "He said a file would just . . ." Let's see –

Butler: ". . . drop behind a counter and my name would never be mentioned in California again." That's all true.

(*Id.* at 843-44).

After confirming that various additions and corrections were in Ms. Butler's own handwriting, Mr. Hodgson went on to the portion of the declaration in which she admitted to having doubted her earlier identification of Petitioner as her attacker. (*Id.* at 844-45). As discussed above, Ms. Butler acknowledged having harbored such doubts (which she then ascribed to Ms. Ermachild's visit) but said that Mr. Hodgson had resolved them for her:

> "And you convinced me, not convinced me, but you asked me how tall the guy was and I told you at least this tall and the other guy was at least that tall, which made me without a doubt know that I had the right man."

(*Id.* at 845).

Ms. Butler nonetheless acknowledged that, in his photographs, Michael Ratzlaff "did look familiar"[78] – though she was now certain he was not her attacker. (*Id.* at 847-48).

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[78] Ms. Butler confirmed this point: "[W]hen we were going through the photgraphs, I was going 'wow, he looks familiar.' Because he did look familiar, as in if I had seen him before." (*Id.* at 849).

Investigator Hodgson suggested to her that perhaps Ms. Butler had "dated" Mr. Ratzlaff, and had confused ("intermixed") his pickup truck with the one driven by her assailant.[79] (*Id.* at 848). Ms. Butler agreed that it was possible that Ratzlaff had in fact dated her, but was absolutely certain that it was *not* possible that she had "intermixed" his truck for the rapist's.[80] And, when read paragraph 22 of her declaration – recounting that the facts of Ratzlaff's crimes against LaVonda Imperatrice (his mustache, his pickup truck, his use of a stun gun, firing a gun at the victim, the demand for anal sex, that he left the victim naked and drove off) – Ms. Butler "agreed" that those facts were "remarkably similar" to the assault she had suffered. (*Id.* at 847; see 1 RH Exhs. 258).

One note that Ms. Butler repeatedly struck during this 2008 conversation was particularly plausible: That she just could not then remember very clearly what had happened, even in 1998. (*Id.* at 822 [reporting that she "actually even considered going and getting hypnotized to where I remember it well"]; 832 ["I'm having such a hard time remembering, Tam, it's just ridiculous"]).

4. Final Recorded Phone Call With Tam Hodgson: October 11, 2011

A few weeks before the reference hearing commenced in this case Investigator Hodgson called Ms. Butler, apparently to make arrangements for her to come and testify. Something was said in the course of that call that prompted Mr. Hodgson to call her back, this time on a "landline" with a recording device.[81] (3 RH Exhs. 856).

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[79] Ms. Butler offered that, if she had "dated" Mr. Ratzlaff, he had "treated me right as opposed to wrong, because the only time I remember having a gun in my face was with David Keith Rogers." (*Id.* at 848). This observation is at variance with her insistence on other occasions, both earlier and later, that other people had pulled guns on her, and thus she was not intimidated when her attacker did.

[80] She explained: "When you're down on your belly and somebody's hurting you, you tend to . . . be more aware of your surroundings." (*Id.* at 848-49).

[81] As in their earlier conversations, it is clear that there was some substantive discussion between Ms. Butler and the investigator that was unrecorded. In this instance that consisted of whatever was said in the earlier cell phone call (which included some

The overarching theme of Ms. Butler's comments during the conversation was her reluctance about returning to California to testify, her hatred of Petitioner and her rage against the State of California for not having executed him already. Thus she began with something of a tirade:

> It's been 28 years he was on death row, he should be dead.... He should have been put to death a long time ago.... I testified to put him from 20 years to death row. That's what I thought I was doing 20, 30 some odd years ago .... You already had him for 20 years.[82] What I understood when I testified way back when was that I was taking the 20 years and putting him from being a prisoner to being on death row.... Why isn't he dead?

(*Ibid*). Ms. Butler returned to this theme throughout the phone call, *e.g.*: "Why should I go through the humiliation of him getting whatever privilege he's trying to get when he should be already dead.... Why do I have to go up there and say how he did this and he did that and he did this, again, for a second time, when he should be long six feet under?" (*Id.* at 861). "It should be done!" (*Id.* at 862).

Toward the beginning of the conversation, the two discussed legal difficulties Ms. Butler was having in Oregon. Apparently her license as a "caregiver" had expired and she had difficulty getting a new one because of a complaint made by the husband of the woman she was looking after. (*Id.* at 857). Ms. Butler was concerned because the licensing authority wanted to check her criminal background. (*Id.* at 857-58) And those concerns

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discussion of her legal difficulties, see *id.* at 859, ll. 2-3), and some amount of conversation that occurred during a break in the transcribed version, which leaves off at 3 RH Exhs. 877 and picks up again at 4 RH Exhs. 937. After the break, Mr. Hodgson refers to a discussion they were having "about the fact that you heard from different people different things and that he killed eight people" (*ibid.*) – but nothing about that is reflected in the prior transcript.

[82] Ms. Butler was under the impression that, by virtue of his conviction in the guilt phase, Petitioner would automatically receive 20 years to life in prison, unless given the death penalty. (*Id.* at 869). Curiously, she clung to this belief even after Mr. Hodgson explained that the sentence would have been life without parole. (*Ibid*).

were connected to her having been cited for "giving massages without a license" – which prompted Investigator Hodgson to refer to a prior, unrecorded conversation:"I just want to be clear that . . . the issue with the massage licensing and all, we talked about that already. I mean we've discussed the fact that, you know, by your own admission that you were . . . having sexual contact with clients that you were being paid." (*Id.* at 859). Ms. Butler responded: "That's correct."[83] (*Ibid*).

A few minutes later, Ms. Butler connected these concerns to her basic theme (but with a remarkable variation):

> "I'm angry that I'm sitting here struggling and these women, I know for a fact that *these women he killed sued the state. They made out.* I, you know, they've never done anything for me in the state other than tell me that I had to do this at the time just to save my freedom .... I'm angry. *What is the state gonna do for me?*"

(*Id.* at 867 [emphasis supplied]).

In between Ms. Butler's expressions of agitation and anger, Investigator Hodgson attempted to review with her again various aspects of her memories of the crucial events. Ms. Butler emphasized that she was sure that her attacker was Petitioner, rather than Michael Ratzlaff, because of the way he restrained her when they were standing outside of the truck: "it comes down to the fact of they said that there was two people out there, right? Clift [*sic*] and Rogers, right? Clift was tall, Rogers was short. Well if the man can hold me while he's sodomized me from behind with his chin on my shoulder, seems like that right there would conclude to the fact that he wasn't 6 whatever feet tall . . . ."[84] (*Id.* at 861). She provided a slightly puzzling variation on her account of the moment that she recognized Petitioner as

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[83] This admission contradicts Ms. Butler's sworn testimony at the reference hearing, that she had given up prostitution when she moved to Oregon. (3 RHRT 510).

[84] As noted, the underlying premise of this reasoning was at odds with what Ms. Butler told the detectives in her freshest interview – that she had never stood outside the truck, "not once;" rather, she was sodomized while lying face down on the bench seat.

her rapist, after he said that he had arrested her in Arvin: "[I]f he did all his crimes in Arvin and he thought I was somebody from Arvin, that right there told me that he thought that I was one of the girls that he messed up in Arvin."[85] (*Id.* at 862).

Similarly, Ms. Butler's story about recognizing Petitioner's wife had new (and crucially different) elements: She first made the connection when she saw Mrs. Rogers in court, and remembered her from the truck stop – but did not then remember the picture at all. However, when she was in the truck with her attacker, and he showed her pictures of his wife and children, he said: "'You probably know her.' And I said, 'Oh, really?' And he goes, 'Yeah.' And I go, 'Okay, whatever.'" Ms. Butler just wanted "to get back to business," but "[t]his guy was already stalling on me."[86] (*Id.* at 865).

In regard to her motivation for testifying at Petitioner's trial, Ms. Butler was much franker than in previous conversations – she had to testify "just to save my freedom." (*Id.* at 867). When Mr. Hodgson asked what she meant by that, she said that she was "either gonna get 16 months or I was gonna testify." Ms. Butler made clear that no one from law enforcement had made her any promises at that point, "but you know, I'm not stupid. I knew if I testified I'd get to go home. I knew that." (*Id.* at 868). If she refused to testify, she "knew" she would be incarcerated for 18 months. "Knowing what I know and not being a stupid woman, I knew that if I testified that I wouldn't have to do 18 months." (*Ibid*). No

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[85] There is nothing in the record to indicate why, at that point – long before Petitioner was accused of the crimes in question (which did not occur in Arvin) – Ms. Butler would possibly have had any idea that Petitioner "did crimes" or had "messed up" "girls" in Arvin.

[86] When asked by the detectives at Lerdo: "Did he say anything about his wife?", Ms. Butler replied: "No." (4 RH Exhs. 908). For that matter, she did not mention seeing pictures of either the children or the wife in that initial interview – and her answers strongly implied the contrary, that she had very little information about them. (*Id.* at 908-09). Moreover, in that initial account, it was Ms. Butler who pursued the conversation, and the attacker who said very little – although he was "nice as could be." (*Id.* at 912). In one respect, however, Ms. Butler was true to what she said in the interview at Lerdo – but had contradicted many times in the interim – namely, that the children were "a son and a daughter." (3 RH Exhs. 866).

one had to tell her that, she had "seen it time and again." (*Id.* at 869). Investigator Hodgson reminded her that she had said that she actually was *not* "happy that you were getting out early . . . ." Ms. Butler replied: "I thought I said I was happy. . . . It's just getting turned around. I didn't want, didn't wanted [*sic*] to do that much time." (*Ibid*).

Ms. Butler made it clear that she had been reading a great deal about the case "on the internet," and that she was concerned about how she was depicted, including "several articles about how she "might be confused" due to her drug use and otherwise. (*Id.* at 863). After Investigator Hodgson (gently) made it clear that Ms. Butler was going to have to testify, and could be compelled to do so (*id.* at 872-73), Ms. Butler expressed great anxiety about how she could impeached on cross-examination – that the lawyers were "gonna make me look like a drug addict, stupid." (*Id.* at 875-76). Finally, she burst out again in frustration and rage, directed at the State and at Petitioner:

> And it's just making me angry that California did not stand by what they were gonna do, which was put him to death.... I have no problems with California putting him to death. So why the hell didn't they.... You know. He needed to die.... He still needs to die.... Fuck the man sticking his thing in my butt for three hours and putting his stinger to my neck and treating me like scum when I was doing good business for him.... That he abused. It was a mutual exchange of I'll do this, you do that, and he abused it ... But still, why isn't he dead? I think he should have been dead.

(*Id.* at 877).

Minutes later, Ms. Butler offered a new and startling addition to her account: She announced that Petitioner had not only been the man with the pickup truck who had raped her in a field, but that he had also molested her on three separate subsequent occasions while she was in jail – "and nobody's ever done anything for me on that one." (4 RH Exhs. 938).

Investigator Hodgson, apparently nonplussed, responded that was the first time he had ever heard anything about it. Ms. Butler insisted that she had told him: "I mentioned it to you

once before that he ... brought me down to interrogation" Ms. Butler also asserted that she "told Lockhart that he brought me down twice and interviewed me. 'Cause at that point it was only twice." (*Id.* at 938; see also, *id.* at 939). When Mr. Hodgson again indicated that he had not heard of the matter, Ms. Butler said that was because she had just referred to Petitioner having conducted an "'interview.' I kinda thought everybody would pick up on what I was saying." Mr. Hodgson replied that he had no recollection of her saying that Petitioner had "interviewed" her. (*Id.* at 938-39).

The investigator then questioned Ms. Butler about these newly-reported assaults. She first responded that, during the time she was a trustee in the jail, Petitioner,

> ". . . called me down three separate times to a little bitty room. No windows, no nothing. Nobody saw it. He just called me down and in I went, and he felt me up once and the second time he made me take my clothes off and stand there. And the third time he took me."

(*Id.* at 939).

After Ms. Butler said again that she had told Deputy Lockhart about the first two occasions, Investigator Hodgson asked: "did you ever tell Jeannie [*sic*] Lockhart that it was David Rogers?" (*Id.* at 939-40). In response, Ms. Butler said that, no, she had never told Deputy Lockhart Petitioner's name – and then gave yet another version of her previously reported conversation with the Deputy. In this telling, what she said to Deputy Lockhart and two other female deputies was that:

> "there was a real bad cop, he was right downstairs. He liked to mess women up and take 'em and bring 'em into interrogation rooms without anybody else knowing about it, and if I had my way he'd already be in trouble."

(*Id.* at 840).

Bizarrely (according to Ms. Butler), none of the three deputies asked anything more at that point – "it kind of went over everyone's head." However, on the way back to Ms. Butler's cell, Deputy Lockhart whispered a name like "Burke or Berg;"when Ms. Butler said

no, the Deputy brought back the "annual," and Ms. Butler told her: "Okay, he's on one of these two pages, but I still got 5 months to do and I ain't saying nothing else." (*Id.* at 940).

Returning to this point later in the conversation, Investigator Hodgson asked how – when Deputy Lockhart asked – Ms. Butler knew that his name was not "Birch." Ms. Butler first said: "I didn't know his name. I just knew his face." (*Id.* at 943). But when the investigator pointed out that she had specifically denied that the name was Birch, Ms. Butler gave a different response: She knew that his name was Rogers, because she had seen it on his name tag in booking; she just did not know it was "David Keith." "And everybody was saying, you know, Rogers this, Rogers that, you know." (*Ibid.*). Ms. Butler then amended that response –

> I don't even think was Rogers, it was Dave, David, David, and it wasn't 'til I actually looked at him when he got in my face and I looked at his tag then and I know it was Rogers. But I really didn't go on the name Rogers, the tag, none of that. I went on the face.

(*Id.* at 943-44).

Investigator Hodgson then questioned Ms. Butler about the details of the molestations she said she suffered. All three, she said, took place in the same room downstairs (she thought one floor down) from the deck on which she was being housed. (*Id.* at 941, 947).

The first time, he pushed her up against a wall, leaned up against her, felt her breasts, grabbed her crotch, rubbed his own erection, and "put me back out of the room and said go to my cell." She walked up the stairs and around the corner, "and then the lady deputies took me to my cell." (*Id.* at 941).

This was two or three weeks after she had been incarcerated and (contrary to what she first said) she was not yet a trustee. The second time she was a trustee, but the third time she had lost that privilege after being accused (falsely, she said) of "slandering" a woman deputy by spreading rumors that the deputy was a lesbian. (*Id.* at 942).

The second incident took place not long after the first – and shortly after she had been made a trustee. Contrary to what Ms. Butler had said a few minutes earlier, she now placed

the second molestation as occurring *after* her conversation with Deputy Lockhart.[87] Petitioner had come to the desk on the women's deck and asked the deputies to bring her out. Once in the room, Petitioner told her to take off her clothes, and threatened that she would lose her trustee position if she didn't. So she stripped down completely and just stood there. Then he told her to put them back on. (*Id.* at 946).

As Ms. Butler recounted the story again, more details emerged: When she stripped and was standing naked she asked: "What, you want me to salute or something?" And then she saluted him and taunted: "Now you happy? What are you going to do now?" He said nothing and just walked her back out. She went around the corner to the women deputies' desk. One of the deputies sensed that Ms. Butler was angry, and asked what was wrong, but Ms. Butler said: "Nothing. Just take me to the cell." (*Ibid*).

Ms. Butler (at one point) said that the third molestation occurred right after she was being interviewed by another male officer about the slander charge; that officer left the room and "Rogers walked in and closed the door and that's when he stuck his dick in me."[88] (*Id.* at 942). He told her to take off her clothes again, but this time she refused. He turned her around "really forcefully," and pushed her face up against the wall. "He stuck his dick in me, pulled it out and said, 'Now put your pants on.'" When she did so, he opened the door and walked away, leaving her to get back to her cell on her own. (*Id.* at 947).

Mr. Hodgson asked if it was possible that Petitioner put his finger or fingers inside of her instead of his penis. (*Ibid*). Ms. Butler responded that it was possible – in fact she did not know if it was a flashlight. (*Id.* at 947-48).

In any event, a week or so after talking with Deputy Lockhart, Ms. Butler went to

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[87] Her account of that conversation changed as well from the one she had given only minutes before: This time she said that she did not know why she knew that her tormentor's name was not "Burke," even though she knew it was "Rogers, but it still wasn't the name it was the face. And I may have even said to Lockhart, 'No, but I'm not sure, which is why she brought me the book." (*Id.* at 945).

[88] Later, she said that she could not remember being escorted down to the interview room. (*Id.* at 947).

Lerdo,[89] and – while sitting on a bunk – Petitioner's face came up on the television, and she said: "Oh, my god. That's him. That's the cop that did me." He was being arrested for, she thought, the murder or attempted murder of eight women. She said to her friend Kay Davis: "And that made me number nine." (*Ibid.*).

Ms. Butler went on to say that she consulted four different lawyers about suing Kern County over these incidents, but all told her that "there was nothing I could do because I was a whore and I was a junkie and I'm just gonna have to eat it because it's been three years, the statute of limitation was up and it's over. 'If I was dead we could do something, honey.' [*Sic*]. This is what one said." (*Id.* at 948).

At this point in the conversation, Ms. Butler was worked up and Investigator Hodgson appeared anxious to bring it to a close. He did not ask her to reconcile what she had just told him with her earlier statements, including her repeated admission that, for a time at least, she was not sure that she had correctly identified Petitioner as the man who raped her in a field (see, 3 RH Exhs. 686-87, 697, 797-98, 815, 817-18, 845) – an uncertainty that would seem impossible if he had also molested her three more times – or with her testimony that she had only seen him either on the streets or in the booking area of the jail. (RT 5780). Instead, he made plans with Ms. Butler for them to speak the next day. (4 RH Exhs. 950). If that conversation transpired no record of it is in evidence.

E. Ms. Butler's Testimony At The Reference Hearing[90]

Before Ms. Butler appeared to testify, she reviewed all of her prior statements and – believing them to be inconsistent and contradictory – took some 7 pages of notes and then

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[89] In this regard, Ms. Butler's chronology was either in conflict or greatly compressed, because the conversation with Deputy Lockhart took place before either the second or the third molestation – depending on which of her versions one applies.

[90] Where pertinent, we shall include the Referee's findings regarding specific matters as to which Ms. Butler testified, and her credibility.

wrote up an 8-page summary of what she currently believed to be true.[91] (RHRT 384-87; 1038-39). Ms. Butler had that material with her on the witness stand, and essentially used it as a script for her testimony until the Referee instructed her to put it aside, after which she used it as necessary to "refresh [her] recollection." (RHRT 439-40). She nonetheless contradicted herself frequently, and in regard to most of the significant factual disputes.

At the very beginning of her cross-examination – after she repeated that she had not seen Petitioner on television before identifying him, and Petitioner's counsel played tape recordings of her repeatedly asserting the opposite (*i.e.*, that she had see him on television) – Ms. Butler asked for an attorney. (RHRT 583-86). The Referee appointed counsel to represent her, and Ms. Butler and her lawyer spent several days determining whether she would invoke her Fifth Amendment privilege and refuse to testify. (See, RHRT 610). Ultimately, she did complete her testimony, with her attorney present throughout.

1. Her Description of the Man Who Attacked Her In 1986

a. Physical Characteristics

Testifying on **direct examination**, Ms. Butler initially described her assailant as having been a "scruffy, older man," appearing to be in his mid-forties.[92] (RHRT 404). She went on to recall that she had "always thought" he was wearing a blue plaid shirt, but could no longer remember (RHRT 418), and she could not tell if he was wearing underwear. (RHRT 413). When he opened his shirt, he was "flabby," had "ugly nipples not like you see on most men," and "wasn't hugely hairy chested," with light-colored chest hair. He had kind

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[91] The handwritten notes, prepared by Ms. Butler while reviewing her statements, were tendered as Respondent's Exhibit "D" and are found at 5 RH Exhs. 1352. Her handwritten summary was tendered as Respondent's Exhibit "E," and is found at 5 RH Exhs. 1360.

[92]At the time Ms. Butler was attacked, both petitioner David Rogers and Michael Ratzlaff were in their late 30s. (4 Exhs. 957; 6 Exhs. 1505).

of "pooch belly but he wasn't fat." (RHRT 420).[93] At some point the man bent over with his back towards her, and Ms. Butler could see his "butt crack" and a strip of about four inches above it, with "lots of moles or dark splotches;" they were "black." (RHRT 425-26).

Ms. Butler recalled her attacker's hair as having been "thinner. Sandy, blondish, slightly gray but not gray . . . older looking hair. It wasn't curly." (RHRT 518). Led by the State's counsel, Ms. Butler recalled it as having been thinner on top, and thicker on the sides. (*Ibid*). Regarding facial hair, Ms. Butler first testified that she had "always said" he had a mustache (RHRT 517), then agreed that the statements in her declarations about her attacker's "thick, bushy mustache" were true (RHRT 523), then said that she could not presently recall whether or not he had a mustache (RHRT 524), and finally that she only had said that the man who raped her had a "thick bushy mustache" after Melody Ermachild came to her house and showed her pictures of Michael Ratzlaff. (RHRT 547).

Her assailant, Ms. Butler testified, "wasn't a large man, but he was bigger than me." (RHRT 420). (This time she gave her height as 5' 9 ½". (RHRT 417)). The State's counsel attempted to correct her ("When you say you were bigger than him . . ."), but (following objection) merely elicited Ms. Butler's statement that, at that point, she could not tell which of them was taller. (RHRT 420). She then said that she knew he was small based on being on top of him, because "normally I can't straddle most men as easily." (RHRT 421). Later she said that she knew he was shorter than her because, when they were standing outside the truck and he was attempting to sodomize her, he locked his chin on top of her shoulder to hold her still, and she could feel his breath on the back of her neck.[94] (RHRT 428-30).

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[93] Photographs of Petitioner's unclothed torso, taken by police a few days after his arrest in 1987 (roughly a year after Ms. Butler was attacked), are in evidence as part of Respondent's Exh. Z. (6 RH Exhs. 1580-81). While ugliness, like beauty, is in the eye of the beholder it is hard for the undersigned to discern anything notably ugly about Mr. Rogers' (rather small) nipples. Nor is it apparent how his physique could fairly be described as "flabby." What is quite clear, however, is that he had virtually no chest hair at all.

[94] Aside from the fact that it was contrary to what she told the detectives at Lerdo, 21 years earlier, the most basic problem with the version Ms. Butler came up with in 2008 –

On **cross-examination**, Ms. Butler admitted telling the detectives at Lerdo that the rapist had a "thick brush mustache."[95] (RHRT 1072). She told them that her attacker had been strong, and that he had big, rough hands ("you notice these things," she said), and his chest was big as well. (RHRT 1073). She also described a number of other details about him: his gold belt buckle; his wallet; the kind of watch and watchband he wore; his boots; the fact that he had a large number of keys on his keyring. (RHRT 1077-78).

Ms. Butler confirmed that she had told her interviewers about the assailant's blue plaid shirt, and that he wore boxer shorts, not briefs. (RHRT 1074). His hair, she had said, was thick, and long on the sides. (*Ibid*). The rapist's chest was "covered with hair," – it was not "just a little bit" – and it was brown. (RHRT 1074-75). She said that, at one point, his shirt was off completely – but she did not see any other body markings, including a tattoo.[96] (RHRT 1077).

* * *

Pertinent Findings: *Petitioner never had a mustache, and the State's theory – that he had used a "theatrical mustache" – is "not persuasive." Petitioner had small hands and a small chest with no hair on it. He had no moles on his back but did have a visible tattoo.* (R&F 7, 8).

Ms. Butler had variously estimated her attacker's height at 5' 6", 5' 8" and 5' 9" – but had never actually stood up beside him. Rather, she told the detectives, twice, that she *never* stood next to her attacker and that she never got out of the truck "not once, not from the time

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which had her standing next to her attacker – is that it is physically impossible. It takes no particular expertise in body mechanics to understand that if a person is standing behind another person who is the same height or taller, and "clamps his chin" on her shoulder, there is no way that he can simultaneously force her to bend over while he maintains that "clamp" – as soon as she leaned forward at all, his chin would come off of her shoulder, and if she bent far enough for him to sodomize her, his chin would be around the middle of her back.

[95] This was a decade before she spoke with Ms. Ermachild.

[96] As the post-arrest photographs of Petitioner reveal, he had (and has) a large and prominent tattoo on his upper right arm. (6 RH Exhs. 1580-81).

I got into it until he pushed me out." (RHRT 1073-74).

* * *

Pertinent Findings: *Because "height and weight are difficult to estimate," and crediting Ms. Butler's statement that she never viewed the assailant while standing outside the truck, "there is insufficient evidence to ascertain the assailant's height and weight."* (R&F 6).

* * *

Ms. Butler reiterated that she had made special mention of the line of dark moles that her attacker bore above his "fanny" – big dark splotches that had "grossed [her] out." (RHRT 1076). Shown a photograph of Petitioner's unclothed lower back, Ms. Butler agreed that it would be "fair to say" that there were no marks that met that description. (RHRT 1076-77; see, 2 RH Exhs. 466 [Pet. Exh. 48]). On **re-direct examination**, Ms. Butler was shown another photograph of Petitioner's unclothed back – this one taken shortly after his arrest – and asked what she saw there. (RHRT 1227, discussing Resp. Exh. I (5 RH Exhs. 1384)). Ms. Butler responded: "Pimples, disgusting pimples," and said that she remembered feeling them and seeing them.[97] (RHRT 1227).

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Pertinent Findings: *The Referee specifically cited this last bit of testimony as one of several indicia of Ms. Butler's unreliability as a witness: "The Court finds Ms. Butler not credible. The 'pimple scenario is but one example of her fudging or changing her testimony."* (R&F at 7).

* * *

On cross-examination, Ms. Butler also acknowledged two significant points regarding the taped interview at Lerdo. First, she said there was indeed some substantive conversation

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[97] Petitioner submits that the naked back displayed in the photograph discussed by Ms. Butler does not bear any memorable characteristics. (See, 5 RH Exhs. 1384). It is undeniable, however, that there is no line of "black" or dark moles within four (or six, or eight) inches above Petitioner's posterior. Ms. Butler had never before mentioned "pimples."

regarding the characteristics of the attacker, as well as the photo identification process, that took place before the investigators turned on the tape. (RHRT 1069-70). Second, Ms. Butler acknowledged that at several points during the taped portion of the interview she was comparing a picture of Petitioner Rogers to her memory of her attacker and saying that they were, in some respects at least, different. (RHRT 1078-79).

b. The Attacker's Family

Ms. Butler testified on **direct examination** that she had asked the man about his family, and "[a]t the time I thought he had a wife and two – daughter and son. But . . . when I thought about this, I remember seeing two boys . . . in a picture he shows me" (RHRT 407). She then went on to describe, in some detail, the picture – where the "father" was standing, and how the "wife" was sitting with the two young boys. (*Ibid*). The man in the picture was the person who attacked her. She did not recognize the "female" then, but did so later – when soliciting men for sex at Bruce's truck stop, where the "wife" was a "counter lady." (RHRT 408). She saw the woman again, sitting behind Petitioner in the courtroom at his trial. At that point she "realized that I knew her from this truck stop."[98] (*Ibid*).

Later on direct, however, Ms. Butler was questioned about the statement in her sworn declaration, that the man had shown her "photos of his children, a boy and a girl"; asked (twice) if that was "true," Ms. Butler testified: "It is an accurate statement." (RHRT 524). She reaffirmed this a bit later, with the additional fact that the "daughter" was "a little blond girl." (RHRT 548).

On **cross-examination**, Ms. Butler admitted that she told the investigators, in 1987, that – when she asked – the man had told her that his children were a boy and a girl. (He had also told her that he had a dog). She had never mentioned anything about seeing any photographs, and had specified that the man had said nothing at all about his wife. (RHRT 1081-84). Similarly, Ms. Butler acknowledged that, at trial, she never mentioned being

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[98] As the Court no doubt has observed, Ms. Butler's response begs the question asked: Did she recognize Mrs. Rogers as the woman in the photo when she saw her at the truck stop? Or in Court?

shown a picture of her attacker's family, and never said anything about recognizing Petitioner's wife. (RHRT 1138).

c. The Truck

Testifying on **direct**, Ms. Butler "want[ed] to say" that her attacker was driving a white pickup truck. "It wasn't a newer truck, wasn't shiny and bright." (RHRT 401). The truck had running boards, weathered two by six planks across its bed "for somebody to load wood or something . . . ." (RHRT 402). Inside there was a toolbox and a flashlight that she kept bumping into. (RHRT 412). The bench seat was tan or brown, and the interior of the truck was "brown to grayish in color." (RHRT 412). She testified that she had "always said I thought it was a Chevy but that's because I have been around Chevys, I'm sure. (RHRT 519). She recalled telling the detectives at Lerdo that it was a Chevy, but now thought that was inaccurate. (*Ibid.*).

In the course of her **cross-examination**, Ms. Butler reviewed what she had told the investigators during the interview at Lerdo in 1987. (RHRT 1087-91). She had said that it was a newer truck – like a "dealer truck," though not brand new; it was a "nice" truck. (RHRT 1087). That was her best recollection when she said it (one year after the event), but her recollection at the hearing (25 years after the event) was better, she said, because she knows more about trucks. (RHRT 1087-88).

Nonetheless, she confirmed the accuracy of much of the rest of what she told the detectives. She had been able to give them a detailed description of other aspects of the vehicle as well: The "L" brackets holding on the sideboards; the gray interior of the truck; the lack of floor mats; the bench seat; the air conditioner (which was on when she got in); the extensive amount of trash on the floor; a hook or light attached behind the drivers' seat; a big thermos rolling around; the toolbox. (RHRT 1089-91). These are all things she remembered from the night of her assault. (RHRT 1090). Later, however, when going over her declaration, Ms. Butler said that she remembered the bench seat, the toolbox and a thermos or flashlight – but as of the time of the hearing "everything else is kind of a blur." (RHRT 1179).

Ms. Butler also affirmed that she had told the detectives it was a Chevrolet truck because she had seen the word "Chevrolet" printed in red letters across the tailgate. (RHRT 1088-89). Asked to explain why she testified that the attacker's truck was a Ford (coincidently, the same make as the pickup the jury associated with Petitioner), she first said that it was because "I didn't know my trucks," and then said that when she was interviewed at Lerdo she "was still coming off of heroin. I was still very unclear." (RHRT 1144).

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Pertinent Findings: *Petitioner did not own a white pickup truck until a year after the attack, and did not have access to it in the interim.* (R&F 9, 17).

* * *

2. Her Account Of The Assault

On **direct examination,** Ms. Butler again told the terrible story of her rape and torture – but did so with new details and some confusion. She described how, late one evening in early February, 1986, she was picked up by the man in the white truck on Union Avenue, near White Lane. (RHRT 401-02). Although her normal practice was to go to her room, the man did not want to go there,[99] so they went instead to an isolated field off Cottonwood. (RHRT 405-06). The man parked several car lengths off the road. It was dark there (RHRT 406-07), but she could see his face and clothes because it was a clear night. (RHRT 411).

They negotiated a price of $40 (less than what she wanted) and she believed it was just for fellatio.[100] (RHRT 409). The man unbuckled his belt and pulled his pants down to his knees; she knelt in front of him and began orally copulating him. After a while he was unable to perform and got "rough," grabbing her by the back of the head and saying things

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[99] Ms. Butler said something different to the Detectives at Lerdo – namely that she had suggested a different outdoor location, or a spot behind her motel. (4 RH Exhs. 905).

[100] Again, this was somewhat different than what she said at Lerdo, *i.e.*, that they agreed to $20 for fellatio, and then (amicably) agreed to another $20 for intercourse when the man initially could not finish. (4 RH Exhs. 887, 912-13).

like "suck that dick, bitch. You love it, don't you. Mortifying remarks."[101] (RHRT 413-14). After about one-half hour, she had to change positions; he let go of her hair and she got back up on the seat. (RHRT 415). Ms. Butler said that the man was very drunk, and she did not want to make him angry – but then said that she told him he was "going to have to give me more money or we were going to have to end this because he was too drunk . . . he wasn't going to climax." (*Ibid*).

The man refused to pay her more, and became "aggressive," demanding "sex." At first they argued, but then she agreed, in order to avoid further conflict and get things over with. (RHRT 415-16). She took off her boots and pants (having previously removed her top; she had no bra) and "mounted him." (RHRT 416-19). They "fondled" each other for 20 or 25 minutes and then Ms. Butler got off, saying "this isn't working." (RHRT 421-22).

Ms. Butler asked him to take her home, complaining that it had gotten too late. (RHRT 422). He responded that she was "not going anywhere," but she started getting dressed. At that point he reached over and grabbed his "stinger" (*i.e.*, the stun gun) off the dash and put it to her neck. (RHRT 422-23). He gave her a short burst at the base of her throat and told her that she was going to do what he told her to do, and not give any further argument. (RHRT 424).

Regarding what followed,[102] Ms. Butler first testified that her attacker demanded more sexual intercourse, but from a different position, with her laying on her back. (RHRT 425). He got out and walked around the front of the truck. In the meantime, however, Ms. Butler

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[101] This too is different from Ms. Butler's account at Lerdo, where she said that the man was "nice as could be" until later, after they had unsuccessfully attempted intercourse and she demanded more money. (4 RH Exhs. 912).

[102] Suffice it to say that both of the versions of the remaining events that Ms. Butler proceeded to provide on direct examination deviated markedly – in terms of the details of what happened and the sequence in which it happened – from what she told the detectives at Lerdo and testified to at Petitioner's trial. For the most part, those deviations do not bear directly on the issues now before the Court, except to the extent to which they further illustrate the unreliability of Ms. Butler's memory and her tendency to confabulate. Thus we will not burden the Court by pointing each one out.

started to get out of the truck to put on her pants, and when he came around to her side, she stood up. (RHRT 425-27). The attacker turned her around and – clamping his chin down on her shoulder and holding her hips – attempted to penetrate her anus. (RHRT 428-30).

Ms. Butler testified that she started mocking the man's inability to sustain an erection, and called him a "dick" and a "faggot."[103] (RHRT 429, 431). This angered him, and he threw her back on the seat, so she hit it with her buttocks. (RHRT 431). He told her to turn over, and when she refused, grabbed her by "the back of the hair and the neck" and held her while he shocked her with his "stinger" again – this time for so long that she could no longer scream. (*Ibid*). At that point, Ms. Butler stopped resisting and obeyed his command to turn over. (RHRT 432). He sodomized her, and finally, pulled out his penis and ejaculated on her back. (RHRT 434-35).

Ms. Butler then announced to him "that was it, it was over, we are done. Fuck you, you bastard. And was really ugly to him." (RHRT 835). She also had "the intention of wiping [her] back off on his seat, which pissed him off." (RHRT 436). Her assailant responded by pulling a gun out of the glove box – a small automatic pistol – and putting it in front of her face. (RHRT 435, 438-39). She was not "real scared" and told him "you are not going to shoot, you are not fooling me." He then put the gun to her temple and pulled the trigger – but she somehow knew to back up "just enough" and the shot went across the bridge of her nose, burning her, and out the window on the driver's side. (RHRT 435). He told her he could kill her if he wanted to, and grabbed her crotch, calling her a "fucking scumbag whore." Then he grabbed his gun, walked around the truck and got in behind the drivers' wheel. (RHRT 437).

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[103]This part of Ms. Butler's account – which she had never mentioned to the detectives at Lerdo in 1987, or at any of the several other recorded times she told her story over the course of the intervening 24 years – is of particular interest because it so vividly echoes what Tracie Clark reportedly said to Petitioner just before he shot Ms. Clark. (See, *People v. Rogers*, 39 Cal.4th at 844). Ms. Butler had searched the internet for material regarding Petitioner's murder trial and had acquainted herself with the evidence in that part of the case during the weeks prior to her testimony at the reference hearing. (RHRT 1201).

At that point in Ms. Butler's testimony, the Court took a break. When she returned to the stand, Ms. Butler explained that she had discussed the matter with the State's counsel and Mr. Hodgson and realized she had made a mistake. (RHRT 438-49). In fact, she said, her attacker had held the gun to her head before he sodomized her – that was what convinced her to cooperate. (RHRT 439).[104] In this version, he "stung" her once, got out of the car, came around and put the stun gun to her neck again, for a longer period of time. She had stopped screaming but was still being "combative ... telling him he wasn't going to get what he wanted, he was going to have to take it. And I was fighting him tooth and nail all the way." (RHRT 445-46). He was still holding her by the back of the neck. (RHRT 446). It was at that point that he reached into the glove box, grabbed the gun, put it in front of her face and then to her temple. (*Ibid*). God intervened, and she backed up "just enough" so that the bullet went out the window.[105] (RHRT 446-47).

After that, Ms. Butler said, she was "extremely cooperative." (RHRT 448). She rolled over on her belly and he sodomized her for 20 or 30 minutes until her removed his penis and ejaculated on her back. (RHRT 448-50). This was after the rapist "pinned" her with his chin on her shoulder and attempted to penetrate her again. (RHRT 551).

In any event, the man walked back around and got into the driver's side of the truck. Ms. Butler was trying to put on her pants, but he grabbed them from her, and went through her pockets, taking her money and her drugs. (RHRT 452). He immediately identified the heroin, which Ms. Butler found "weird," as not many "family men" would know what it was. (RHRT 453-54). After making her beg for it, he gave it back to her. (RHRT 452-53). He also gave back $20.00 that he had taken; after Ms. Butler told him that her "pimp" would

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[104] It was at this point that Petitioner's counsel noticed that Ms. Butler was reading from the notes she had prepared, and brought it to the Court's attention, whereupon Ms. Butler was instructed not to do so. (RHRT 440). She then spent a few minutes re-reading the notes before testifying further. (RHRT 441-42).

[105] It was never made clear how she managed to do this while he was still holding her by the hair at the back of her neck.

beat her up if she came home without money, he threw it in her face. (RHRT 457). And he was "eyeballing" pearls that she was wearing around her neck; she had the impression that he would snap them off.[106] (RHRT 457).

The rapist drove back toward town, saying demeaning and humiliating things to Ms. Butler, who in turn threatened to get back at him. He replied: "What are you going to do, you're just a hooker," but she promised that she would "get him back." (RHRT 460).

At some point the man slowed down and told Ms. Butler to "get the hell out." They were close to the Knight's Rest, where Ms. Butler stayed. The man leaned over, opened the door, and – without stopping the truck – kicked her out the door with his right foot. (RHRT 459). Ms. Butler landed in a ditch and rolled. (RHRT 460). After she landed, she saw his "backing lights"; when he backed up towards her she rolled further away, and "he hit or log or something." (RHRT 461). He appeared to be backing up again, but another car came and he drove off. (*Ibid*).

Ms. Butler went back to her motel and collapsed. Her boyfriend put her in the bath and fixed her a syringe full of heroin. (RHRT 462). She did not tell him what happened – "he knew." (*Ibid*).

Soon afterward – "almost the next day" – Ms. Butler saw the rapist again; he was "right there" when she came out of her room. (RHRT 465). She told her boyfriend, who attempted to give chase, but his truck would not start. (RHRT 465-66). She saw her attacker a number of times after that, as well. Once she was orally copulating a customer and looked up to see her assailant, standing next to his truck with a gun in his waistband. Several other times she saw him on Union Avenue. On all of those occasions, he was driving the same truck in which she had been assaulted. (RHRT 466-67).

While Ms. Butler was not extensively **cross-examined** on this version of the assault she suffered, she did acknowledge that she gave the detectives at Lerdo a detailed account

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[106] The Court will recall that, originally, it was her "gold watch" that he was after; sometime later, the story changed into him finding her pearls in her pocket.

of the attack – the use of the stun gun, the torture, the forced sex acts, the small pistol fired across her nose, the violence. (RHRT 1084-85). She also acknowledged that, when she saw the rapist on the streets – during the period when he seemed to be stalking her – he looked "the same" as he had that night. (RHRT 1095). She was, however, specifically questioned about her assertion that she was standing outside the truck, next to the rapist, when he attempted to anally penetrate her. She admitted twice telling the detectives that she never got out of the truck, "not once," but rather was inside the whole time. (RHRT 845-46).

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Pertinent Findings: *Besides finding Ms. Butler's reference hearing testimony generally "not credible" – in part because "so much time had passed. She admitted being confused, and her credibility suffered for it" (R&F at 7) – the Referee specifically credited her earlier admissions that she had never stood next to her attacker, and thus found that she could not reliably estimate his height. (R&F at 6).*

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3. What She Said Happened While She Was In Jail

a. Seeing Petitioner In The Booking Area

On **direct,** Ms. Butler testified that, some 18 months after the assault in the field, she was "caught in the middle of giving someone narcotics" and sent to jail. (RHRT 468). While she was sitting on a bench in the booking area, she saw her attacker – he was in uniform and "walking back and forth and kind of cutting up with former deputies and buddies and so forth." (RHRT 469). She did not immediately recognize him, but there was "something about him and his demeanor and his attitude, and the way he was cutting up and talking" – "laughing, cutting up with some other officers" – that triggered a recognition.[107]

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[107] As will be seen, to the extent that Ms. Butler appears to be describing a characteristic "demeanor" that made her recognize Petitioner, her testimony is impossible to square with that of other Deputies who worked with him and testified at the reference hearing that, on the job, Petitioner "was like wound tight and he hardly ever smiled." (RHRT 943 [Jeannine Lockhart]).

(RHRT 470; 1140-41). She stared at him – "dogged him" – and when he noticed he asked her what she was looking at. (RHRT 470, 1140). She told him: "I know you." In response, he said, "Yeah, I arrested you in Arvin." (RHRT 470). But she had never been arrested in Arvin, and said so. (*Ibid*). At that point, "something clicked," and Ms. Butler said: "I know who you are, you son of a bitch." (RHRT 471).

The Deputy had been standing about 15 feet away, but now walked over over, "[a]nd he got in my face, about three inches away, and said in a quiet voice, that's right. I know who you are, you know who I am. You have got time to do. And you can do it my way or you can do it the – you can do it the easy way or the hard way." She took that as a threat. He told her to be quiet, and she complied. (RHRT 473).

Asked about the different version of this encounter she had given in her sworn declarations – and in particular, her prior statement that "nothing he said was actually threatening or indicated he was the man who attacked me" – Ms. Butler said that was not true, and reiterated the threats just mentioned. (RHRT 550-51).

On **cross-examination**, Ms. Butler admitted that what she told the detectives in 1987 about the (then relatively recent) encounter was quite different. (RHRT 1096-1101). Then she had said that she saw the Deputy two or three times, while visiting her "husband" in jail, and the encounter happened on the last of those visits. (RHRT 1097-98). (She testified to the same effect at Petitioner's trial. (RHRT 1149)). She told the detectives she thought his name was "Birch," and that the turning point in their encounter was when she said she knew him from somewhere. (RHRT 1098-99). At that point, she said: "You drive a white truck," to which Petitioner responded that he had arrested her in his white squad car, in Arvin. (RHRT 1099). She suddenly "realized" who he was, and "snapped" – she stared hard at him and cursed him. (RHRT 1099-1100). He responded by telling her: "I suggest if you want that visit, you turn your ass around and keep your mouth shut." (RHRT 1100).

Ms. Butler never told the detectives that the Deputy said "I know you and you know me" or words to that effect. (*Ibid*).

Confronted with her prior statement, Ms. Butler first said that she was indeed in custody when the encounter happened – as was her "husband" – but they were allowed to visit each other. (RHRT 1100-01). Then she said that her husband was not in custody, and then said she was "very confused at this point" and could not recall.[108] (RHRT 1101).

b. Her Conversation With Deputy Lockhart

According to her testimony on **direct**, Ms. Butler was a trustee in jail when she came upon Deputy Lockhart "and a couple of her gal pals" sitting around and "shoot[ing] the shit." (RHRT 476). In this version, Deputy Lockhart "paid [Ms. Butler a] nice compliment that I wasn't the type to be on the street, that I had more class . . . ." Deputy Lockhart asked if she had ever been hurt, and Ms. Butler says she responded: "I have been hurt a lot. In fact, one of Kern County's finest hurt me, right downstairs raped me," and pointed to the floor – saying that the officer had "raped the heck out of me right below us." The woman deputies were "shocked" and Deputy Lockhart grew curious. (RHRT 476).

The other deputies just "moved on," but Deputy Lockhart asked how Ms. Butler recognized him.[109] Ms. Butler just said that she did. (RHRT 477). The Deputy asked for details, and Ms. Butler gave her "some. I told her he held the gun to my head. I told her he beat me up and raped me. I told her he hurt me really bad." (She could not recall if she mentioned the stun gun). (RHRT 478). Ms. Butler did not give more details, she said, because she "had other things to do, I was in jail." (*Ibid*). At the State's suggestion, Ms. Butler added that she also did not know who she could trust. (RHRT 478-79).

As they walked back to Ms. Butler's cell, the Deputy asked if she would recognize a name, and suggested "Lewenski" or "Lewoski, something like that." Ms. Butler said "no." Ms. Butler testified that, at that point, she knew Petitioner's name – she had seen it on his name tag during booking – but for some reason continued to think his name was "Birch."

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[108] Later, she acknowledged having told Investigator Hodgson, in 2008, that the encounter took place while she was being booked. (RHRT 1194).

[109] That would seem to have been an odd question if, as Ms. Butler testified, she had just told Deputy Lockhart that she was raped *in the jail*.

(RHRT 479-80). The Deputy asked if she would be able to identify a picture of the man, and Ms. Butler said she did not know – "bring me a picture and I will see what I can do." (RHRT 480). Sometime later, the Deputy brought her a copy of the "annual" (*i.e.*, "Behind the Badge"), left it with her and walked away. (RHRT 480-81). Ms. Butler said that she spent an hour looking through it, and found Petitioner's photo on a page where there were 12 pictures, facing another page with 12 pictures. (RHRT 482). She saw the name "Rogers" and it came back to her – she recognized the name from when she saw him in booking, but had not seen him in the interim.[110] (RHRT 482).

When Deputy Lockhart came back, Ms. Butler told her that "he is on one of these two pages." (RHRT 483). The Deputy asked why she would not say which picture was the one, and Ms. Butler testified that she replied: "because I've got to do a lot of time here, I would like to get out before I get crazy." (RHRT 483). She already felt she had said too much, and was afraid for her safety; she was pretty sure he was still working in the jail – he had "made it clear in booking." (RHRT 484-85).

In this account, Ms. Butler's conversation with Deputy Lockhart apparently happened before any of the times that Petitioner allegedly molested her in the jail. (See, RHRT 485, *et seq.*; but see preceding footnote.).

When **cross-examined**, Ms. Butler reviewed what she said to the detectives, at Lerdo, and then changed her testimony significantly. She had gone through the book specifically looking for a man named "Birch." (RHRT 1093). Not finding him, she "showed Ms. Lockhart a picture of a guy who looked like [the] assailant because he had a mustache and thicker hair."[111] (RHRT 1095). Ms. Butler also told the detectives that Ms. Lockhart had

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[110] In this regard (and others) Ms. Butler's testimony on direct was inconsistent with what she had told Investigator Hodgson just a few weeks before she testified (and then reaffirmed on cross) – namely, that Petitioner had molested her in jail either once or twice before she talked to Deputy Lockhart. (4 RH Exhs. 938, 945).

[111] It is uncontroverted that Petitioner was never pictured with a mustache in his photos in "Behind the Badge."

advised her "there wasn't a lot that could be done." (*Ibid*).

Ms. Butler was also reminded that, at Petitioner's trial, she said the rapist had told her his name was "David." (RHRT 1139). But she never told that to Ms. Lockhart. (RHRT 1140). In fact (Ms. Butler testified at the hearing) she got the name "David" from seeing his name tag in booking. (*Ibid*). She then amended that, and said the name tag only said "Rogers" – she had learned he was "David" on the night of the assault – but did not mention that either to Ms. Lockhart or to the detectives at Lerdo.[112] (RHRT 1141-42).

Ms. Butler went on to give a somewhat ambiguous report about what it was that she did say to Deputy Lockhart: "I did not tell her his name. I pointed to a picture and I said he looks like this man. But this is not him. He is one of the 12 on this page or that page." (RHRT 1148-49). Still later, she was confronted with what she had told Mr. Hodgson in 2001 – that she had picked the picture "out of the 12 men that had the potential of being on the news and that he was the one that was on the news" – and explained that she had told Deputy Lockhart that the man's picture was "on one of these 12 pages [*sic*] and when it came up on the news, his face was one of those 12. Out of 24, I'm sorry." (RHRT 1187). Asked why she said that, Ms. Butler further explained that Petitioner's face was *already* on "the news" and that Ms. Lockhart would thus know which of the faces on those two pages she meant. (RHRT 1186).

Finally, Ms. Butler was confronted with the transcript of her conversation with Tam Hodgson, which had occurred just a month previously. (RHRT 1207-08). Then she had claimed that she had told Deputy Lockhart, not once but twice, about the bad deputy who "really liked to mess women up and take them and bring them into interrogation rooms without anybody else knowing about it. And if I had my way he'd already be in trouble." (RHRT 1208-09). After reading that (recent) prior statement, Ms. Butler affirmed in her

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[112] Ms. Butler said that was because she had been "afraid" to give the name David. (RHRT 1142). She was then asked: "You weren't afraid to pick out a man and point to him that you knew was on trial for possibly going to death row. Correct? But you were afraid to say 'David.' Is that your testimony?" – to which she answered: "Yes." (*Ibid*).

present testimony that she had indeed said all of that to Deputy Lockhart – who had taken no action, other than showing her the Behind the Badge book. (RHRT 1209-10).

c. The Alleged Molestations In the Jail

According to her testimony on **direct,** the ***first molestation*** occurred a few weeks after Ms. Butler's conversation with Deputy Lockhart. (RHRT 485). She was in her cell, when a "lady guard" came and took her to a small, windowless interrogation room (there was a window in the door, but it was always "papered over"). The room was about 4 feet by 4 feet – big enough for a small table and a couple chairs, but there was nothing in it. She went in and Petitioner, in uniform, closed the door behind her. (RHRT 486-87).

Then, she said, Petitioner told her to take off her clothes. When she initially refused, he threatened her, saying that "I can always say that I have been a violent inmate [*sic*] here and you never know what will happen." (RHRT 487). She complied, and took her clothes off. (RHRT 488). He walked around her, and she "felt something brush up the crack of my fanny." He looked at her with apparent disgust, and told her to put her clothes back on. Then he opened the door and told her to check herself back in. He did not accompany her back to the matron's desk. (RHRT 488-89).

During that encounter (she said) he called her names and said something about her being an inmate and having fun, and that he had told her he would be back. At one point – either in that encounter or a subsequent one – he said: "I know you said something to somebody." (RHRT 489).

The ***second molestation*** allegedly took place 10 days to two weeks later, in the same cell. (RHRT 489). Again, a female guard came for her and took her to the same room. (RHRT 490). Again, Petitioner was already there and closed the door behind her. She started crying immediately. He told her to take off her clothes, and when she asked: "Why are you doing this?" He responded: "'Just take off your damn fucking clothes' . . . or something like that." He told her to turn around; when she did he put his hand in the middle of her back and shoved her, hard, against the wall. (*Ibid*). She felt something run up the cheek of her butt but it did not penetrate her; instead (she said) it was "to kind of ruin my

anus." (RHRT 491). She testified that, "in my mind I thought it was his penis. But it wasn't his penis. I know it was a device. It was something like a light, a pen light, a pencil, something. And he told me just to get it 'stinky'" – meaning, she thought, to insert it in her anus. (*Ibid*).

When he was done he told her to turn around, put her clothes on, and "get out of here." He told her to turn herself in to the "lady guards" and go back to her "home" – "[h]e called it my home. But it was where I was going to be for the rest of my life." (RHRT 492). She did as he said and did not tell anyone because she was so "mortified." (*Ibid*).

She testified that the ***third molestation*** occurred just two days before she went to Lerdo, perhaps on a Sunday (all of them took place on weekends when there were fewer people there). (RHRT 493). Again someone came and took her from her cell to the same, empty room. (*Ibid*). Petitioner came in behind her and pulled the door shut. (RHRT 494). He told her to take off her clothes, and she complied. This time he did nothing, but said: "we are not going to have any more game time." Ms. Butler distinctly remembered him saying that, and he said something else, but she could not remember what. (*Ibid*). After five or six minutes, he allowed her to return to her cell. (RHRT 495).

She never told anyone what happened in the jail except her husband,[113] because she was "humiliated," and "why make myself feel dirtier than I already felt." (RHRT 499).

On **cross examination,** Ms. Butler was confronted with the only prior account she had provided of the alleged molestations – the one she gave to Tam Hodgson on the telephone, less than a month before she testified. As she had to acknowledge, that account was very, very different than the version she had just given on the stand.

In that previous account, the ***first alleged molestation*** Petitioner "felt [her] up," "on [her] boobs and on [her] crotch" (RHRT 1208, 1212) – something that never happened in any

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[113] In this instance, "husband" referred not to her boyfriend ("Pegleg" Weise) but rather to Gordon DeHarpport, who was deceased at the time of the hearing. (RHRT 499).

of the incidents she described on the witness stand.[114] The ***second alleged molestation***, as she had described it, consisted of her simply having to take her clothes off and stand there (RHRT 1208) – which generally corresponded to her testimony about what happened in the third alleged incident, except that it perforce did not include any of the remarks she testified to about them "not going to have any more games"

In the ***third alleged molestation***, as she first described it to Mr. Hodgson, Petitioner had put his penis in both her vagina and her anus. (RHRT 1214). However, at Hodgson's suggestion, she said that she was not sure if it was a penis or a flashlight. (RHRT 1215). This generally resembles what she described on direct examination about the *second* molestation, but on direct she had said nothing about him penetrating her vagina and had been certain that what penetrated her anus was some sort of "device." (RHRT 491). Now, on **cross,** she was no longer sure whether it was his penis or something else. (RHRT 1215).

She acknowledged, however, that (a month earlier) when she described for Mr. Hodgson the incident in which Petitioner "took" her, she had said that it happened just after some other officer had been interviewing her regarding her "slander" of a woman deputy, and that Petitioner had come into the room where she was being interviewed and had raped her there immediately after the other officer left. (RHRT 1215). On the stand, Ms. Butler said that she must have been confused – that this was in fact a ***fourth*** encounter with Petitioner, one she had never mentioned before, and as to which she provided no details. (RHRT 216).

Ms. Butler acknowledged telling Investigator Hodgson that two of the alleged molestations occurred prior to her conversation with Deputy Lockhart, and that she had told the Deputy about them – at least that she had said there was another deputy working in the jail who "really liked to mess women up and . . . bring them into interrogation rooms without anybody knowing about it." (RHRT 1209-10). On the stand, she confirmed that she had said that to Deputy Lockhart in the conversation that led to the Deputy showing her the book. (*Ibid*). At that time, Ms. Butler had known her nemesis was named "Rogers." (RHRT 1216).

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[114] Conversely, she had not said anything to Investigator Hodgson about him running his hand up her "fanny" crack and thus "ruining" her "anus" in that encounter.

* * *

Pertinent Findings: *The Referee found that Ms. Butler's testimony regarding the molestations was not credible, and that it only served to discredit the balance of her testimony. "Specifically, in describing the jail molestations (the Court finds to be incredible that she remembered the detail she did after some twenty years). And she was thoroughly impeached by Ms. Lockhart's ... and Mr. Simon's testimony."*[115] (R&F at 7).[116]

* * *

4. The Disputed Statements In Her Sworn Declarations

Much of Ms. Butler's testimony was devoted to going through various admissions and other factual statements she made in her several sworn declarations. To the extent that she was no longer comfortable with those statements, Ms. Butler tried to suggest on **direct** that they had been fabricated by Melody Ermachild and that she (Ms. Butler) had just signed the declarations without paying much attention to what they said because she "just wanted

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[115] As will be discussed, former Sheriff's Deputies (and State's witnesses) Norm Simon and Jeannine Lockhart, who both worked in the jail during that period, testified to the effect that the events as described by Ms. Butler simply could not have occurred.

[116] In our arguments to the Referee we set out the many reasons, grouped in four enumerated categories, why Ms. Butler's tale(s) regarding the jailhouse molestations cannot be credited. (See POBR at 188-94). Those points, briefly, were: (1) If Ms. Butler in fact had that much (very intimate) contact with Petitioner, it would have been impossible for her to harbor the doubts and confusion about his identity and characteristics that she repeatedly acknowledged, not only in her sworn declarations, but also in her conversations with Investigator Hodgson and even to an extent in the Lerdo interview; (2) For 25 years she had not only kept silent on the matter, but had expressly denied having any additional information that would inculpate Petitioner – even though her avowed purpose was to put him on death row and keep him there; (3) The specifics of her stories about the molestation were decisively contradicted by the evidence presented at the hearing by the State's own witnesses – notably the deputies who worked in the jail; and (4) The accounts that she gave, even though only a month apart, were utterly inconsistent with each other.

The State made no effort to rebut that analysis, either in its briefing or in oral argument before the Referee.

Melody Ermachild out of [her] house" and to be done with the whole thing. (RHRT 521-22, 544-45, 1231).

On **cross examination,** however, Ms. Butler had to acknowledge that she had spent five or six hours with Ms. Ermachild in the latter's first visit to her home; that she had even invited Ms. Ermachild to stay for dinner with her husband and other guests; that after interviewing her and handwriting the initial declaration, Ms. Ermachild had read it out loud to her and then had her read it; that she had gone through and asked for numerous specific changes in the declaration, which were made; that Ms. Ermachild had subsequently called and set up an appointment to come back again, with the revised, typewritten declaration; that they had repeated the process of reading and reviewing that declaration; that Ms. Butler asked for additional changes and modifications, which were made – some in her own hand, and all initialed by her; that Ms. Ermachild had subsequently mailed her a brief, supplemental declaration that Ms. Butler dated, signed and mailed back; that she in fact signed all of the declarations, and did so under penalty of perjury, knowing full well what that meant and what the legal consequences would be; and that she did all of these things fully aware that their purpose was to assist Petitioner David Rogers in this proceeding. (RHRT 988-1000, 1160, 1197, 1172-85).

Ms. Butler nonetheless continued to dispute – at least for a while – some of the more significant of the statements she made in those declarations.

* * *

Pertinent Findings: *The Referee relied on Ms. Butler's sworn declarations as "relevant to her credibility" and as "newly discovered evidence" supporting the "fact that another assailant other than the petitioner committed the assault on Ms. Butler."* (R&F at 6, 16).

* * *

a. Whether She Saw Petitioner On Television Before Identifying Him

When testifying at Petitioner's trial, Ms. Butler was asked whether she had seen "photographs of Mr. Rogers on television or in the newspaper before you talked to the police," to which she answered: "No, sir, none whatsoever." (RT 5795). In her declarations, however, she admitted that she had indeed seen Mr. Roger's face on television in news coverage regarding his arrest, just the day before the interview at Lerdo in which she picked his photograph out of the lineup, and that she had intentionally lied when she testified otherwise. (See, 1 RH Exhs. 256-57).

When asked about this at the hearing on **direct examination**, Ms. Butler testified that she had *not* seen Petitioner; rather, she had been reading a book when her friend Kay Davis (with whom she had apparently talked about the attack in the field) said "oh my God, there he is!" Ms. Butler looked up at the television and saw a Kern County Sheriff's badge, and heard them talking about David Rogers having been arrested for murdering women – but she never saw his face. (RHRT 498, 500; 552; 556).

On **cross**, Petitioner's counsel played several recorded excerpts of Ms. Butler's various interviews with Tam Hodgson, in which she explicitly admitted, on at least four different occasions over the years, that she had indeed seen Petitioner's face on the news the night before the Lerdo interview. (RHRT 1004-21). In at least one of those interviews, Ms. Butler asserted that she had "seen the whole thing on t.v." – including Petitioner's face – and that she even had told that to the detectives when they came to Lerdo. (RHRT 1023-24; 4 RH Exhs. 888, 841). Ms. Butler admitted at the reference hearing that those were her own words – not something that Ms. Ermachild had put in her mouth. (RHRT 1023-24).

In the midst of this impeachment, Ms. Butler asked to explain: "So this sounds very confused. And I knew basically what I saw on the news. And I'm not trying to perjure myself. I'm not trying to. I'm pretty sure I didn't see his face. If I did, it was just so fast." (RHRT 1018). On **redirect** she was asked about it again, and gave yet another answer that was different from what she said on direct: "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 . . . ." (RHRT 1224).

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Pertinent Findings: *After hearing and reviewing her testimony, the Referee found that "Ms. Butler saw petitioner on TV before she identified him," and that she testified falsely at trial when she denied having done so.* (R&F at 8).

* * *

b. Whether She Followed Petitioner's Case and Talked to Others in Jail

Ms. Butler was also asked at Petitioner's trial whether "this case was discussed amongst other people in jail, the details of it," to which she had answered: "Not really. I didn't discuss it with a whole lot of people." When pressed as to whether it was "a matter of jail gossip before [she] talked to Mr. Hodgson," she replied: "In my part, I kept it to myself." (RT 5803). She admitted in her declarations that she had perjured herself in this regard as well. (1 RH Exhs. 257).

On both **direct** and **cross examination** Ms. Butler essentially admitted that she had lied about this at Petitioner's trial. As just reviewed, her attempt to deny having seen Petitioner on television was based on the fact that her friend and cellmate, Kay Davis, was watching the coverage and knew enough of Ms. Butler's story to tell her that the police officer who had assaulted her had been arrested. Ms. Butler also insisted – both at the hearing and in several earlier conversations with Mr. Hodgson – that she had initially refused to talk to the detectives but had changed her mind when she received a large number (as many as 150, in one version, and 175 in another) of "kites" from men in the jail who urged her to do so. (RRHRT 110, 1030, 1066, 1103-04; 3 RH RH Exhs. 807, 836). At another point in her testimony, Ms. Butler mentioned that while she was in jail she "had a lot of women telling me I was going to get out" if she testified against Petitioner. (RHRT 1030). The unavoidable inference is that much of the jail population was aware not only that a Kern County Deputy Sheriff had been arrested for murdering two prostitutes, but also that Ms.

Butler was saying that same deputy had raped her – and many inmates talked to her about it.

It is undisputed that the media coverage of Petitioner's arrest and subsequent trial was ubiquitous in Kern County (see, RHRT 1477, 1740, 1987-88), and that there were multiple television sets, turned on at all times during waking hours, in the women's confinement areas. (RHRT 917, 2430-32; 5 RH Exhs. 1330-33). Ms. Butler nonetheless testified that she did not follow the story between the time she was interviewed by the detectives and when she testified at Petitioner's trial. (RHRT 1133, 1227). On **cross examination**, however, Ms. Butler admitted having told Tam Hodgson that she understood she "was the only living key witness who could take [Petitioner] from 20 years to life to death row" and that she knew that from reading about it and from "a lot of talk on the streets." (RHRT 1133-34). She added: "Just because I testified didn't mean I quit watching the story." (RHRT 1134-35). As she acknowledged, that imported that she had indeed been watching and following the story of Petitioner's prosecution all along. (RHRT 1135).

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> **Pertinent Findings:** "*Ms. Butler talked with other inmates extensively about the case and she testified falsely [at trial] when she denied talking to other inmates about the case.*" (R&F at 7). *Thus while she was in jail, Ms. Butler did indeed follow the case against Petitioner, and testified falsely at trial when she denied doing so.* (R&F 7&8).

* * *

c. Whether She Ever Harbored Doubts About Her Identification of Petitioner

In several paragraphs of her declaration, Ms. Butler expressed deep reservations about the accuracy of her in-court identification of Petitioner as the man who attacked her. (See, *e.g.*, 1 RH Exhs. 258-59, ¶¶ 21-23). She said that she had "often worried over the years" that she had "testified against the wrong man;" had "always questioned how accurate my identification of Rogers was;" and had shared her uncertainty with her husband. She also averred that, in the photos that are not part of the record, Michael Ratzlaff "looked like the man who attacked and raped me;" that she was "particularly haunted by one of the

photographs;" that she "cannot be sure he was not the man who attacked me;" and that she was "more concerned than ever that I wrongly identified David Rogers." (*Ibid*).

She disavowed all of these statements on **direct examination.** She testified that she had never been bothered by her identification of Petitioner and "throughout the years up until today" remained just as sure as she ever was that he was her attacker. (RHRT 511). And she denied ever telling her husband anything to the contrary.[117] (RHRT 560). But Ms. Butler immediately amended her blanket denial, saying that the only time she had harbored some doubt was when Ms. Ermachild came and showed her pictures of Mr. Ratzlaff, and "made me question myself to the point of near – near insanity."[118] (RHRT 511). Later in that same examination, however, Ms. Butler said that when she saw the pictures of Mr. Ratzlaff, she didn't think he looked like her attacker, and she told Ms. Ermachild that. (RHRT 521). Still later, however, Ms. Butler said that she did tell Ms. Ermachild that Ratzlaff resembled her attacker – but it was not true. Michael Ratzlaff was "handsomer than Mr. Rogers . . . way better looking man than Rogers. Rogers was an ugly man." (RHRT 543). Finally, towards the end of the **direct**, she noted that she "wasn't attracted to Mr. Rogers, who was a short, stubby man to me. Mr. Ratcliff [*sic*] was somebody that I might have dated personally because of his height, his weight, his demeanor, his darkness, his dark hair. I have no doubts. She [*i.e.*, Ms. Ermachild] made me doubt." (RHRT 559).

On **cross examination**, Ms. Butler acknowledged that – in 1998, a few months after signing the declarations – she told Investigator Hodgson something quite different than what she testified to on direct. (RHRT 1153-55). In fact, what she told the investigator was the opposite of her testimony at the reference hearing: That the pictures of Michael Ratzlaff were "very close in description to David Keith Rogers" – "[t]he pictures that she showed me were

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[117] Melody Ermachild started to testify as to what Ms. Butler's husband said to *her* on the subject, but the State's hearsay objection was sustained.

[118] She added that it "made me question – not my identification, but my conscience. If that makes sense." (RHRT 511-12).

a young man with a bushy mustache and it was like . . . oh my god she's pulled him out of the past and that's him . . . . It was like, okay, this is David Keith Rogers eleven years ago. . . . . It took me to the point to where, I mean I got chill bumps on the back of my neck because I was looking at David Keith Rogers eleven years ago. . . . . It was that close." (RHRT 1155; 1163-64; 3 RH Exhs. 700). She reiterated this when she met with Investigator Hodgson three years later and said that, in his pictures, Ratzlaff "was close enough in appearance that with or without a mustache there could have been that much confusion" – which, she admitted at the hearing, was true. (RHRT 1166-67).

Confronted with her statements to Mr. Hodgson, Ms. Butler admitted that, when she saw the pictures of Michael Ratzlaff she did indeed think "Oh, my God, that's the man." (RHRT 1164). Ms. Butler's admissions also made it clear that her "questioning" was not limited to when she was talking with Ms. Ermachild: She continued to doubt her identification even as she talked with Investigator Hodgson:

> "I am still kind of – you know, I know Mr. Rogers is the cop that I was supposed to testify against because of the fact that he did get in my face, that did confirm it for me. And the wife is the same wife. *But he doesn't match the description that I remember in my head.*"

(RHRT 1162-63 [emphasis supplied]).

After going through her prior statements, Ms. Butler changed her testimony regarding the veracity of her sworn declaration. She conceded that it was true that she thought, when she saw his picture, that Michael Ratzlaff "looked like the man who attacked and raped me," and that she was "particularly haunted by one of the photographs." (RHRT 1180). She admitted that she (not Melody Ermachild) had written that she could not be certain that Ratzlaff was not the man who attacked her, and that she was "more concerned than ever that I wrongly identified David Rogers as the man who attacked me." (RHRT 1180-81). While Ms. Butler said that she no longer felt that way, she admitted that all of that was true when she signed the declaration(s). (RHRT 1181).

Ms. Butler's explanation for why she harbored doubts was, once again, that it was Melody Ermachild's fault. She said that she told Mr. Hodgson that she "was talking to my husband about how I was very upset that this woman came into my life and then made me question my opinion." (RHRT 1157). But when pressed on what it was that Ms. Ermachild said that raised those questions, Ms. Butler cited the photographs of Ratzlaff and three "big important items": that Petitioner did not have a white pickup truck when she was attacked; that he was never associated with a stun gun; and that he never had a mustache. (RHRT 1170). The Court will observe that all of those things were, in fact, true.[119]

d. Ms. Butler's Interactions With, And Expectations of, Law Enforcement

At Petitioner's trial, Ms. Butler testified that she was then in custody for (simple) possession of heroin (RT 5779), that no promises of leniency had been made to her in connection with her testimony (RT 5794), that she did not expect to get out of jail until August (it was then March), and that she did not expect any assistance from law enforcement. (RT 5801). The real facts concerning her legal situation, her expectations in that regard, her contacts with law enforcement personnel regarding the case, and the benefits she actually did receive were different (and a good deal more complicated) than her testimony disclosed.

In fact, at the time of Petitioner's trial, Ms. Butler was serving time for the crime of possessing heroin with the intent to sell it, in violation of the felony provisions of Health and Safety Code, section 11351. (RHRT 1994; 1 RH Exhs. 165). Moreover, she had originally been arrested for the even more serious offense of furnishing heroin, in violation of section 11352 of that Code, and the District Attorney was talking about amending the charges to include that offense. At that time, she was on felony probation as well as separate probations on two misdemeanors. (RHRT 1111). She "knew I was about to go to prison and this was

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[119]As such, they contrast sharply with things that Investigator Hodgson told Ms. Butler in persuading her that Petitioner was indeed her attacker: That Detective Soliz had pictures of Petitioner with a white truck at the time of the attack and that he (Hodgson) had "no way of knowing" whether Petitioner had a false mustache that could have been worn in the attack – neither of which were true.

my last shot" and expected to receive an 18 month prison term. ((RHRT 1111-12). In a plea bargain – made after she had identified Petitioner to the detectives at Lerdo, and before she testified – she was permitted to plead guilty to the lesser charge and the probation violations were taken "off calendar." (RHRT 1112). She was sentenced to "up to a year in the County Jail" rather than any of the much longer prison terms that would otherwise have resulted from such a felony conviction. (RHRT 1113).

This lenient disposition followed a long string of criminal convictions in Kern County for drug possession, prostitution, and providing false information. (RHRT 1045-56). Among those many priors encounters with local law enforcement, the very first is of particular interest. In April, 1985 – shortly after she came to Bakersfield – she was arrested for being under the influence of heroin. (RHRT 1045-46). Taken to jail, she was cited and released – by Deputy David Keith Rogers. (RHRT 1046-47; 1 RH Exhs. 59). Thus, if Ms. Butler encountered Petitioner in the jail (while being booked on a different charge some two years later) and said she knew him from somewhere – to which he replied that he had arrested her at some earlier time – they were both in a sense correct.

Ms. Butler testified that, because of her propensity for getting in trouble with the law, her greatest concern when she was asked to testify against Petitioner was to not be on felony probation when she was released, for she was certain that she would violate that probation and end up in state prison. (RHRT 1030-31). On **direct examination** at the reference hearing, Ms. Butler averred that she expressed this concern to men from the District Attorney's office who came to prepare her to testify against Petitioner. (RHRT 535-36; 554-55). They refused to promise her anything, and told her that she would not get anything in return for testifying. (RHRT 555).

Ms. Butler was also asked about the statement in her sworn declaration in which she stated that, in the meeting, she had been told "that David Rogers had killed nine women they knew of and probably more;" that "Tracie Clark had been pregnant and her body had been mutilated;" that when she "asked if the baby had been cut out of her, one man said 'use your

imagination;'" that they had convinced her that Petitioner was guilty and that she should "testify to protect other women prostitutes." (RHRT 554). Ms. Butler confirmed that it was true that they told her that Petitioner had killed "nine women and probably more" and that she would be helping other women if she testified against Petitioner. (RHRT 554-55). The part about Ms. Clark being mutilated was, she said "more of my speculation." (RHRT 554). On **cross-examination**, however, she said that *she* had asked *them* about the number of women killed and about whether Ms. Clark had been mutilated and that they had said they could not give out that information – but one "rolled his eyes" which led her to assume it was all true.[120] (RHRT 1119-1120).

Also on **cross examination**, Ms. Butler was confronted with the text of her telephone conversation with Investigator Hodgson, recorded less than a month prior to the reference hearing. (RHRT 1030). Ms. Butler said in that conversation that, although no overt promises had been made to her, she wasn't "stupid" and she knew that she would get out early if she testified – no one had to tell her that because she had seen it work that way and knew that was how it would go. (RHRT 1030-32). She told Mr. Hodgson that she knew she was "testifying for [my] freedom;" she knew she was doing the State a "huge favor by putting this man away" and that the State would probably let her go. (RHRT 1031-33). She also expressly disavowed her repeated assertion that she actually did not want to get out of jail early, saying "I didn't want to do that much time." (RHRT 1033). At the hearing, however, she said that had just been anger talking and her real concern had been the prospect of violating felony probation. (RHRT 1031-32).

In the event, however, she was indeed released from jail several months early – on the same day Petitioner was sentenced, May 2, 1988. (RHRT 2171; 2173). And, what was perhaps more important for her purposes, she never had to face the consequences of violating her felony probation.

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[120] A moment later, pressed further on this point, she testified that she could not recall what took place in the meeting at all. (RHRT 1120-21).

As she anticipated, Ms. Butler did indeed get arrested again within a short time after she was released. In October, 1988, she pled guilty to another "under the influence charge," and was sentenced to 180 days in jail. She was given until December of that year to turn herself in; in the interim she had pending court dates to answer for her violation of felony probation. (RHRT 1151).

Ms. Butler testified that, while all of that was pending, Tam Hodgson came out to Union Avenue to talk to her. (RHRT 540). In her declaration, Ms. Butler had sworn that Mr. Hodgson had told her that some police officers might have thought she had "done a bad thing by testifying against Rogers," and that she should "leave California and never come back or I might wind up in a ditch, dead. He said a file would just drop behind a file cabinet and my name would never be mentioned in California again." (1 RH Exhs. 223). On **direct**, she testified that only a portion of that was true – that she was in danger and should get off the streets. (RHRT 540). On **cross-examination,** however, she was again confronted with a tape recording of a conversation with Mr. Hodgson – the one that occurred in 2008 – in which the investigator read her those same portions of her declaration to her and she told him that it was "all true." (RHRT 1034-36). Ms. Butler was asked on the stand: "these things that are in this declaration that you signed, they are all true. Isn't that true?" To which she replied: "They are true." (RHRT 1035).

* * *

Pertinent Findings: *Ms. Butler testified falsely both about the offense for which she was in custody and her expectations of early release in exchange for her trial testimony. Specifically, the Referee found that, although "there was no express promise of leniency . . . it is clear she knew she would get out if she testified." (R&F 9). The Referee also found that Ms. Butler was in custody for "felony possession of narcotics for the purpose of sale ...; that is a completely different – and far more serious offense than simply possessing heroin," the offense she identified as the one she was doing time for. Thus, the Referee*

found, "she testified falsely, either inadvertently or otherwise, about an issue material to her credibility as a witness." (R&F 9-10).

* * *

B. Other Evidence Bearing On Ms. Butler's Accounts

1. Dr. Kathy Pezdek: Eyewitness Identification Expert

In his Report and Findings, the Referee acknowledged – and in part relied upon – the uncontroverted testimony of Dr. Kathy Pezdek. (See, *e.g.*, R&F at 6, 22). Dr. Pezdek is a professor of cognitive psychology at Claremont Graduate University who has taught, researched and published academic articles regarding eyewitness identification since 1977, and who has testified on the subject in over 300 trials since then. (RHRT 612 - 627).

Although Dr. Pezdek did not opine on the "ultimate factual question," the conclusion to which her testimony clearly pointed was two-fold: First, that Tambri Butler's *description* of her attacker, provided to the detectives at Lerdo, was probably quite reliable (RHRT 640-41); Second, that for many of the same reasons, Ms. Butler's *identification* of Petitioner as that attacker was highly unreliable. (RHRT 651, 784, 785-86, 792).

a. Reliability of the Description of the Attacker

Regarding the reliability of Ms. Butler's description of her assailant, Dr. Pezdek applied a list of seven specific factors bearing on that determination: (1) Physical distance and lighting (how close the witness was to the perpetrator and how well she could see him); (2) Exposure time (how much time did she have to look at him); (3) Multiple exposures (how many opportunities did she have to see him within a short period of time); (4) Distraction (was the witness viewing one person or a crowd; (5) Weapon focus (*i.e.*, whether her attention was trained primarily on a weapon being brandished – usually only a factor when the exposure time was brief); (6) Race (whether the witness and perpetrator were of the same or different races); and (7) Time delay between viewing and identification. (RHRT 634-38).

As to the first two factors, Dr. Pezdek noted that Ms. Butler was at a very close distance to her attacker, with adequate lighting for much of that time for a considerable

period of time – between 45 minutes and two hours, depending on how one interprets Ms. Butler's account. (RHRT 638-39). Regarding the third factor, Ms. Butler saw the man, she said, several times more within a short period after the attack. (RHRT 639). As to the fourth, as Dr. Pezdek put it, "there was nothing else going on in that truck." (*Ibid.*). While the fifth factor – "weapon focus" – could have vitiated the reliability of the description if the use of the stun gun or the pistol consumed a substantial portion of the encounter, in this case they only consumed a small part of the time Ms. Butler spent with the man. (RHRT 639-40). "Cross-racial identification" was not a pertinent factor here, for both Ms. Butler and her attacker were apparently Caucasian. (RHRT 640). The one factor that cut against reliability was the last – "time delay" – in that it was some 13 months before Ms. Butler's first documented description of her assailant. (RHRT 640). Had she testified in 1988, Dr. Pezdek would have said that, "based on the applications of these factors, it appeared that Ms. Butler got a very good look at her perpetrator and saw him quite clearly." (RHRT 641). As Dr. Pezdek observed, regarding what Ms Butler told the detectives at Lerdo: "that's a description [of] someone who was observed in an awful lot of detail in a long period of time." (RHRT 657). This in turn means that Ms. Butler's description was most likely reliable to the extent to which she recalled specific details – for example, a thick, bushy mustache; thick hair; a line of moles; that the man had a large chest and "big hands;' that he had hair on his chest and his belly; grey sideboards and the word "Chevrolet" written in red letters across the back of a truck. (RHRT 706-07).

Conversely, among the descriptors included in Ms. Butler's account, her estimate of the attacker's height (at roughly 5' 8") was *not* a specific or "telling" detail. (RHRT 660). Dr. Pezdek said that she normally would not rely upon a descriptor like that because it was "such generic information" – it just suggested that the man's height was "within the normal range." (RHRT 659-60). People, she explained, are not particularly good at estimating height (RHRT 659) – especially if they have not stood next to the person whose height they are guessing. (RHRT 650). Asked, hypothetically, about the weight to give such information if the witness had told police that she never stood next to her attacker "not once," Dr. Pezdek

replied that:

> . . . the 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.

(RHRT 660-61).

Ms. Butler's estimate of her attacker's weight (as "160" or "175") was similarly generic and even more demonstrably unreliable, given that, at the same time, she estimated Det. Lage's weight (which he said was "190") as being "165" or "170." (4 RH Exhs. 892).

b. Reliability of Her Identification of Petitioner

In contrast to her (generally very dependable) description of her assailant, Ms. Butler's identification of Petitioner as that assailant was anything but reliable. Indeed, given that the man she picked out – the Petitioner – did not have any of the specific characteristics described by Ms. Butler, "there is such a significant mismatch here that it would raise questions about whether this could possibly be the same person." (RHRT 655-56). But what was most significant about Dr. Pezdek's testimony was her explanation of how, given that "mismatch," Ms. Butler was led to identify Petitioner as her assailant.

As Dr. Pezdek explained, there are well-accepted guidelines, dating back to before the mid-1980's – for ensuring (or at least bolstering) the reliability of a photographic lineup identification. (RHRT 650). One basic principle governing eyewitness identifications is set forth in the standard jury instruction (CALJIC 4.92): the accuracy of the identification correlates to "the extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness." (RHRT 648-49; 2 RH Exhs. 463). Thus, when (as in this case) the witness can give a detailed description of the malefactor, it is critically important that the description be obtained *before* the identification is attempted, and the lineup be composed of individuals who fit as closely as possible the exact description given. (RHRT 648-49; 668-69; 689-90).

In this case, the lineup was prepared before any description was evoked – and in fact was composed to show witnesses to a different and completely separate crime. Although Ms. Butler described her attacker as having a thick, bushy mustache, none of the men pictured in the lineup she was shown had a mustache. As Dr. Pezdek explained:

> [T]he fact that none of these people have a bushy mustache would render her ability to then identify them from this of dubious value. We all look a little bit different with our hair down or in a ponytail, with a baseball cap on or not, with maybe sunglasses on or not. So when we see a face, we encode the face holistically, not as just a bunch of different features . . . . If you alter any of those features of a face, the holistic impression changes. . . . So if an eyewitness looks at an attacker and remembers that he had a bushy mustache that was the salient characteristic of the face. It is not just that she remembers that mustache but seeing the face with a mustache affects the encoding of the whole face. So she now looks at the person . . . or bunch of people, none of whom have mustaches, the probability of making a correct identification from a bunch of faces is going to be seriously impaired by the absence of a critical feature on all of the faces.

(RHRT 685-86). Nor was any effort made to ensure that the men in the photographs shared any of the other salient characteristics described by Ms. Butler – body markings, abdominal hair, big hands, a large chest, *etc.* Moreover, the pictures themselves were unusually small, and in black-and-white – which would also hamper the likelihood of an accurate identification being made. (RHRT 672, 722). Dr. Pezdek would have testified that by accepted standards, the photo spread used in this case was "far less than [an] ideal lineup and one that's specifically unfair and biased." (RHRT 722-23).

It remains that, out of the six men pictured in the lineup, Ms. Butler did pick Petitioner as the one who attacked her. An understanding of how that came about begins with the fact that, as Dr. Pezdek put it, the lineup itself was "really just a multiple choice test" (RHRT

650; 668-69) – in other words, it carried the expectation that Ms. Butler would chose one of the images. Why she chose that particular image can best be explained by "confabulation" – the well-documented process by which people's memories can be affected and even determined by information received after the fact.[121] (RHRT 619-21). Thus, if Ms. Butler had encountered Petitioner – however innocently – before picking out his picture from the lineup, it would be an entirely normal process of memory for her to look at his picture, realize that she "knew him," confabulate his appearance into the mental image of the person who attacked her, and thus select him as the culprit. (RHRT 663-66). The witness may be quite sincere – and even extremely confident – about the resulting "identification."

As Dr. Pezdek testified on cross-examination, what is called into question is not the *credibility* of the witness making the identification, but rather the *reliability* of that identification. (RHRT 764). And there is no meaningful relationship between the witness's degree of confidence in the resulting identification and its accuracy. (RHRT 709-10, 767; see also, *People v. McDonald* (1984) 37 Cal.3d 351, 369 ["[T]he majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative – *i.e.*, the more certain the witness, the more likely he is mistaken."]).

It is undisputed that Ms. Butler had indeed encountered Petitioner before she identified him in the Lerdo interview – and indeed, before she allegedly "recognized" him in the booking area of the jail in the Fall of 1987. Her first recorded arrest in Kern County

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[121] Dr. Pezdek also pointed out another significant breach of accepted protocol that could have directly contributed to the process of confabulation: The police failed to use a "double-blind" procedure in which the officer showing the witness the photographic lineup does not himself know which one is the suspect. This is important, she explained, "so that we know exactly that the officer did nothing to direct the eyewitness' attention to any particular person" and – perhaps unintentionally – affect the witness's response. (RHRT 702-03). The criticism carries special heft in this case, given that the actual identification procedure took place "off-tape," and thus there is no record of what was actually said and done that can be examined for such influences.

(for being under the influence), in April, 1985, had resulted in a citation and summons – given to her by Deputy Sheriff David Rogers. (RHRT 278-79, 1045-47; 1 RH Exhs. 59). As Dr. Pezdek testified, that interaction in itself could explain why Ms. Butler identified Petitioner as her attacker when presented his picture in a photo lineup. (RHRT 665-66). And, for the same reasons, it explains Ms. Butler's "recognition" of him when she saw him again in the jail.

But an even more compelling explanation for Ms. Butler's choosing Petitioner's picture out of the "six-pack" would be if – as she later admitted, and as trial counsel easily could have established to be probable – she had seen his image in the news media. (RHRT 666). That does not mean Ms. Butler was being dishonest when she made the identification – rather, she was just "confusing who's familiar from media exposure and who's familiar from the crime itself." (*Ibid*). As Dr. Pezdek would have explained to the jury:

> [I]f we are identifying someone because we saw him in a media, on TV, not at the scene of the crime, those are unconscious kinds of processes that people aren't aware of. . . . [O]nce memory has been suggestibly influenced, for example, by media exposure, you can't unring that bell. You can't take that information out of her memory. If her memory from the attacker has been influenced by media exposure of the defendant's face, forevermore information from media exposure has been morphed into her memory for the attacker – that's who she thinks she saw. Those are just natural memory processes that happen that we are not even aware of that forevermore taint the identification accuracy of the eyewitness.

(RHRT 666-67).

The conclusion – that Ms. Butler's identification of Petitioner was the unreliable result of confabulation – was bolstered, according to Dr. Pezdek, by Ms. Butler's statements to the detectives when she examined a photograph of Petitioner and observed that it "seemed like he had more hair . . . it seemed thicker . . . it seemed like there was more through here and

right through here." (RHRT 793-94). As Dr. Pezdek put it, it "appears that she has a memory that maps onto her description and she's comparing that description to the photograph. . . . [I]t sounds like this is her saying that there is a misfit, that her description just doesn't map onto the person she is identifying in the photograph . . . ." (RHRT 793-95).

If Ms. Butler's identification of Petitioner at Lerdo was unreliable, her in-court identification of him was that much more so. (RHRT 704-05). Dr. Pezdek testified that "[a]n in-court identification is never a reliable source for an identification," and explained why: The absence of any "foils" (*i.e.*, alternatives persons to choose from) and the "suggestion ... that if this person is in court, they must have a volume of evidence against [him]. There is a presumption on the part of an eyewitness that this must be the guy, which then puts a heavier valance on the probability that that witness will just say yes, that's the person . . . ." (*Ibid*). Another factor that vitiated the reliability of all of Ms. Butler's identifications of Petitioner was time – that a year transpired before the first documented identification (at Lerdo) and two years before she identified him in court. As Dr. Pezdek explained, one of the oldest findings in psychology is called "Ebbinghaus's forgetting curve" – information continues to fade from memory, and "the longer you wait to test memory, the less of a memory is going to be there." (RHRT 646-47). "Most research studies stop testing people after six months just because memory is so lousy at that point regardless of how well they saw the person to begin with." (RHRT 762). Thus by the time Ms. Butler allegedly saw Petitioner at the booking desk, some six months after the assault, her memory – and attendant ability to recognize him – had declined substantially, and that decline became more dramatic by the time of her first documented identification of him, 13 months after the incident, and far more so by the time she testified, two years after the attack. (RHRT 744-47; 762).

The State's cross-examination of Dr. Pezdek was quite helpful, for it was grounded on several of the same popular misconceptions about memory that were current at the time of Petitioner's trial – and that had been decisively refuted, even by then. One such misconception was already discussed: the failed notion that an eyewitness's confidence is proof that an identification is reliable. (See, RHRT 767; *People v. McDonald*, 37 Cal.3d at

369). Another proposition, pursued aggressively by counsel for the State, was that Ms. Butler's identification of Petitioner should be considered more reliable because the horrible circumstances of their supposed encounter – the rape and torture she suffered in that field – would have made her memory indelible. (RHRT 781-87). As Dr. Pezdek explained, however, the effect of all that trauma was simply to raise Ms. Butler's level of stress – and it is well-established that under high levels of stress, memory only becomes *less* reliable. (*Ibid*; see also, *People v. McDonald*, 37 Cal.3d at 362-64 [noting the common misconception in that regard and observing that both scientific research and judicial opinion had established that the risk of misidentification is only "'increased when the observation was made at a time of stress or excitement.'" (Citation omitted)]).

* * *

> **Pertinent Findings:** *In this case there is great difference between the descriptors given by Ms. Butler and those of the petitioner. Dr. Kathy Pezdek, who testified at the reference hearing, would have explained these differences and demonstrated to the jury the difference and how Ms. Butler's descriptions of the assailant were reliable, but in contrast, her identification of the petitioner was unreliable.* (R&F at 22).

* * *

2. Deputy Jeannine Lockhart[122]

a. Trial Testimony

Then a Kern County Deputy Sheriff, Ms. Lockhart was a witness for the prosecution during the penalty phase of Petitioner's trial. (RT 5805-5810). She testified that, in the Fall of 1986, she worked in the main jail, overseeing the women prisoners. (RT 5805). In late October or early November of that year she had a conversation with Tambri Butler (also

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[122] Between the time of her testimony at Petitioner's trial and her testimony at the reference hearing, Ms. Lockhart married and took the name Jeannine Ibarra. As with Ms. Butler, we will attempt to avoid confusion by referring to the witness by the name she was using at the time of trial.

known as Kay Davis) regarding Ms. Butler's work as a prostitute. (RT 5805-06; 5807).

During that conversation, Ms. Butler told Deputy Lockhart that she had been raped by someone who worked in the jail. In response, Deputy Lockhart had shown Ms. Butler a copy of "Behind the Badge" – a book with pictures of all of the deputies – and asked her if she could point out the one who did it. Ms. Butler did *not* mention the name "Birch" (RT 5807), and for her part, Deputy Lockhart definitely did not suggest any names to her – not "Loski" or "Lanski" or anything else. Asked about this at trial, Deputy Lockhart responded: "No, I wouldn't do that. . . . I just wouldn't want to put any names [in] her head. If she saw him in the book, that would be fine, then she could point him out to me." (RT 5809).

Ms. Butler looked at the book for about an hour and then told Deputy Lockhart that she did not see him in the book. Ms. Butler also said that she "didn't want anything done about it" because she was afraid, because the deputy who raped her was working in the jail at that time. (RT 5806). Deputy Lockhart could not recall whether Petitioner was working in the jail during that time period.[123] (RT 5808).

Deputy Lockhart reported the conversation to her supervisor, including the fact that Ms. Butler was unable to point out who attacked her; the supervisor told her not to do anything more. After Petitioner was arrested, she relayed the conversation she had to Tam Hodgson, with whom she was taking a class. (RT 5810).

b. Reference Hearing Testimony

At the reference hearing, Ms. Lockhart confirmed her trial testimony, including that neither she nor Ms. Butler had mentioned any possible names; that – after examining "Behind the Badge" – Ms. Butler had said that she had not seen her attacker in any of the pictures; and that Ms. Butler never suggested that the attacker resembled anyone in particular in the book. (RHRT 918-21). The supervisor she talked to about what Ms. Butler told her

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[123]As will be discussed, it was established at the reference hearing that Petitioner was not assigned to the jail during that period, and in fact had made great efforts to be transferred out of the jail and back to patrol duty.

was Senior Deputy Norm Simon. (RHRT 941).

Ms. Lockhart also addressed the more recent assertions by Ms. Butler regarding the content of their conversation. Ms. Butler never said, nor did she ever imply, that there was "a deputy who liked to take women into interrogation rooms without anybody else knowing about it," nor that "there was a deputy that messed with women in the jail." (RHRT 2376-77). If Ms. Butler had said or implied anything of the sort, (then) Deputy Lockhart would have reported it to the supervisor. (RHRT 2377).

The former Deputy was also asked about the physical circumstances of the women's wing of the jail. That wing was part of "C" Deck, on the third floor of the jail. (RHRT 910-11). Only women deputies worked there; men would be summoned to the women's cells only in cases of emergency. (RHRT 915-16). Sergeants and senior deputies – men – would come to perform checks twice per shift, but would not walk down the tier where the cells were. (RHRT 915-16). Petitioner was neither a sergeant nor a senior deputy. (RHRT 938). He would not have had a key to gain entrance to the wing and would have to have been let in and probably escorted to the cell of any woman prisoner. (RHRT 937-38).

There were bars in front of the women's wing, and a desk regularly staffed by two women deputies. (RHRT 912). There were two television sets, visible from the cells, that were normally on during waking hours, except during "counts." (RHRT 913, 917). The interrogation rooms – she recalled two of them – were around the corner from the desk. (RHRT 914). They had windows, which were never covered.[124] (RHRT 917). "C" Deck was an active place, and there was a lot of foot traffic back and forth in from of the interrogation rooms, though somewhat less so on weekends. (RHRT 2382-83).

The guards would conduct deck checks every hour; if an inmate was out of her cell, they would search until they found her. (RHRT 2377-39). Women inmates, working as

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[124]Similarly, photographs of the interview room one floor below ("B" Deck) show a large window in the door, and table bolted to the wall. (RHRT 2084; 5 RH Exhs. 1271-72).

"trustees" could be out of their cells for an extended period of time.[125] (RHRT 2379). However, inmates were never allowed to travel between floors of the jail without being escorted by a deputy. (RHRT 916). There was never any visiting allowed between male and female inmates. (RHRT 914).

Ms. Lockhart was acquainted with Petitioner, who had helped train her in booking on "A" Deck. (RHRT 937). She said she was "not completely surprised" when he got arrested, because: ". . . my opinion was that he was wound tight, it was the only description I can actually give. He was like wound tight and he hardly ever smiled."[126] (RHRT 944).

3. Deputy Norman Simon

In the mid-1980's Mr. Simon was a Senior Deputy working at the Kern County Jail. (RHRT 2065). In that capacity, he supervised both Jeannine Lockhart and Petitioner David Rogers. (RHRT 2067, 2077). He testified at the reference hearing as a witness for the State.

Mr. Simon expanded somewhat on the description of the "C" Deck women's wing given by Ms. Lockhart. He explained that not only was there a barred door separating where the cells were from the rest of the wing, there was also a solid, locked door separating the women's wing from the rest of the "C" Deck. (RHRT 2068-70). The deck was normally accessed by elevator, but there were also two sets of stairs that were only used when the elevator was broken. (RHRT 2067, 2072, 2076). The staircases were blocked off by solid doors, and were kept locked with mechanical keys. (RHRT 2072). The keys were kept in either the jail office or the sergeant's office on "A" Deck. (RHRT 2073).

Mr. Simon confirmed that women inmates, other than trustees, were not permitted to walk around the jail unescorted. (RHRT 2082). If they had completed an interview, they would be escorted at least to the "top of the wing" where the metal doors were, and then

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[125] By her own account, Ms. Butler was a trustee for some, but not all of the time she was housed on "C" Deck; she testified that either one or two of the molestations took place while she was *not* a trustee.

[126]This testimony undermined Ms. Butler's assertion that she was able to recognize Petitioner at the booking desk by what she described as his customary demeanor – "laughing, cutting up with some other officers." (See RHRT 470, 1140-41).

watched by the guards at the desk as they went back to their cell. (*Ibid*). Inmates did not walk up or down the stairs without being escorted by a guard. (RHRT 2082-83).

Mr. Simon also confirmed that there was "a lot of activity happening" in the hallways of the jail – meals, medications being distributed, attorney visits, deck checks, *etc.* – "there was always something going on." (RHRT 2085-86). One thing that did *not* happen, however, was visiting between male and female inmates; "that was not allowed." (RHRT 2086-87). If anyone had reported to Mr. Simon that an inmate said – or even suggested – she had been assaulted in an interview room, he would have started an investigation. (RHRT 2087). He did not recall any such complaint while he was working in the jail. (*Ibid*).

* * *

Pertinent Findings: *Ms. Butler's testimony regarding the alleged jailhouse molestations was "thoroughly impeached by Ms. Lockhart's . . . and Mr. Simon's testimony."* (R&F at 7)

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4. District Attorney's Investigator Tam Hodgson

Investigator Hodgson, who had sat through virtually all of Ms. Butler's testimony, did his best to bolster the veracity of her account of their interactions – except when doing so would suggest wrongdoing on his part. He nonetheless was forced to contradict a good deal of what she said.

Thus Ms. Butler was wrong when she said that the Lerdo interview was conducted by six men (three in suits and three in uniform) – in fact there was just Mr. Hodgson and Dets. Soliz and Lage in the room with her. (RHRT 2142). Mr. Hodgson helpfully suggested, however, that Ms. Butler may have been including the uniformed officers working on the other side of the interview room window, whom (he said) were curious about what was going on inside. (RHRT 2143). More substantively, he strongly denied Ms. Butler's many statements to the effect that she had told her interviewers at Lerdo about having seen Petitioner on the news the night before she picked out his photograph. (RHRT 2347-48).

Mr. Hodgson initially testified that virtually nothing transpired in the interview room at Lerdo before the tape was turned on: Detective Soliz asked Ms. Butler if it was true that she had been raped and thought it was a deputy, and when she said "yes," he gave her standard admonitions and showed her the photo lineup. (RHRT 2342-43). On cross-examination, however, he conceded that there were references on the tape to other substantive conversation that had occurred before it was turned on – descriptors of her attacker and references to the "stalking" that took place after the attack. (RHRT 2344-45). He could not recall the full extent of that pre-tape conversation, but said that it was mainly just to determine whether to show her the line-up – which also happened before the tape was turned on. (*Ibid*).

Regarding the photographic lineup, Investigator Hodgson confirmed the testimony of Detective Lage (who put it together) that the choice of photos was not in any way based on Ms. Butler's description of her attacker. Rather, it had been put together to show a different witness for a different purpose – *i.e.*, to see if Connie Zambrano (another Union Avenue prostitute) could identify the person whose truck Tracie Clark got into a year after the attack on Ms. Butler. (RHRT 2341). As noted, Mr. Hodgson also acknowledged that the searches of Petitioner's house, vehicles and lockers had yielded a wealth of evidence incriminating Petitioner in the killing of Tracie Clark (including the fatal weapon) as well as a great quantity of other embarrassing material, including pornography and a cache of women's undergarments – but there was no trace of a stun gun.[127] (RHRT 2389). Similarly, the investigator admitted that the only vehicles associated with Petitioner were the green Datsun truck, the Jeep, and the white Ford pickup with camper attached – and that he had personally determined that Petitioner did not purchase the Ford truck until nearly a year after Ms. Butler was attacked. (RHRT 2390-91).

As for the subsequent meeting that Ms. Butler described – in which men from the

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[127] This echoed the testimony of Detective Soliz, that the searches had turned up no indication of either a stun gun or a false mustache. (RHRT 1780-81).

District Attorney's office prepared her to testify and either did or did not say something about Tracie Clark having been mutilated, *etc.* – Mr. Hodgson's testimony was that it never happened at all. Indeed, he claimed, there was no contact between law enforcement and Ms. Butler regarding the case, from the day she was interviewed at Lerdo, in February, 1997, to the day she testified against Petitioner in March, 1998. (RHRT 2161-62; 2396-98; 2400). If there had been, he would have been aware of it. (RHRT 2400). The only pre-trial interview that did occur was conducted by the prosecutor, Sara Ryals, on the same day Ms. Butler took the stand; although Mr. Hodgson was present, it was Ms. Ryals who asked all the questions. (RHRT 2162-63).

According to Investigator Hodgson, Ms. Butler was similarly mistaken regarding the conversation in which he advised her to get out of town. He never went out to Union Avenue, he testified; in fact, the last time he saw her in that decade was in court, on the day that she was released. (RHRT 2403, 2411, 2416). Nor did he tell Ms. Butler that, if she did not leave town she would "wind up in ditch" – nor did he ever promise that her "file would fall behind a cabinet." (RHRT 2411-12; 2415-16). Rather, he testified, he merely warned her that it was dangerous for her to remain in Bakersfield and told her to call him when she was released so he could get her a bus ticket to go back to her family in Texas or Louisiana. (RHRT 2172; 2411, 2415). Even as he was denying the particulars of Ms. Butler's version of events, Mr. Hodgson stoutly defended it: "My testimony is everything she said is accurate, she has got the wrong time and context is all." (RHRT 2415).

Investigator Hodgson also had to explain his apparently unlawful – and perhaps criminal – actions in advising a convicted felon to flee the state while on probation. He asserted on direct examination that he had arranged for Ms. Butler's felony probation to be terminated when she appeared in court on May 2, 1988. (RHRT 2171-72). Thus there would have been nothing improper about him urging Ms. Butler to leave – if (as he testified) he did so when she was no longer on probation and before she was arrested and bailed on a new offense. On cross-examination, however, Mr. Hodgson was confronted with the actual

minutes of Ms. Butler's May 2, 1988 court appearance, which state that, while her sentence was modified, the "conditions of probation remain the same." (RHRT 2404-05; *see*, 5 RH Exhs. 1329). Mr. Hodgson first responded that, in fact, he had "made no arrangements" for Ms. Butler's probation to be changed; then that his "intent was to put her on a bus to go to Texas before this hearing happened;" then he asserted that the court clerk had made a mistake and incorrectly failed to note the termination of probation; and finally he said that he knew nothing of it and did not recall being in the courtroom when the modification hearing occurred – though he was definitely in the courthouse that day and spoke with Ms. Butler there.[128] (RHRT 2406; 2433).

Investigator Hodgson engaged in similar acrobatics in attempting to explain away inconsistencies in Ms. Butler's various statements over the years. Mr. Hodgson was asked about the ways in which Ms. Butler's testimony had shifted to become more inculpatory of Petitioner than her Lerdo statement had been – testifying for instance, that her attacker said he had "two boys" (Petitioner had two sons) rather than "a boy and a girl;" that he drove a Ford (like Petitioner's) rather than the Chevrolet she described at Lerdo; that her attacker was married to the woman who worked at Bruce's truck stop. (RHRT 2435-37). Mr. Hodgson assured the Court that law enforcement had not fed her that information – and testified that it was not in the media, either. (RHRT 2388, 2435-37). Elsewhere in his testimony, however, he stated that he did not know what was in the media – he was too busy working on the case to watch it on the news. (RHRT 2337).

The investigator was also asked about the phone interview with Ms. Butler in October, 2011, which – he acknowledged – was the very first time she had mentioned anything about the molestations that allegedly took place while she was in jail. (RHRT 2423-24). He traced what she told him about those alleged incidents, which varied substantially from what she

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[128]As will be discussed, Mr. Hodgson had a strong motivation to contradict Ms. Butler about the timing of their "get out of town" conversation. If – as Ms. Butler maintains – it happened in October, 1988, that would have been shortly after the investigator received a letter from Petitioner suggesting that Michael Boyd Ratzlaff was the true perpetrator.

said about them on the witness stand just a few weeks later. (RHRT 2424-27). Ms. Butler had told him that the room in which she was molested had "no windows, nothing" – but, as he conceded on cross-examination, there were no interview rooms in the jail without windows. (RHRT 2443). Nor were there any interview rooms on "C" Deck that fit the description she gave in her testimony at the reference hearing. (RHRT 2838-39). However, he thought the interview rooms downstairs on "B" Deck (one of which was apparently pictured in the photograph shown to Norman Simon) were "identical to the description she gave with the exception of the doors have been changed." (RHRT 2437). His recollection on the witness stand was that the doors, which (as pictured) have very large windows in them, at some time previously had "little port type windows," about 8 inches by 8 inches. (RHRT 2438). They were located approximately 30 feet from the staircases on "B" Deck. (*Ibid*). To his knowledge, even the smaller windows were never covered over.[129] (*Ibid*).

5. The Benefits Conferred on Ms. Butler

Much of Mr. Hodgson's testimony was devoted to explaining why his post-trial contact with Ms. Butler was not what it appeared to be – the prosecution rewarding a key witness by getting her out of jail early and (unlawfully) hustling her out of the state when she was both on felony probation and facing a serious prison term – but rather something much more benign, even chivalrous. The sole motivation, according to Mr. Hodgson and the prosecutor, Ms. Ryals (who had personally secured Ms. Butler's early release from jail (RHRT 1963)), was to protect Ms. Butler from other law enforcement officers who were so loyal to Petitioner that they might harm or kill her in retribution for her testimony against

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[129] Investigator Hodgson's description of the "B" Deck interview rooms as "identical" to Ms. Butler's description apparently did not account for the metal tables that were always affixed to the walls in those rooms (RHRT 2075, see 5 Exh. 1271-72), as opposed to the absolutely bare room she described. (RHRT 487). Nor did his effort to rationalize Ms. Butler's account contain any explanation as to how she would have managed, unescorted, to travel from a "B" Deck interview room, down a tier for male prisoners 30 feet to the stairs, enter and exit doors to the stairs that were always locked, and then gain admittance through the solid locked door to the women's wing on "C" Deck.

him.[130] (RHRT 1963-64, 2169-70). All that the State managed to accomplish in this regard was a shameful slander of dead and retired police officers, perpetuated in an attempt to cover the fact that Investigator Hodgson and the District Attorney's office actually did act improperly – and probably illegally – in helping a felon flee the jurisdiction while she was on probation and facing new charges.

6. Documentary Evidence and Testimony From Other Witnesses

As discussed, Ms. Butler repeatedly asserted that she recognized Joyce Rogers when she saw Ms. Rogers in the courtroom, sitting behind Petitioner, while she testified at the penalty phase of the trial. At her conditional examination, however, Ms. Rogers testified that she was not in the courtroom when Ms. Butler testified – and in fact *never* sat in the courtroom during the penalty phase because she was a witness, and thus was prohibited from being there. (JR RT 6-7; see RT 5905, *et seq.*). Ms. Rogers also confirmed that Petitioner had no chest hair – he was often kidded about it – and had never worn a mustache. (JR RT 50-51).

The likelihood of Petitioner having been the person whom Ms. Butler identified as

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[130]To this end the State attempted to paint Kern County Deputy Sheriffs assigned to Squad 7, with whom Petitioner rode patrol, as lawless thugs ready and willing to do extreme violence on behalf of a convicted murderer. The chief culprit was apparently the since-deceased Deputy Ulysses Williams. (RHRT 2164). But, aside from maligning dead and former officers, the State was unable to present a shred of evidence that any of them threatened, harassed or intimidated any witness – much less harmed one – or that they otherwise ever engaged in any unlawful activity whatsoever on Petitioner's behalf. As for the lengths to which the deputies would go, and the ethical compromises they were prepared to make, to assist Petitioner the only pertinent record evidence is to be found in the transcript of the penalty phase of the trial. Deputy Williams – identified as Petitioner's closest friend, and the person most likely to do something untoward on his behalf – was called as a witness in mitigation at the penalty phase. When asked specifically whether Petitioner should be given the death penalty, or have his life spared, Deputy Williams responded:

> "It's just hard to say."

(RT 5917-18).

driving a white or light-colored truck during the attack and in their several later street encounters was also addressed by the testimony of Toby Coffey. Mr. Coffey (who had testified for the prosecution at trial) sold Petitioner the Ford pickup that Petitioner drove in the fatal encounter with Tracie Clark – but he affirmed that he did not sell it to Petitioner until the end of 1986, almost a year after Ms. Butler was attacked. (RHRT 325-26). Equally important, Mr. Coffey was adamant that he had never loaned Petitioner the truck before selling it to him. (RHRT 330). Mr. Coffey – who lived right across a very small residential street from Petitioner and was acquainted with the other vehicles Petitioner kept – also testified that he had never seen Petitioner possessing or driving a white pickup truck prior to that time.[131] (RHRT 329-30).

In response to Ms. Butler's statements and testimony that the deputy who assaulted her was working in the jail while she was confined there in the Fall of 1986, a great deal of time was spent in the hearing litigating whether Petitioner was in fact working in the jail during that period. Ultimately, the Court admitted into evidence several documents, obtained from the Sheriff's Department files, that settled the matter: A "Personnel Order," signed by then-Sheriff Larry Kleier, stating that, as of May 31, 1986, "Deputy David Rogers [was] transferred from Detentions Bureau . . . to Patrol Division." (3 RH Exhs. 668); a "grievance packet," chronicling Petitioner's vigorous efforts – starting in July, 1985 – to get transferred from the jail to patrol duty, and culminating in memoranda from Lts. Williams and Howard to Deputy David Rogers, stating respectively that "You are . . . being transfered to Patrol effective 5/31/86. Contact Cmdr. Lisenbee for your assignment," and "Effective Saturday, 5-31-86, you are assigned to the Bakersfield Metropolitan patrol division. Contact Sgt. M. Moore Squad 5 for assignment." (5 RH Exhs. 1252-53); a memorandum to Sheriff's Commander Mike LaFave from Deputy Mark Nations – prepared in response to a discovery request in a lawsuit – stating that: "David Rogers personnel file shows he was transferred

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[131] While Mr. Coffey recalled meeting with someone from the District Attorney's Office (apparently Mr. Hodgson), he was certain that he was never contacted by anyone from the defense. (RHRT 331).

from the Detentions Bureau . . . to Patrol Division on May 31, 1986. After transferring to patrol Rogers worked the following shifts and squads:

"June 1, 1986 to June 20 1986, Squad 2, 1330 hours to 2330 hours.

"June 21, 1986 to January 16, 1987, Squad 7, 2200 hour to 0800 hours."

(*Id.* at 1258); and a memorandum from Commander LaFave to Kern County Counsel, reiterating that same information. (RHRT 1259).

In short, Petitioner was not working regularly in the jail, but rather was assigned to patrol duty, during the period when Ms. Butler said that the man who assaulted her was working in the jail. At first, the State attempted to dispute this fact, but finally fell back on testimony to the effect that Petitioner could have picked up overtime shifts in the jail, even after he was assigned to patrol duty. (RHRT 940). There was no corroborating evidence, however, that Petitioner actually *did* take any shifts in the jail after winning his hard-fought transfer out of that facility.

III. Evidence Pointing to Michael Ratzlaff as the Actual Perpetrator

The Referee heard the testimony of several witnesses who knew Michael Boyd Ratzlaff, with varying degrees of intimacy, during the mid-1980's: His (then) wife, Helen "Beth" Scoville Ratzlaff Morgan;[132] Jeannie Shain (a former prostitute with whom Mr. Ratzlaff was friends, until he savagely attacked her); Deborah Castaneda and Dealia Winebrenner (both former prostitutes for whom he was a repeat customer and one-time assailant); and Det. John Fidler, who arrested Mr. Ratzlaff for the attack on Lavonda Imperatrice. The Referee admitted into evidence the police reports and transcripts pertaining to Mr. Ratzlaff's arrest and conviction for the Imperatrice assault; Ms. Winebrenner's sworn declaration (as past recollection recorded); photographs of Mr. Ratzlaff and of his truck, supplied by his former wife; and photographs taken of his body after he was killed, in 2003.

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[132] Like several other of the witnesses, Ms. Morgan's name had changed over the many years that the case was pending. In an effort to minimize confusion, we will refer to her by the name she was using at the time the habeas corpus petition was filed – her maiden name, "Helen Scoville."

A. Similarities, and Dissimilarities, Between Ratzlaff And the Assailant Described By Tambri Butler

1. His Body

Ms. Butler described her attacker as having a "thick, brush" **mustache**, which curled over his upper lip. All of the witnesses acquainted with Mr. Ratzlaff described him as having such a mustache during the mid-1980's. (RHRT 859, 1261-62, 1293-94, 1316, 1641; DWRT7). His former wife testified that Mr. Ratzlaff "had a mustache pretty much all the time of his life" (RHRT 1261-62), a description borne out both by the photographs she supplied (5 Exhs 1344-46), and those taken post-mortem. (6 Exhs 1714). Ms. Butler similarly described her assailant as having "**thick hair**" on his head, which was also how his former wife described Mr. Ratzlaff, and which was again confirmed by his contemporaneous photographs. (RHRT 1259; 5 Exhs 1344-46).

A very significant descriptor to Ms. Butler was that the rapist had "**big hands.**" That was how Jeannie Shain recalled Mr. Ratzlaff as well. (RHRT 859). Criminalist James Norris, after analyzing Mr. Ratzlaff's palm prints, testified that he did indeed have very large hands – estimating conservatively, they fell within the 95th to 98th percentile for the adult male population.[133] (RHRT 826-828). And Ms. Butler's description of the man as notably "**strong**" was also one of the ways that Dealia Winebrenner described "Mike." (DWRT31).

Like Ms. Butler's attacker, Mr. Ratzlaff also had a **"big chest"** – certainly one that was bigger than his belly. (See, 5 Exhs 1345-47; 6 RH Exhs. 1716). More significant, in relationship to Ms. Butler's description of her attacker, is the fact that Mr. Ratzlaff had **hair covering his chest and abdomen** – but not so thick as to obscure the flesh underneath. (RHRT 857-58 [Jeannie Shain]; 1263 [Helen Scoville]; 5 RH Exhs. 1347; 6 RH Exhs. 1714).

Ms. Scoville (Ratzlaff's ex-wife) could not recall if he had a line of **dark moles** on his lower back (RHRT 1292) – something else that was significant to Ms. Butler. The post-

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[133] Doing the same analysis of Petitioner's hands, Mr. Norris found that they fall between the 1st and the 5th percentile – meaning, that they are exceptionally small. (RHRT 828-829).

mortem photograph of his back does not provide an entirely clear view of the area, but it is fair to say that if Mr. Ratzlaff had such blemishes in 1986, they were not obvious in the 2003 photo. (6 Exhs 1715).

As the State has emphasized, the most obvious disparity was in regard to **height** – Ms. Butler's estimates put her assailant at no more than 5' 9", at the tallest, while Mr. Ratzlaff was apparently 6' 3" tall. (RHRT 1259). It is notable, however, that none of the other witnesses who "dated" Mr. Ratzlaff – almost all of whom had more close encounters with him than Ms. Butler had with the rapist – recalled him being that tall. Thus Jeannie Shain, who knew Mr. Ratzlaff fairly well, testified that she thought he was between 5' 10" and 6' in height (RHRT 859), while both Ms. Winebrenner and Ms. Castaneda estimated that he was an even 6' tall (DWRT31-32; RHRT 1318), and the same estimate was given to Det. Fidler by Mr. Ratzlaff's victim Lavonda Imperatrice. (RHRT 1641).

2. His Family

According to what Ms. Butler told the detectives at Lerdo, her attacker said that he had **a wife and two children – a boy and a girl** (who "weren't babies") and a dog. At that time, Mr. Ratzlaff was married and had two school-age children, a son and a daughter, and owned a german shepherd. (RHRT 1258). He had described his family in similar terms to Jeannie Shain (RHRT 860) and Dealia Winebrenner (DWRT23).

3. His Clothes and Personal Effects

Mr. Butler described her attacker as wearing **short brown boots** (that were not cowboy boots), jeans, **boxer shorts** and a **blue plaid shirt**. On his wrist he wore a gold-colored metal **watch with an expansion band**, and he had a fold-over **wallet** and a **big set of keys**. In his truck he had a **large silver thermos** and a **case** of some kind on the floor (she later described it as a "briefcase" or "suitcase").

Ms. Scoville testified that Mr. Ratzlaff regularly wore brown workboots (RHRT 1265); Ms. Imperatrice described the same sort of boots (RHRT 1642) and Det. Fidler found multiple pairs of them when he searched Mr. Ratzlaff's residences. (RHRT 1658). The detective also found metal watches with expansion bands, both at Mr. Ratzlaff's home and

at the apartment he was living in after he was arrested and Ms. Scoville threw him out. (RHRT 1658, 1660). The detective similarly found a wallet like the one described by Ms. Butler (RHRT 1658), which Ms. Scoville confirmed was the sort that Mr. Ratzlaff carried. (RHRT 1264).

Mr. Scoville also confirmed that Mr. Ratzlaff carried a large key ring with a lot of keys on it. (RHRT 1265). She testified that, in his truck, Mr. Ratzlaff always had a silver thermos, approximately a foot long (RHRT 1274-5) – a fact that was independently confirmed by both Jeannie Shain (RHRT 860-61) and Detective Fidler. (RHRT 1659, 1660). Mr. Ratzlaff also always kept a briefcase or suitcase in the truck. (RHRT 862 [Shain]; 1273-74, 1295 [Scoville]).

By coincidence or otherwise, in the largest and most contemporaneous of the pictures provided by Ms. Scoville, Mr. Ratzlaff is wearing a blue plaid shirt.[134] (5 RH Exhs. 1346).

4. His Truck

Ms. Butler's attacker drove a **white, or light-colored, pickup truck** which was **not brand-new** but was "nice" and of **fairly recent vintage**. It had a **radio** and **air conditioning** and a **bench seat covered with fabric**. The most notable thing about the truck were the **weathered grey wooden sideboards** on the bed. She recalled that it said "**Chevrolet**" on the tailgate. The inside of the truck was **cluttered with trash**.

Mr. Ratzlaff drove a white pickup truck – a Ford, not a Chevrolet – with a black roof that he purchased (probably used) from a dealer around 1977. (RHRT 860, 1465-66, 1642). Ms. Scoville at first testified that it had a radio and air-conditioning, but then recalled that there was no air-conditioning. (RHRT 1269). The truck had bench seats, covered in dark fabric. (RHRT 1270).

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[134]Ms. Scoville was certain that her ex-husband never had boxer shorts like the ones Ms. Butler said her attacker wore. (RHRT 1292). Joyce Rogers similarly testified, without contradiction, that Petitioner never wore boxer shorts, either (JRRT 16) – except for the jail-issued ones he was wearing in the pictures taken of him after his arrest. (RHRT 2124-25). It is unclear whether or when Ms. Butler was shown those pictures.

Photographs of Mr. Ratzlaff's truck show gray sideboards on the bed. (5 RH Exhs. 1348). Ms. Scoville described the sideboards as "junky pieces of wood," and thought that he only put on the sideboards when he was going to chop wood (RHRT 1290). She agreed, however, that the photographs were taken at night, and Mr. Ratzlaff would not have been involved in getting wood then. (RHRT 1302). Ms. Shain independently recalled Mr. Ratzlaff's truck as sometimes having sideboards (RHRT 860-61), and Ms. Castaneda recalled more generally that there was something distinctive about the particular pickup truck that Mr. Ratzlaff drove – but she could not recall what it was. (RHRT 1318).

Several of the women who "dated" Mr. Ratzlaff specifically recalled that the inside of his truck was always messy, strewn with trash. (RHRT 860 [Shain]; DWRT24 [Winebrenner]). In fact, a "cluttered interior" was one of the first descriptors that Lavonda Imperatrice gave to Det. Fidler when she reported *her* rape at Mr. Ratzlaff's hands. (RHRT 1462; 4 RH Exhs. 1116).

5. His Weapons

Among the focal points of Ms. Butler's account were the **small pistol** that her attacker fired in front of her face, and of course the **stun gun** (or "stinger") that he pulled from his glove box to torment her.

Mr. Ratzlaff regularly carried a handgun small enough to fit in his pants pocket. (RHRT 862, 1275). In fact, he was carrying such a weapon – a .25 automatic – in that fashion when Det. Fidler confronted him at his place of work to ask him about the Imperatrice assault. (RHRT 1646; 4 RH Exhs. 1118). Lavonda Imperatrice identified it as the weapon Ratzlaff used when he assaulted her; she had described it as so small that she thought it was a b.b. gun.

And both Jeannie Shain and Deborah Castaneda had seen the stun gun that Mr. Ratzlaff kept in his glove box (RHRT 862, 1323) – which is where Det. Fidler found it when he confronted Ratzlaff. (RHRT 1645, 1646-48; 4 RH Exhs. 1118). Shown pictures of a "Nova XR 500 Freedom Stun Gun," Jeannie Shain and Det. Fidler both testified that it was similar to Michael Ratzlaff's – and Tambri Butler said that it looked like the one used to

torture her.[135] (RHRT 871-72, 1084-85, 1467; see 3 RH Exhs. 652, 4 RH Exhs. 1112). Lavonda Imperatrice identified that stun gun as the one Ratzlaff used to torture her as well. (RTR 25-26).

B. Ratzlaff's Attack On Lavonda Imperatrice

On May 21, 1988, Lavonda Imperatrice was working as a prostitute on Union Avenue when Michael Ratzlaff pulled up in his white Ford pickup truck and said he wanted a "date." (RTR 3-5). He was wearing a "plaid, checkered shirt." (RTR 8). Ms. Imperatrice offered to give Mr. Ratzlaff a "blow job" for $20.00, but said she wanted to do it in her motel room, where she would feel safe. (RTR 5-6). He offered her more money if she would go with him in his truck, and she agreed. (4 RH Exhs. 963).

They drove out to the "country, somewhere in the trees" near Highway 58 and Oswell. (RTR 6, 99). Along the way, they had "normal conversation," about whether he was married, his work, *etc.* – "[h]e acted like a normal person." (RTR 6-7). Mr. Ratzlaff had a beer in the truck, and he smelled very strongly of alcohol. (RTR 7).

Once they arrived, Ms. Imperatrice took off her clothes, and Mr. Ratzlaff took off his pants. (RTR 7-8). Ms. Imperatrice put a condom on Mr. Ratzlaff's penis, and began to fellate him. (RTR 8). He was unable to sustain an erection, however, and after about 20 minutes, Ms. Imperatrice stopped and asked him to take her back as she was planning to leave town. He offered her additional money if she would "stay a little longer," and he ended up paying her a total of $40.00. (RTR 8). She continued to fellate him, and at some point they had vaginal intercourse as well – but he was still unable to finish. (RTR 8, 75). After another 15 or 20 minutes, Ms. Imperatrice told Mr. Ratzlaff that she "needed to get back;" he asked to stay "just a little longer," but she refused. (RTR 10).

At that point Mr. Ratzlaff produced a very small handgun, which he put to her temple. (RTR 10-11). Ms. Imperatrice thought it was fake; it looked like a "b.b. gun," and so she

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[135] Misty Gatewood – another woman who worked as a prostitute on Union Avenue – told Det. Fidler that Ratzlaff bragged to her about using his stun gun on some "gal" who "burned" him so he "had to get rough with her." (RHRT 1651).

said: "This isn't real." (RTR 10). He responded by firing the gun into a cup of Pepsi that she had on the floor of the truck, and "blew it up." (RTR 10-12).

Mr. Ratzlaff then told her to put her arms out; she complied and he bound them together – "handcuffed" her – with some sort of plastic tie. (RTR 10, 15-16). He told her to lay back, and that he was going to "do something" to her. She complied, and he put his hand – first some fingers and then the entire fist – into her vagina. (RTR 17-18). When she started to cry, he threatened to shoot her in the stomach with his pistol. (RTR 18). He then inserted his fist in her rectum. (RTR 30; RCT 15).

Next, Mr. Ratzlaff told Ms. Imperatrice to get out of the truck and urinate in front of him. (RTR 20). She tried, but was unable to do so. (RTR 21). After a minute or two, he told her that he had something "that would help [her] go." (RTR 21). Mr. Ratzlaff told her to lay back down; he took a stun gun from his dashboard, and stung her with it repeatedly on the stomach. (RTR 22-24). She screamed in pain, but he told her that if she did not "shut up," he would shoot her with his gun. (RTR 24-25). She stopped screaming and he told her to spread her legs; when she did, he used the stun gun on her vagina. (RTR 26-27).

In the midst of her pain, Ms. Imperatrice managed to break the plastic "handcuffs," and attempted to kick Ratzlaff in the groin with both feet. (RTR 27-28). He responded by grabbing her hair, calling her a "bitch," dragging her out of the truck and beating her savagely in the face with his fists. (RTR 27, 29-30). She tried to fight him, but at some point, she hit her head on something very hard – perhaps cement – and she "finally gave up." (RTR 30-31). She said to him: "If you are going to kill me, get it over with and do it now." (RTR 31).

Mr. Ratzlaff replied: "'No, I ain't going to kill you. I'm just going to do a few other things, and then I'll let you go.'" (*Ibid*). He then took out a Polaroid camera and had Ms. Imperatrice pose in a few different positions. (RTR 31-32). When he was done with that, he gave her her clothes and shoes (she was still naked); he pulled out his gun and told her to "run." (RTR 33). She ran, holding her clothes. (*Ibid*). As she was running, she heard the gun fire, four times. (RCT 30). She kept running until she got to someone's house, knocked

on the door and yelled: "Help me." (RTR 33-34). She told the person who opened the door that she had been raped; he brought her inside and called the police. (RTR 34).

As a result of the blows to her face, Ms. Imperatrice lost her front teeth. RTR 39). She showed the jury her missing teeth, and marks on both of her wrists from the plastic handcuffs Ratzlaff placed on her. (RTR 40-41). Ms. Imperatrice also identified photographs taken on June 24, 1988, of stun gun burns on her stomach and leg she received from Ratzlaff on May 21, 1988. (RTR 44-46).

On March 23, 1989, Michael Boyd Ratzlaff was sentenced to six years imprisonment for sexual battery, assault with a deadly weapon causing great bodily injury, violent false imprisonment, and other crimes committed against Lavonda Imperatrice. (RCT 232).

C. Ratzlaff's Attacks on Other Women

1. Jeannie Shain

Ms. Shain was about 20 years old, living with her parents, when she met Michael Ratzlaff at a local park. (RHRT 858, 873). He bought her a beer, and they became friends – going out together to eat, drink, talk and sometimes to shoot his pistol. (RHRT 858-59).

As Ms. Shain descended into prostitution and drug addiction, eventually moving into a Union Avenue motel, Mr. Ratzlaff also became a regular customer.[136] (RHRT 862-63). He typically paid for a "half-and-half" (fellatio and vaginal intercourse); he often asked to perform anal sex, but Ms. Shain always refused. (RHRT 863). He generally treated her very well. (*Ibid*).

On March 16, 1988, Ms. Shain was beaten so badly that she was hospitalized. (RHRT 863-64). Her jaw was shattered, she had bruises and injuries over her entire body, and she was hospitalized for ten days, several of them in a coma. (RHRT 864, 878-79).

Ms. Shain's last memory of that day was of walking to the gas station across from her

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[136] At the time she testified, Ms. Shain had been "off the street" for 17 years, and had been clean and sober for four years. She was working as a caretaker for the elderly. (RHRT 858, 870, 880).

motel to buy snacks – she was planning to watch the Country Music Awards with friends – when she ran into "Mike." (RHRT 865).

Deborah Castaneda was living in the same motel – the "Topper" – and her room was right across from Ms. Shain's. (RHRT 1312-13). On the day Ms. Shain was hospitalized, Ms. Castaneda was in her own room with a couple of friends when Ms. Shain's boyfriend, Rudy Lentz, came over. (RHRT 1314). Mr. Lentz said that Ms. Shain had a date with "Mike," and asked if he could stay in Ms. Castaneda's room until they were done. (RHRT 1315).

At some point, Ms. Castaneda and her companions heard some noises – something banging around. (*Ibid*). Ms. Castaneda and Mr. Lentz looked out her window; she noticed a big white pickup truck parked near where Ms. Shain lived.[137] Ms. Castaneda saw a man leave Ms. Shain's room; she remembered him as tall, kind of thin and good-looking, with a mustache. (RHRT 1315-16). (At the time, Ms. Castaneda did not know Michael Ratzlaff). The man was moving quickly; he got in the white truck and pulled away. (RHRT 1316). Rudy Lentz went over to Ms. Shain's room and then emerged, screaming: "Mike Ratcliff! Get back here you son of a bitch!"[138] (RHRT 1316-17).

Ms. Castaneda went over to Ms. Shain's room. There was blood all over the walls, everywhere. Ms. Shain was unconscious and appeared to have been beaten badly. (RHRT 1317). Mr. Lentz was still screaming: "That son of a bitch! He's a regular, how could he do this?" (*Ibid.*).

After she emerged from the hospital, Ms. Shain never saw Mr. Ratzlaff again. (RHRT 865). Police officers came to talk to her, and showed her pictures of possible suspects.

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[137] As noted above, Ms. Shain described the truck as a white pickup, and said that it sometimes had wooden sideboards on the bed; it was in "decent shape" on the outside but always messy inside; and in it Mr. Ratzlaff always kept a foot-long thermos and a briefcase or suitcase, as well as his stun gun and a pistol. (RHRT 860-62).

[138] Several witnesses testified to knowing Mr. Ratzlaff as "Mike Ratcliff." (See, *e.g.*, RHRT 1337).

(RHRT 866). One of the pictures they showed her was of Michael Ratzlaff. (*Ibid*). They told her that they thought he was the person who beat her up – that he had attacked other women in Bakersfield and in Fresno. (RHRT 866-67). Ms. Shain did not want to believe it, because "Mike" had always been so nice to her, and she did not tell the police that she had heard that he had been her attacker. (RHRT 867). It hurt her to think that her "friend" had done this to her. (*Ibid*).

2. Deborah Castaneda

Ms. Castaneda worked as a prostitute on Union Avenue for about two years, roughly from 1987 to 1989. (RHRT 1335-36). She did so to support her addiction to heroin, which lasted from 1983 until about 1991. (*Ibid*).[139] Whenever she was on a "date" she would inject herself with heroin, right in front of her customer – it was not good for business, but she could not have sex for money without doing that immediately beforehand. (RHRT 1319-20).

Sometime after the attack on Jeannie Shain, Ms. Castaneda got to know Michael Ratzlaff – at the time, she did not associate him with the man who had hurt Ms. Shain. (RHRT 1317-18). He became a regular customer, and they "dated" around 10 times. (RHRT 1318).

On one of those dates, he attacked her. Mr. Ratzlaff had picked her up in the late afternoon and taken her out to a big field, near Highway 58 and Oswell Road. (RHRT 1319, 1340). The attack did not commence right away; at first he was drinking beer – he always drank, whenever she saw him – and he watched as she injected her heroin. (RHRT 1319-20; 1323).

They tried to have sex, but that was unsuccessful. Ms. Castaneda performed fellatio on Mr. Ratzlaff, but he was unable to sustain an erection. (RHRT 1321). Mr. Ratzlaff became very angry, saying that she was supposed to be a professional and "know how to do this." (RHRT 1321). He began calling her names and pushed her. (*Ibid*). He demanded

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[139] At the time of her testimony, Ms. Castaneda was on disability; prior to that, she had been working as a mental health and substance abuse counselor at Walden House and Corcoran State Prison. (RHRT 1313).

anal sex; she refused – saying he would have to kill her first – and she tried to get away from him. (RHRT 1321, 1333).

At that point Mr. Ratzlaff grabbed Ms. Castaneda and started choking her. She tried to fight, and was kicking the windshield, until she finally passed out. (RHRT 1321-22). He stopped; when she regained consciousness they got out of the truck. Mr. Ratzlaff walked around to the front and started pounding on the hood and "stomping around." He threatened to hang her from the big tree next to where they were parked, or shoot her with the stun gun that she knew he kept in his glove box. (RHRT 1322). Ms. Castaneda kept talking, trying to calm him down, and was finally successful. They attempted sex again, and – several hours after the "date" began – he was able to climax. (RHRT 1322-23).

Ms. Castaneda did not report the attack to the police; she had reported a prior attack by another customer, and the police had done nothing. (RHRT 1323). And she kept "dating" Mike, though she never again went far from her motel with him. (RHRT 1324). She felt confident that she could calm him down – and in any event she was an addict, and seeing his truck "meant money" to her. (*Ibid*).

The police eventually came to talk with her about Mr. Ratzlaff, apparently after the attack on Ms. Imperatrice, in May, 1988. (RHRT 1327-28). They told Ms. Castaneda that Mr. Ratzlaff was hurting girls and taking Polaroid pictures of them, and that he was dangerous, and there was some conversation about him using a stun gun. (RHRT 1326-30).

3. Dealia Winebrenner[140]

In the mid-1980's, Ms. Winebrenner was also a heroin addict and prostitute, working on Union Avenue. (DWRT5- 6, 20). One of her customers was a good-looking man, about

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[140] Although Ms. Winebrenner, already seriously ill, testified at a conditional examination in 2009, she was unable then to remember all of the pertinent details of her encounter with Mr. Ratzlaff, which are set out in her declaration in support of the habeas petition (Pet. Exh. 22), in the police report made at the time of that attack (Pet Exh. 45) and in Det. Fidler's report on the Imperatrice attack, which describes an interview the detective conducted with Ms. Winebrenner. (4 RH Exhs. 1100-1101).

6 feet tall with a mustache, who drove a pickup truck and whom she knew as "Mike."[141] (DWRT6-7). She "dated" him four or five times, she thought. (DWRT21-22). At her conditional examination, Ms. Winebrenner identified the pictures of Michael Ratzlaff as being the man she knew as "Mike." (DWRT8).

On the evening of January 28, 1986, Mr. Ratzlaff picked up Ms. Winebrenner on Union Avenue. (DWRT6). He was already drunk, and the two of them consumed more beer – "a lot." (DWRT11; Pet. Exh. 22; Pet. Exh. 45). They agreed that Ms. Winebrenner would perform fellatio and, after he paid her, she proceeded to do so. (DWRT9). Mr. Ratzlaff was unable to sustain an erection however, and grew frustrated and angry.[142] (*Ibid.*) He grabbed Ms. Winebrenner and strangled her, using his arm in a "choke hold." (DWRT9-10).

Ms. Winebrenner was extremely frightened; she urinated on herself, bled from the nose and lost consciousness. (DWRT10; 4 RH Exhs. 1100). When Mr. Ratzlaff stopped choking her and she came to, however, she reassured him that she was fine, and suggested that they get some more beer. (DWRT11). He agreed, and drove her to a 7-11 store at Brundage and Union. (DWRT12).

Once inside the store, Ms. Winebrenner appealed to a stranger, telling him that she had almost been killed by the person the in the truck outside; she asked the stranger to write down the license number and call the police. (DWRT13-14). He did so, and Sheriff's Deputy Ulysses Williams arrived and took Ms. Winebrenner's report. (Pet. Exh. 45). The deputy had the license number traced; the truck belonged to Michael Ratzlaff. (*Ibid*). When interviewed, however, Mr. Ratzlaff claimed that he had just given Ms. Winebrenner a ride

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[141] By the time of the conditional hearing, the only thing Ms. Winebrenner recalled about the truck was that it was white and the interior was messy. (DWRT12, 24).

[142] According to the contemporaneous police report, Ms. Winebrenner said that, when Mr. Ratzlaff was unable to perform after a while she grew "irritated," and told Mr. Ratzlaff that "she was wasting her time and not making any money." She demanded that Mr. Ratzlaff take her back to Union Avenue, and told him that she had friends waiting who would be "upset with him" if she did not return soon. It was at that point that Mr. Ratzlaff became violent. (Pet. Exh. 45).

to the store, and neither had sex with her nor harmed her in any way. (*Ibid*). The deputy elected to take "no further action." (*Ibid*).

During his investigation of the Imperatrice case, Det. Fidler found nude photographs of various women in Ratzlaff's truck. (4 RH Exhs. 1098). He showed the pictures to Misty Gatewood and Deborah Castaneda, who identified one of the women in the photographs as Ms. Winebrenner. (*Id.* at 1100). Det. Fidler found Ms. Winebrenner, who acknowledged that Ratzlaff had paid to take the photos of her. (*Ibid*).

In the course of their conversation, Ms. Winebrenner told the detective about Ratzlaff's assault on her, two years earlier. (*Id.* At 1101). She also told him that "Mike" had shown her his stun gun, and had:

> " . . . told her about a prostitute he had dated and he was drinking and he took too long to ejaculate. Mike told Winebrenner he got into an argument with this prostitute and pulled out a gun and took what he wanted. Winebrenner stated that Mike likes anal sex also. She said he dates several prostitutes on the Union Avenue area [*sic*] and he only becomes violent when he has been drinking."

(*Id.* at 1100).

LEGAL ARGUMENT

I. PETITIONER'S DEATH VERDICT WAS OBTAINED BY FALSE EVIDENCE AND THUS VIOLATES STATE LAW AND THE UNITED STATES CONSTITUTION

A. Ms. Butler's Testimony Was False: Pertinent Findings By The Referee

Tambri Butler averred that she had "often worried over the years that I might have testified against the wrong man." (1 Exh. 253; see RHRT 541). The record evidence, reviewed above, clearly demonstrates that she did. Tambri Butler's testimony – which the trial judge identified as the decisive element in the jury's decision (and his own) to sentence Petitioner to death – was false. Petitioner was not the beast who raped, sodomized, tortured and attempted to kill Ms. Butler on that night in 1986.

Such was the conclusion adopted, unequivocally, by the Referee delegated by this

Court to hear testimony, evaluate the evidence and find the facts. In response to the first of the reference questions posed by the Court, the Referee found that:

> *Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial.*

(R&F at 5). The Referee explained:

> *This is supported by the sworn recantations contained in her declarations. .... None of the descriptors given by Ms. Butler of her assailant fit the petitioner. The following are Ms. Butler's descriptions of the assailant: . . .*
>
> – *Thick brushy mustache*
>
> – *Big hands*
>
> – *Big hairy chest larger than stomach*
>
> – *Dark moles across his back above fanny . . . .*
>
> *Petitioner had a small chest, small hands, no moles on his back. 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.*
>
> *Her description of the white pickup truck with grey weathered sideboards and cluttered interior is important because petitioner was driving a white pickup during the Tracie Clark murder, but the petitioner did not own the above-described truck or any white pickup until nearly a year after the attack on Ms. Butler.*

(R&F at 5-6 [citations omitted]).

The Referee elaborated in answering another of the Court's questions, namely, whether there was "*newly discovered, credible evidence indicating that petitioner did not assault Tambri Butler in 1986, including evidence that another person committed the assault?*" The Referee found that there was indeed such evidence:

> *Sworn recantations and the descriptors did not fit petitioner. (See [findings set out above]). There were attacks on other women that shared the same*

circumstances:

- *Prostitutes picked up off Union Avenue*
- *Taken to the countryside*
- *Assailant obsessed with anal sex*
- *Assailant pleasant, then got drunk and became violent*
- *Striking parallel between the Butler assault and Mr. Ratzlaff's documented attacks on Lavonda .Imperatrice and Ratzlaff's assaults on other women including Jeannie Shain, Deborah Castaneda, and Delia [sic] Winebrenner depicted a similar pattern*
- *Deals made on Union Avenue; assailant insisted on going out to remote area in country; sex starts with fellatio; cannot perform; more money agreed on to continue; victims say too long want to go back to Union; assailant goes off the handle into a violent rage; fires warning shots and uses a stun gun; victims receive anus abuse, then robbed and left on country road.*
- *Assailant had bushy mustache; driving light-colored pickup with sideboards and cluttered interior.*

The Court finds this pattern supports the fact that another assailant other than the petitioner committed the assault on Ms. Butler.

Ms. Butler listed the following physical characteristics of her assailant that differed from those of the petitioner and that could be attributed to a third party:

- *Long thick mustache curling over lip*
- *Layer of hair covering (but not obscuring) chest and abdomen*
- *Extremely big hands*

- *Thick hair*
- *Big chest*
- *Big, crowded keychain*
- *White pickup with weathered sideboards*
- *Tool chest and large silver thermos*
- *Interior of cab of his truck strewn with litter*
- *Stun gun*

The Court finds the similar patterns of the above mentioned assaults, combined with the differing characteristics of the assailant and petitioner, support the fact that another assailant other than the petitioner committed the assault on Ms. Butler.

(R&F 10-11 [citations omitted]).

In addition to finding that Ms. Butler testified falsely regarding the ultimate issue – whether Petitioner was her assailant – the Referee found that she gave false testimony regarding significant subsidiary matters. She simply lied when she denied, on the stand, the fact that she had seen Petitioner on television shortly before she picked his picture out of the photo lineup. (R&F at 8 ["*The Court finds Ms. Butler saw petitioner on TV before she identified him. . . . (Her contrary testimony at trial) was false.*"]). Similarly, "*Ms. Butler talked with other inmates extensively about the case and she testified falsely when she denied talking to other inmates about the case.*" (R&F at 7).

Ms. Butler also testified at trial that she had no expectation of being released early from jail after testifying for the prosecution. (RT 5801). This too was false; as the Referee found: "*it is clear that she knew she would get out if testified . . . she was aware that she would get out.*" (R&F at 9). And, whether intentionally or otherwise, Ms. Butler misrepresented to the jury the nature of the crime for which she was incarcerated when she testified:

[T]he prosecutor at petitioner's trial asked Ms. Butler: "What are you in

custody for?" Ms. Butler replied: "For possession of heroin." That testimony was false. It is undisputed that, in fact, Ms. Butler was in jail for felony possession of narcotics for the purpose of sale, in violation of Health and Safety Code Section 11351; that is a completely different – and far more serious offense than simply possessing heroin (Health and Safety Code Section 11350). The latter crime is generally just a misdemeanor, while [a violation of] Health and Safety Code Section 11351 is a crime that makes possessing narcotics for sale a crime of moral turpitude.

(R&F at 9-10). The Referee concluded, as to these latter points: "*The Court finds she testified falsely, either inadvertently or otherwise, about an issue material to her credibility as a witness.*" (R&F 9-10).

B. State Law, and the Federal Constitution, Provide Remedies for False Testimony

The fact that Ms. Butler testified falsely, and the nature and import of that false testimony, give rise to three closely-related but distinct bases for vacating the sentence of death imposed on Petitioner. Two of those grounds – although they implicate Due Process and Eighth Amendment principles – arise under California law; they will be reviewed presently. The third, arising from the prosecutor's intentional failure to correct what she knew to be false testimony, will be discussed in the final portion of this brief, devoted to prosecutorial misconduct.

1. False Evidence – Penal Code Section 1473

First and most obviously, Petitioner is entitled to relief under Penal Code section 1473, which provides a remedy in *habeas corpus* when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration." § 1473, subd. (b); *see, Richards II*, 63 Cal.4th at 307. A petitioner seeking relief under this statute has no "'obligation to show that the testimony was perjured or that the prosecutor or his agents were aware of the impropriety.'"*In re Richards* (2012) 55 Cal.4th 948, 961-62 [*"Richards I"*]; quoting, *In re*

Hall, 30 Cal.3d at 424. Thus this Court has explicitly taught that even the most honest and sincere identification can be mistaken and constitute "false evidence."[143] *In re Hall*, 30 Cal.3d at 417-18.

The Referee's findings emphatically make clear that Ms. Butler's testimony, identifying Petitioner as her assailant, was "false evidence" as defined in section 1473(b) and *Hall*. Indeed the record establishes several persuasive reasons, including those set out by the Referee, that compel the conclusion that her trial testimony was false, "either inadvertently or otherwise:"

- **Ms. Butler's Description Did Not Fit Petitioner:** Perhaps the most compelling reason for concluding that Ms. Butler wrongly identified Petitioner is that Petitioner did not match the very specific descriptors of her assailant that she gave the police. Unlike the man who attacked Ms. Butler, Petitioner did not have a brush mustache (or any mustache), or a hairy chest, or big strong hands, or thick hair, or a particularly big chest, or dark moles across his back – and he *did* have a prominent tattoo. He did not own or drive a white truck with grayish wooden sideboards and a trash-strewn interior with various specific contents (thermos, flashlight, suitcase); and he did not own or use a "stun gun."[144]

  In its arguments before the Referee, the State relied on the fact that Petitioner jibed with a few of the more generic descriptors, including that he was of roughly the same height and weight (both essentially average for adult

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[143]As the Court in *Hall* specified: "'In this case, the trial testimony of' two key witnesses 'identifying petitioner as the killer apparently was false, *albeit unintentionally so.* As it was virtually the only damning evidence against petitioner, that testimony clearly satisfies the statute's test of materiality.'" *Ibid.* [emphasis by Court; other citations omitted].

[144]To this list should be added a point established by the record but not explicitly mentioned by the Referee. Although the attacker (while still in a jovial mood) specified that he had a young daughter and son and a dog, Petitioner did not have any of those.

men), and argued that he could have used a false mustache and disposed of the stun gun. The Referee dispatched these arguments. He agreed with Dr. Pezdek that height and weight are at best difficult to estimate, and – given that Ms. Butler admitted never standing next to the perpetrator – her estimate of his height was simply unreliable. (R&F at 6). As for the notion that Petitioner covered his tracks by disposing of a fake mustache and the stun gun, the Referee observed that "[e]xtensive 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."[145] (R&F at 7). But even giving the State the best of its argument, it remains that neither the generic similarities nor the speculative notions it relies on provide any real counterweight to the extensive and much more specific *dis*similarities between Petitioner and the description Ms. Butler gave.

- **Ms. Butler Has Repeatedly Recanted:** The fact that Ms. Butler repeatedly recanted her identification testimony – and did so with full awareness and under penalty of perjury – is very persuasive evidence that her identification of Petitioner was wrong. See, *Hall*, 30 Cal.3d at 418. Those recantations take

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[145]The Referee's finding is a shorthand description of the fact that the only actual evidence in the case strongly suggests that Petitioner did *not* dispose of or hide incriminating evidence. When he was arrested (for killing Tracie Clarke) he still had the gun that he used to shoot her – the same gun that, according to the prosecution, he had used a year before that to kill Janine Benintende, and that he had stolen, some time before *that*, from a store while he was on patrol. As a police officer himself, he surely knew that the tire tracks at the scene of the crime could be traced back to his truck – but he made no effort even to change his tires during the several days between the Clarke killing and his arrest. And the searches conducted at the time of Petitioner's arrest turned up a great many potentially incriminating, and certainly humiliating items – including a cache of women's panties, and a trove of pornography possessed at a time when doing so was far less tolerable to society. He did not attempt to dispose of any of these things, or even to hide them where they would not be found in the most routine search.

on their full significance when viewed in the light of the factors next discussed: The grave unreliability of the identification when first made; the extraordinarily suggestive circumstances under which it was made; and the inherent pro-prosecution bias of the context. That significance is underscored by the fact that, in subsequent statements made to Inspector Hodgson and even in open court, Ms. Butler reaffirmed many of the exculpatory things said in her declarations, even as she struggled to disavow their thrust.[146]

- **The Identification Was Suggested To Her Before She Made It:** Equally persuasive is the almost comically suggestive nature of her initial identification of Petitioner: The very first time she identified Petitioner as her attacker to the authorities (or to anyone, so far as can be evidenced) was less than 24 hours after she had seen him on television, publicly named as the murderer of two of her fellow Union Street prostitutes. And – contrary to accepted practice – the photo array provided to her was not even constructed to correspond to her description of her attacker; instead it was specifically put together to elicit identification of the person who committed a different crime – one to which Petitioner had admitted. Even at the time Ms. Butler chose Petitioner's photograph, she repeatedly suggested that it looked different than her memory

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[146]The State attempted to argue to the Referee that Ms. Butler's declarations should be disregarded – that Ms. Butler was hornswoggled into signing them by defense investigator Melody Ermachild and she was not paying attention and did not know what she was signing. The Referee rejected those arguments (see R&F at 6, 10), and the record makes clear why. Even in Ms. Butler's telling, Ms. Ermachild was a welcome guest in her home and did not lie to her, and Ms. Butler was intimately acquainted with the contents of the declarations. Over the course of several hours she had the declarations read to her, read them herself, reviewed and amended them – crossing out some passages and interlineating others – and then signed them with full knowledge that she was doing so under penalty of perjury. (1 RHRT 136-40; 6 RHRT 988-1000, 1160, 1172-85, 1197).

of the man who assaulted her.[147]

- **She Was Self-Interested and Thus Biased:** Ms. Butler was herself a chronic criminal offender who was in custody, both at the time she first identified Petitioner and at the time of his trial. As the Referee found – based on Ms. Butler's own admissions – she expected to be released early if she testified for the prosecution. (R&F 6; see 3 RH Exhs. 867-68 [Ms. Butler to Tam Hodgson: "I'm not stupid. I knew if I testified I'd get to go home. I knew that."]). She also anticipated both that she would be on felony probation *and* the likelihood that she would, at some point, almost certainly violate that probation. (3 RHRT 540; 1 RH Exhs. 257; 4 RH Exhs. 871-72). It is elementary that a witness in that position has good reason to want to curry favor with the prosecution and law enforcement authorities, and can fairly be expected to do so.[148] See, *e.g., Davis v. Alaska* (1974) 415 U.S. 308, 318; discussing, *Alford v. United States* (1931) 282 U.S. 687, 693.
- **Another Man, Who Committed A Virtually Identical Crime, Much More Closely Fit Her Description:** Without even mentioning Michael Ratzlaff's name, the weight of the record evidence tilts heavily in favor of the conclusion that Ms. Butler's identification testimony was wrong. That conclusion becomes overwhelming when one adds in the alternative perpetrator – Ratzlaff

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[147]This does not even include the fact that the identification procedure was not "double-blind," and the resulting likelihood that the investigators (inadvertently or otherwise) suggested which photograph was the "correct" one to pick. (See 4 HRT 703-04).

[148]It is important to note that, as a result of her testimony, Ms. Butler got what she herself claims to have been the one thing she wanted: to be free of felony probation and the prison term that was almost sure to follow when she violated that probation. The prosecution made that happen for her by encouraging her to leave the state while she was on probation and then ensuring that she would never face either a probation revocation hearing or charges for fleeing the jurisdiction.

– who not only committed an assault on another prostitute that was nearly identical to the attack on Ms. Butler, but also happened to have: the thick brush mustache; big hands; large hairy chest; thick hair; blue plaid shirt; big set of keys; son, daughter, and dog; truck with gray wooden sideboards and interior strewn with trash and containing a thermos and suitcase; and – last but far from least – the stun gun, all described by Ms. Butler in her original identification statement to the police. See, *Thomas v. Chappell* (9th Cir.) 678 F.3d 1086, 1104, *cert denied* (2013) ___ U.S. ___ 133 S.Ct. 1239 [credible evidence of alternative perpetrator created reasonable doubt as to defendant's culpability].

Each one of these elements would probably be enough, taken individually, to support the conclusion that Ms. Butler's identification testimony was wrong. But taken together, as they must be, they go far beyond demonstrating by a preponderance of the evidence that Ms. Butler "testif[ied] falsely (either inadvertently or otherwise) ... regarding the identity of the person who assaulted her ...." (See 1 RH Exhs. 40).

2. Newly Discovered Evidence

"If a petitioner fails to show that false evidence affected the outcome of petitioner's trial, a petitioner may present new evidence to challenge the conviction, but in order to prevail, "'such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" *Richards II*, 63 Cal.4th at 307, quoting, *In re Clark* (1993) 5 Cal.4th 750, 766. As shown, Petitioner's proof in this case satisfies the "false evidence" standard; but even if that were not the case, the record is replete with "newly discovered evidence" sufficient to meet that more demanding standard as well.

Ms. Butler's declarations, recanting her trial testimony are themselves "newly discovered evidence" as that term has been defined by the Court. *In re Hall*, 30 Cal.4th at 423. In fact, the instant case is much like *Hall*, except that this presents a much stronger case for relief. In *Hall*, the Lara brothers (like Ms. Butler in the instant case) were only

eyewitnesses to the pertinent crime; "[a]s such, they obviously were the key prosecution witnesses." *Id.* at 417. They both subsequently recanted their identifications of the defendant and – although neither was able to say definitively that the defendant was *not* the perpetrator or otherwise culpable for the murder – those recantations were the foundation of the Court's determination that the defendant was entitled to a new trial. *Id.* at 423.

Indeed, Ms. Butler's recantations would arguably be enough in and of themselves to warrant relief. See *Richards II*, 63 Cal.4th at 308 ["prior case law ... established that lay testimony can be false merely if the witness recants his or her prior testimony, whether or not other evidence demonstrated 'the truth or falsity of the ultimate fact to which the witness testified.'"][149] But, as in *Hall,* there is other evidence decisively supporting that conclusion.

As in *Hall,* there is evidence in this case that the eyewitness's initial identification of the defendant was the result of an "unduly suggestive" process. (*Id.* at 422). But while the Court found the evidence of undue suggestion in *Hall* was not itself adequate to require reversal, here it is overwhelming. Ms. Butler's admissions, credited by the Referee, that she saw Petitioner on television "in jail clothes" shortly before picking him out are of themselves enough to impeach the integrity of her ensuing identification. (RHRT 666-667; R&F at 8). And this does not even take into account the fact that other inmates were encouraging her to name Petitioner as her attacker (see R&F at 7), nor the many other breaches of proper identification procedures outlined in Dr. Pezdek's testimony: the fact that the photo array was composed to resemble the suspect, rather that the victim's description of the perpetrator; the fact that the presentation was not "double-blind;" the fact that it was not recorded but instead took place before the detectives turned on the tape. (RHRT 688 - 692).

Most important, as in *Hall*, there is evidence in this case that an alternative perpetrator

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[149]In the quoted passage, the Court is in turn quoting Justice Liu's discussion of *Hall* in his dissenting opinion in *Richards I*, 55 Cal.4th at 973. However, if undersigned counsel is reading *Richards II* correctly, the Court – recognizing that *Richards I* had been disapproved by the Legislature – was now adopting the analysis articulated by Justice Liu.

committed the crime. What sets this case apart, however, is the volume and sheer persuasive force of that evidence. As discussed, Michael Ratzlaff (unlike Petitioner) matched nearly every truly specific descriptor that Ms. Butler provided regarding her assailant: the thick, bushy mustache; the huge hands; the big chest lightly covered in hair; the "newish" white pickup truck with weathered gray sideboards and a litter-strewn interior; the toobox, large keyring and thermos; the family consisting of a young daughter and son, wife and dog. Equally, if not even more convincing is the fact that Ratzlaff's other crimes – in particular, his savage attack on Lavonda Imperatrice – closely resembled what Ms. Butler reported, from the initial encounter on Union Avenue to the apparent attempt to take her life as they parted; the aroma of alcohol, the failed negotiations and inability to complete the sex act; the obsession with anal sex; the torture with a small pistol and stun gun.

These similarities point inescapably to the conclusion that Michael Ratzlaff – and not petitioner David Rogers – was the man who horribly assaulted Tambri Butler in 1986, and they "undermine the entire prosecution case [to the contrary] and point unerringly to innocence or reduced culpability." *Richards II*, 63 Cal.4th at 307; *Hall*, 30 Cal.3d at 423.

C. Petitioner Must Be Afforded A New Penalty Trial Because Tambri Butler's False Testimony Was Critical To The Decision To Put Him to Death

The claims just discussed employ somewhat different tests for what need be shown to entitle a petitioner to a new trial. To obtain relief under section 1473, the petitioner must demonstrate that the "false evidence" was "material" – meaning "'there is a "reasonable probability" that, had it not been introduced, the result would have been different.'" *Richards II*, 63 Cal.4th at 312. As the Court further explained:

> Our courts have held that "'false evidence is "substantially material or probative" if it is "of such significance that it may have affected the outcome," in the sense that "*with reasonable probability* it *could* have affected the outcome ... ." In other words, false evidence passes the indicated threshold if there is a "reasonable probability" that, had it not been introduced, the result

would have been different. The requisite "reasonable probability," we believe, is such as undermines the reviewing court's confidence in the outcome.'"

Ibid. [emphasis by the Court; citations and internal signals omitted]. As noted above, a "newly discovered evidence" claim demands a somewhat more stringent showing – the new evidence "'must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" *Id.* at 307 [citations omitted].

We describe and discuss these tests together because it really does not matter which one is applied. Petitioner is entitled to relief under *any* pertinent standard, for Tambri Butler's false testimony had a decisive effect on the jury's decision to impose the death penalty and the trial court's decision not to modify that verdict.

As we've reviewed, the trial judge did not mince words when describing the significance of Ms. Butler's testimony: "[Petitioner's] actions with Tambri Butler shocked me almost more than any other case I have ever heard. [¶] The use of a cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably influenced the jury, in my view, and the court more than any other . . . ." (RT 5995). At the reference hearing, prosecutor Sara Ryals testimony supported and animated that assessment; she recalled that, as Tambri Butler spoke, the jurors were "all leaning forward, listening. Very, very focused on what Ms. Butler was saying. The little lady in the back seat was obviously distraught at some of the testimony because she was dabbing her eyes with a Kleenex." (RHRT 1957-58).

The point was also seconded by another witness for the State, Petitioner's trial counsel, Eugene Lorenz, who reiterated at the reference hearing that Ms. Butler's testimony "had an enormous effect on the judge and the jury."[150] (RHRT 1468, 1471). Mr. Lorenz

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[150] Mr. Lorenz expressed that view in his sworn declaration in 1999 (5 RH Exhs. 1414), which he reaffirmed at the hearing in 2011. (The declaration was itself admitted into evidence as "past recollection recorded." (RHRT 1609)).

helped flesh out *why* her testimony was so important: The only facts the jury had heard about the circumstances of Tracie Clark's death – aside from the bare forensics – were from Petitioner's own account, and even less was known about what happened between Petitioner and Janine Benintende. When Ms. Butler described the horrific rape and torture she suffered, allegedly at Petitioner's hands, the jury would naturally infer that the same happened to the two dead victims as well: "thinking about it, you have a jury almost putting Tammy Butler [*sic*] in the place of the actual crime victim." (RHRT 1468; see RHRT 1500).

Criminal defense expert witness David Coleman expressed the same view, somewhat more cogently:

> Butler's evidence was essentially a surrogate for the two victims. There was very little known about some of the circumstances around the two victims' deaths. There was his confession, which could be viewed as self-serving, with regard to one case. With regard to the other, there was a dearth of evidence. . . . What Tambri Butler did was to essentially serve as a surrogate for those two victims in the courtroom and describe an incident which I believe the jury quite possibly thought was exactly the kind of incident or similar to the incidents that the two victims had gone through. And it was horrifying. And . . . so it gave life to something that was absent from the case.
>
> Now, independently of that, the actions described by Ms. Butler are so shocking that in and of themselves in a case where the whole point is ... this man, should he die . . . that made a terrible contribution to the conclusion that he should die. So, it was very critical.

(RHRT 2217-18).[151]

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[151]Mr. Coleman's credentials and the balance of his testimony will be discussed in connection with Petitioner ineffective assistance of counsel claim, *post.* Suffice it for now to note that the Referee made special mention of Mr. Coleman, observing: "*The Court found Mr. Coleman to be a very credible witness.*" (R&F at 17).

There was certainly nothing else in the prosecution's (relatively brief) penalty case remotely as shocking as Ms. Butler's testimony. The other evidence in aggravation basically consisted of evidence tending to show that, while on duty as a police officer: (a) after rescuing another prostitute, Ellen Martinez, from a knife-wielding attacker, and helping in her unsuccessful search for her underwear, Petitioner instructed her to disrobe and took photographs of her (RT 5766-5768); and (b) Petitioner stole the gun used to kill Tracie Clark from a convenience store while pretending to investigate a robbery there. See *People v. Rogers* (2006) 39 Cal.4th 826, 836-41. As distasteful as these anecdotes may have seemed to the jurors, they surely did not establish Petitioner as "the worst of the worst" – a loathsome beast for whom the only appropriate fate was the death chamber. It was Tambri Butler's testimony that accomplished that.

That in turn brings up the other, incalculable damage that the testimony did to Petitioner's chances in the penalty phase: it effectively negated the defense mitigation strategy. That strategy, much of it founded on the testimony of mental health professionals, consisted of demonstrating that there was a "good David Rogers" – an (otherwise) dedicated police officer and devoted family man whose conduct with prostitutes stemmed from a deep sexual confusion and who only killed Tracie Clark because her provocations had awakened the traumas of his abusive childhood. (See RHRT 5965-66). Thus defense counsel urged the jury not to kill the "good David Rogers" along with the "bad David Rogers." (*Ibid*). But the picture painted by Tambri Butler left no room for the proposition that Petitioner was basically a good man who sometimes went badly astray due to causes largely beyond his control. It was a portrait of a disgusting creature, undeserving of either sympathy or mercy.

In short, the introduction of Tambri Butler's false testimony was sufficiently pernicious to require that Petitioner be given a new penalty phase trial under state law standards. It was **false evidence** "'of such significance that it may have affected the outcome,' in the sense that '*with reasonable probability* it *could* have affected the outcome . . . .'" *Richards II*, 63 Cal.4th at 312 [emphasis by the Court, citations omitted]. And the

newly discovered evidence demonstrating that Ms. Butler's testimony was false – and that Michael Ratzlaff, rather than Petitioner, perpetrated the attack on her – "undermin[ed] the entire prosecution [penalty] case and point[ed] unerringly to innocence or reduced culpability.'" *Id.* at 307; *Hall*, 30 Cal.3d at 423.

Thus, under any applicable standard, Petitioner is entitled to a new penalty trial.

II. TRIAL COUNSEL'S INVESTIGATION WAS INCOMPETENT AND HIS FAILURE TO RESPOND TO TAMBRI BUTLER'S TESTIMONY DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE CONSTITUTION

A. The "Crucial" Significance Of Ms. Butler's Testimony

As the Court's Referee observed, in providing context for his assessment of trial counsel's efforts: "*Tambri Butler was a crucial witness whose testimony impressed not only the Jury but also the trial judge . . . [she] was the most important witness in the entire penalty phase of the trial.*" (R&F at 23).[152] As already reviewed, that assessment was confirmed by the trial judge, the prosecutor (RHRT 1957-58), and by Petitioner's trial counsel, Eugene Lorenz. (RHRT 1468, 1471 [reiterating at the reference hearing that Ms. Butler's testimony "had an enormous effect on the judge and the jury."]). Mr. Lorenz also reaffirmed, at the hearing, that because "Ms. Butler's testimony was very damaging . . . I would have done anything to exclude her testimony or to impeach her identification of Mr. Rogers." (RHRT 1473-74; see also, RHRT 1500 [agreeing that "it was incumbent on [defense counsel] to either impeach or minimize this evidence."]).

As will be seen, however, Mr. Lorenz did nothing to exclude Ms. Butler's testimony, and close to nothing to impeach it. Although Ms. Butler was by far the most significant penalty phase witness, counsel did not even point out to the jury the few (but still potent) pieces of existing record evidence that contradicted her testimony. In fact, he never mentioned her at all in his jury argument. Put simply: Mr. Lorenz did virtually nothing to

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[152]The Referee ascribed the latter part of that statement to criminal defense expert David Coleman (*ibid.*); in context, however, it is clear that the Referee adopted Mr. Coleman's assessment.

respond to the most explosive and effective aggravation evidence presented by the prosecution.

In response to this Court's questions, the Referee concluded that Mr. Lorenz failed to conduct an adequate investigation regarding Tambri Butler. (R&F 16) The Referee foudn that – had it been conducted – such an investigation would have led to a mass of additional, credible evidence (R&F 17-18); that "*after conducting an adequate investigation ... [a] reasonably competent attorney acting as a diligent advocate would have shown the many differences between Ms. Ms. Butler's description of the assailant and the petitioner*" (R&F 19); that competent counsel would have moved, pretrial, to exclude Ms. Butler's testimony (R&F 20); that trial counsel unreasonably failed to impeach her testimony with powerful, available evidence (R&F 21-22); and that – unlike Mr. Lorenz – a "*reasonably competent attorney, acting as a diligent advocate, having made an adequate investigation and presentation of evidence, would have addressed Butler's testimony*" in his argument to the jury. (R&F 24).

As will be seen, Mr. Lorenz did none of these things. As this Court explained in another (nearly contemporaneous) capital case that was reversed because the same lawyer – Eugene Lorenz – had provided incompetent representation, trial counsel is constitutionally inadequate if the record shows that he "failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *accord*, *Wiggins v. Smith* (2003) 539 U.S. 510, 523; see, *In re Hardy* (2007) 41 Cal. 4th 977, 1020.) In this case, trial counsel's failure to submit the State's penalty phase evidence to any meaningful adversarial testing deprived Petitioner of the ineffective assistance of counsel. (*Ibid.*; see also, *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [plurality opinion]; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 377; *Strickland v. Washington* (1984) 466 U.S. 668, 685; *United States v. Cronic* (1984) 466 U.S. 648, 656-62; *People v. Ledesma* (1987) 43 Cal. 3d 171, 215.)

B. What Trial Counsel Did, And Did Not Do, In Regard To Ms. Butler's Testimony

1. Trial Counsel's Investigations

On October 13, 1987, the prosecution filed and served on Mr. Lorenz its "Notice of Intention to Introduce Evidence in Aggravation," listing four "incidents" that, in addition to the crimes of conviction, it intended to prove at the penalty phase of Petitioner's trial. (RHRT 1495; 4 RH Exhs. 1011-13). One of those incidents was alleged as "occurring on or about January 1986 [when] the defendant forced Tambri Butler to have anal sex with him, using a handgun and a 'taser.'" (*Id.* at 1012). On March 23, 1998, Ms. Butler took the stand during the penalty phase of Petitioner's trial.

The sum total of the investigation of Ms. Butler, and preparation for her testimony, that Mr. Lorenz completed in the interim (or indeed ever) appears to have consisted of the following: (a) At some point, Mr. Lorenz's daughter picked up a discovery packet from the District Attorney that included Det. Soliz's (somewhat inaccurate) report of the Lerdo interview conducted the year before (4 RH Exhs. 1027-48);[153] (b) On March 21, 1988 Mr. Lorenz served a letter on the prosecutor requesting to interview Ms. Butler and other penalty phase witnesses the following day – March 22, 1988 – which was in turn the day before the penalty phase was to begin. (RHRT 1505-06; 5 RH Exhs. 5367);[154] (c) On March 18, 1988, at Mr. Lorenz's direction, an investigator did a "criminal records check" of five potential witnesses, including Ms. Butler. (RHRT 345-49).[155] The resulting report, which was limited to a list of criminal cases actually filed against each witness, with filing dates and charges, was delivered to Mr. Lorenz in court at 10:30 a.m. on March 23, 1988 – perhaps

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[153] The discovery packet was accompanied by a "receipt for discovery," signed by Mr. Lorenz's daughter, and dated "3/21" – but without a year. (RHRT 1096-97; 4 RH Exhs. 1027). Mr. Lorenz believed that it was picked up before the preliminary examination, in 1987. (RHRT 1497).

[154] Those interviews never took place. (*Ibid.*)

[155] The Referee took judicial notice that March 18, 1988 was a Friday. (RHRT 346).

an hour before Ms. Butler began her testimony.[156] (RHRT 347-51; 353; 1504-05).

Testifying at the reference hearing, Mr. Lorenz could not recall what, if anything, he did to investigate Ms. Butler or prepare for her testimony. (RHRT 1444). He was certain that he personally never interviewed Ms. Butler. He testified, however, that his practice was not to interview witnesses himself, but to have investigators do that (RHRT 1420); that he generally relied on investigators (RHRT 1479); and that the extent to which he used investigators in this case would be documented in his accounting and trial file.[157] (RHRT 1530). It is clear from those records that no one working on behalf of the defense ever tried to interview Ms. Butler or to take any other effective action to investigate her story.

Trial counsel's records showed that, over the course of his representation of Petitioner, he used three different sets of investigators. First, he employed Southwest Investigations from the end of February through the middle of April, 1987.[158] (RHRT 338-39). Southwest was owned by investigator Mitch Rowland; most of the work on the case was done by his employee, Chuck Feer.[159] (RHRT 338-42; 1 RH Exhs. 49). During that

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[156] The parties stipulated that Ms. Butler began testifying before lunch on that day. (RHRT 1504-05).

[157] Mr. Lorenz added, however, that a woman named Shirley Kelley sometimes did "bits of work" for him for free – but other than helping locate a psychiatric witness, he could not recall "anything else she might have done on the case." (RHRT 1530-31). He also had an assistant – "kind of an office manager" – named Elias Munoz who helped manage his personal injury cases, but he did not think that Mr. Munoz helped out on Petitioner's case. (RHRT 1419-20). Other witnesses testified that Mr. Munoz in fact did a good deal of the case management that one might have expected Mr. Lorenz himself to do – such as meeting with the client and the client's family. (RHRT 359-62). However, there is nothing in the record to indicate that Mr. Munoz did any investigative work related to Ms. Butler.

[158] All of the work performed on the case by Southwest was documented in their activity logs and billing statements (and in their single report), admitted as Petitioner's Exhs 35 through 41, and set out at 4 RH Exhs. 328 - 359. (RHRT 338-47; 1 RH Exhs. 49).

[159] Mr. Rowland's stipulated testimony states that his work was primarily in "contested adoptions;" and that he had previously worked with Mr. Lorenz on personal injury cases, but never a criminal case. (1 RH Exhs. 49-50).

initial period, almost all of the work Southwest did consisted of "running errands" – picking up guilt phase discovery, school and medical records and the like. (RHRT 340-42). Mr. Feer only attempted to interview one witness, Connie Zambrano; that was in connection with the guilt phase, and she refused to speak with him.[160] (RHRT 340).

In April, 1987, Rowland and Feer recommended to Mr. Lorenz that he hire another investigator, Susan Peninger, who specialized in developing "mitigation" evidence for the penalty phase of capital trials. (RHRT 372, 377, 1420-21,1482-83). Ms. Peninger worked on the case through September, 1987. (RHRT 1370-71). Her work consisted almost entirely of interviewing the Petitioner, family members, and others and doing related investigation in an effort to put together a case in mitigation designed to make Petitioner more sympathetic to the jury in the event that the case proceeded to a penalty phase.[161] (RHRT 1395, 1420-21, 1483-84). She did not do any work whatever in regard to the "aggravation" evidence, and she was never asked to do any investigation pertaining to Tambri Butler.[162] (RHRT 1385).

The Court records indicate that Mr. Lorenz sought reimbursement for payments totaling $800.00 to another investigator, Larry Crandall, for work performed in October, 1987. (1 RH Exhs. 50; 4 Exh. 1017). Mr. Crandall could not recall having done anything on the case (1 RH Exhs. 50-51); for his part, Mr. Lorenz could only vaguely remember Mr. Crandall, and had no memory of what he did. (RHRT 1484-86). Mr. Lorenz's file discloses

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[160] At some point, Mr. Rowland interviewed Petitioner's son, Harold, but he did not talk with any other potential witnesses. (1 RH Exhs. 49-50).

[161] Ms. Peninger testified that the only thing she did on the case aside from standard "mitigation" work was to help locate a ballistics expert for use in the guilt phase of the case. (RHRT 1367-68, 1385). Mr. Lorenz did not put on any ballistics evidence, however.

[162] Nor did Ms. Peninger have the opportunity to finish the work she was brought on to do; when she stopped working on the case, in the Fall of 1987, the work on "mitigation" was, by her estimate, 40% complete. (RHRT 1377). Mr. Lorenz testified that he stopped using Ms. Peninger because she was upsetting Petitioner. (RHRT 1481). There is no indication that any other investigator completed the mitigation work.

only one piece of work performed by Mr. Crandall: A detailed "index" of the material previously obtained by Mr. Lorenz pertinent to the investigation of the case, notably including the police reports and transcripts of taped interviews.[163] (RHRT 1485-86; 4 RH Exhs. 1024-25). Among those indexed materials was the report of the Lerdo interview with Tambri Butler; however, neither the tape nor the transcript of the interview itself was noted. (4 RH Exhs. 1025).

Finally, starting in January, 1988, Mr. Lorenz again retained Southwest Investigations. (RHRT 339; 2 RH Exhs. 348). Their work on the case through the end of trial was almost entirely devoted to serving subpoenas. (RHRT 343-45; 2 RH Exhs. 348, 350-51, 353). They spent a total of one and one-half hours doing penalty phase investigation, consisting of: one hour spent on March 18, 1988 at the courthouse researching the criminal cases filed against the five potential witnesses (including Ms. Butler) discussed above, 15 minutes preparing a report regarding that research, and 15 minutes billed for delivering the report to Mr. Lorenz, in court, on March 23, 1988.[164] (2 RH Exhs. 353).

2. The Cross-Examination and Impeachment of Tambri Butler

After Ms. Butler gave a wrenching account of the assault she suffered, and identified Petitioner as the assailant, Mr. Lorenz commenced his cross-examination. (RT 579). It was immediately apparent that he was not well acquainted with her prior statements, as he asked: "Isn't it true that you contacted the police officers about Mr. Rogers shortly after his arrest?

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[163] The only other document from Mr. Crandall in Mr. Lorenz's file was a letter, dated November 20, 1987, proposing to undertake a complete investigation of Petitioner's case and estimating the cost of doing so at $6,000 to $7,000. The letter was accompanied by a biographical summary and curriculum vitae for a criminalist named Lucien Haag, whom Mr. Crandall apparently was proposing to use as a ballistics expert. (4 RH Exhs. 1017-22).

[164] The only other substantive investigative work on the case performed by Southwest in 1988 consisted of an hour contacting ballistics experts, an hour spent meeting with Mr. Lorenz regarding ballistics, and a quarter-hour spent meeting with Mr. Lorenz and a ballistics expert named Leroy Livermore. (2 RH Exhs. 348).

. . . You caused a kite or a letter to be sent to a detective officer?" There was nothing to suggest that had happened; Ms. Butler answered (truthfully) that, no, the police had contacted her. (RT 5795).

Mr. Lorenz then asked Ms. Butler if she had seen pictures of Petitioner in the news media before she talked with the police. She answered (untruthfully): "No, sir, none whatsoever." (*Ibid*). He did not follow up or attempt to impeach that denial; he just left it at that.[165] (*Ibid*). Later, he asked her to admit to having discussed the case with "other people in jail," and that "it was a matter of jail gossip" before she talked to the detectives at Lerdo. She (falsely) denied it, and he left it at that.[166] (RT 5803). Similarly, Mr. Lorenz asked Ms. Butler if she was "still an addict" when she talked with the police; she said she was "clean" – and he left it at that. (RT 5795-96).

Ms. Butler had testified on direct that she was in custody for (simple) possession of heroin (RT 5778-79), when in fact she had been convicted of the felony of possession of heroin for sale.[167] Mr. Lorenz, apparently unaware of her actual legal situation, did not

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[165] As Mr. Lorenz observed at the reference hearing, "it would have been extraordinary if she didn't see him on television" given the ubiquitous media coverage of his arrest and the charges against Petitioner and the intense interest it naturally stirred among women working locally as prostitutes. (RHRT 1477, 1509,1528). And it would have been quite simple, for instance, to establish that there were televisions mounted to the walls of the room in which Ms. Butler was being held; that those televisions were on almost continuously; that inmates tended to watch the televisions constantly; and that, during the time period in question, they showed frequent news reports concerning Petitioner's arrest and the charges against him, complete with pictures of his face. Mr. Lorenz did not attempt to prove up any of these facts at trial.

[166] While Mr. Lorenz was of the firm (and surely accurate) opinion that, after Petitioner was arrested "there was widespread publicity and discussion [about the case] amongst prostitutes that worked on Union Avenue" (RHRT 1509), he made no effort to interview any of the women in jail with Ms. Butler to test the veracity of her assertions in this regard.

[167] As will be reviewed, *post*, the difference was enormous, both because possession of a narcotic for sale (unlike simple possession) was a crime of moral turpitude, and because

impeach her with that disparity. He did question her about the fact that she had several prior criminal convictions but was not in prison – to which she responded that, no, she had been sentenced to County jail. (RT 5796, 5801). Mr. Lorenz gave the jury no reason to think that was out of the ordinary. Ms. Butler also testified on direct that she had been promised nothing in exchange for her testimony. Mr. Lorenz asked her: "isn't it true that although perhaps no formal promises have been made to you that you . . . hoped to get our of jail as soon as possible?" Ms. Butler replied (again, falsely) that no, she would get out at the end of her term and she did not "expect any help." (RT 5801). Mr. Lorenz provided the jury no further evidence in that regard, and no reason to doubt she was telling the truth.

Mr. Lorenz did bring out that Ms. Butler had identified her attacker as having a mustache and "thicker hair." (RT 5798). And he subsequently adduced Joyce Rogers' testimony that, in fact, Petitioner never had a mustache prior to his arrest. (5909-10). But although Mrs. Rogers could have been perceived as an interested witness, he did not attempt to corroborate that testimony. As for the "thicker hair," Mr. Lorenz never attempted to establish for the jury what that meant – *i.e.*, that Ms. Butler had said *while looking at a picture of Petitioner* that her attacker had "thicker hair."

Indeed, the most notable aspects of trial counsel's relatively brief cross-examination of Mr. Butler were the things he did not ask her about. At the reference hearing, Mr. Lorenz acknowledged that Ms. Butler had described her attacker as having moles across his lower back, and agreed that it would have been desirable to establish that his client – Petitioner – had none. (RHRT 1523-24). But Mr. Lorenz did not bother to question Ms. Butler about that specific descriptor that she had given the police – and certainly made no effort to show that it did not apply to Petitioner. Nor did Mr. Lorenz examine her about her statement to the police that she had seen her assailant with his shirt off, and he had no other distinctive markings on his body – even though Petitioner's quite visible tattoo could have undermined

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of the far more serious potential penal consequences, which in turn suggested a far stronger motive for Ms. Butler to be biased in favor of the prosecution.

the reliability of that account. Similarly, although Ms. Butler had told the detectives, quite emphatically, that her the attacker had "big hands," Mr. Lorenz neither adduced that evidence nor demonstrated – as would have been quite simple to do – that Petitioner in fact has very small hands.[168] (See, RHRT 828-29).

Mr. Lorenz also acknowledged – in light of Ms. Butler's statements that her attacker was working in the jail at the time of her conversation with Deputy Lockhart – that it would have been helpful to establish that Petitioner was in fact *not* working in the jail then. (RHRT 1520-21). He made no effort, however, to prove that Petitioner was on patrol duty during that period. Moreover (as Mr. Lorenz pointed out), at the time of the trial there were almost certainly records available that would have established whether Petitioner *ever* pulled a shift in the jail in the Fall of 1986 (RHRT 11521) – but he made no effort to check them.

Nor did Mr. Lorenz ask Ms. Butler anything about the many disparities between what she told the detectives at Lerdo and what she said at trial. Ms. Butler testified at trial that her attacker drove an older model Ford truck – thus matching the description of the truck that the jury associated with Petitioner's fatal encounter with Tracie Clark.[169] See, *People v. Rogers*, 39 Cal.4th at 838. At Lerdo, Ms. Butler had described the truck as being a *newer* model, and distinctly recalled the word "Chevrolet" being written on the back of the tailgate – but the jury did not know of those contradictions, because Mr. Lorenz never asked about them. In regard to the model year, this was likely due (at least in part) to a more basic failure on his part – the failure to obtain and review the actual interview. The change to an "60's"

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[168] It also would have been easy to establish that the many searches of Petitioner's home, vehicles and effects – while yielding a great deal of inculpatory material – had not turned up a stun gun or a false mustache.

[169] As will be discussed presently, it had already been established (by the prosecution, during the guilt phase of the trial) that Petitioner did not buy the truck until the end of 1986, but Mr. Lorenz apparently did not appreciate the significance of that fact and certainly did nothing to make the connection for the jury – *i.e.*, that Petitioner did not own a white pickup truck at the time Ms. Butler was raped in one. As Mr. Lorenz acknowledged, this would have been an important fact for the jury to have in mind. (RHRT 1508-09).

model year first appeared in Det. Soliz's report, which (as Mr. Lorenz admitted) appears to be all that he looked at.[170] (RHRT 1520). But the failure to note – and bring out for the jury – the contradiction regarding the make of the truck is inexplicable, given that the prosecutor had herself started to do so on direct.[171]

Perhaps his failure to review the actual Lerdo interview provides an explanation for why Mr. Lorenz did not bring out, on cross-examination, that Ms. Butler repeatedly told the detectives about differences between the assailant of her memory and the picture of Petitioner that she had just identified – *e.g.*, that her assailant had a larger chest, and "thicker hair." (4 RH Exhs. 889-90, 923). Similarly, that may be why Mr. Lorenz did not bring out the fact that the detectives did some quantity of substantive interrogation of Ms. Butler *and* conducted the photographic identification process before turning on their tape recorder. As he acknowledged at the reference hearing, that was information the jury surely should have had. (RHRT 1526).

There is no similar explanation for trial counsel's failure to challenge the reliability of the photographic identification itself. As Dr. Kathy Pezdek's testimony (reviewed above)

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[170] Mr. Lorenz testified that he had no memory of ever hearing the tape or reviewing the transcript of the Lerdo interview. (RHRT 1516). He did not know whether he had just relied on Det. Soliz's summary of the interview, but acknowledged that his cross-examination seemed to be limited to what was in that report. (RHRT 1520). When Mr. Lorenz subsequently turned over all of his files and records regarding the case to post-trial counsel there was no indication in them that he had ever obtained either the tape or the transcript. (RHRT 2448-49). In fact, every indication is to the contrary: The index prepared by Larry Crandall lists only the report, and not the tape or transcript and (as just discussed) counsel's cross-examination was not informed by the differences between them. (4 RH Exhs. 1024-25).

[171] When Ms. Butler had testified to telling the detectives that the "brand" of the assailant's truck was "a Ford," the district attorney asked: "Are you sure you didn't say Chevrolet?"; to which Ms. Butler replied that she did not remember what she said. (RT 5794). (The prosecutor quickly dropped the matter, rather than impeach her own witness.) Mr. Lorenz did not bring out that Ms. Butler had indeed said it was a "Chevrolet" – much less that she had expressed a clear memory of the red lettering that said so.

demonstrates, an eyewitness identification expert could have provided devastating testimony to the effect that, while Ms. Butler's description of her assailant was reliable, her identification of Petitioner – who did not match any of the specific descriptors given by Ms. Butler – was utterly unreliable. As Dr. Pezdek made clear, the testimony she gave at the reference hearing in 2011 was substantially the same as what she would have said, had she been called as an expert at Petitioner's trial in 1988. (RHRT 650; see generally, *People v. McDonald* (1984) 37 Cal.3d 351 [reviewing with approval the same principles set out in Dr. Pezdek's testimony]).

Mr. Lorenz acknowledged that calling such an expert "might have been a good idea in retrospect," but said that he had never used one and did not know of anyone else "using an actual expert" in Kern County during that time period. (RHRT 1454-55). However more able lawyers in Kern County definitely did use such experts – Dr. Pezdek (who testified at the reference hearing) had herself testified in Bakersfield as an expert on eyewitness identifications during the 1980's, and indeed had been testifying as such in criminal trials since the late 1970's. (HRT 627; see also, *People v. McDonald*, *supra* [recognizing the efficacy of expert testimony regarding eyewitness identifications, some four years prior to Petitioner's trial]).

But even without regard to whether he employed an expert witness, trial counsel had at his fingertips the evidence showing that Petitioner did not match Ms. Butler's description of the man who raped her, and could easily have developed evidence showing that her identification of Petitioner as her attacker was likely the result of other influences and factors that tended to discredit it.

3. Closing Argument and Jury Instructions

Although, in her closing argument, the prosecutor emphatically noted the violence that Petitioner had used against Tambri Butler (RT 5951), trial counsel never mentioned her at all in his own (exceedingly brief) closing argument. (RT 5956-66). While (as just discussed) Mr. Lorenz passed up numerous, potent opportunities to impeach Ms. Butler's

testimony that Petitioner was the beast who raped and tortured her, even the record that *had* been developed contained some persuasive evidence in that regard. Ms. Butler had consistently described her attacker as a man with a bushy mustache who drove a white pickup truck. Mr. Lorenz did go to the trouble of establishing that Petitioner never wore a mustache. (RT 5909). And, during the guilt phase of the trial, the prosecution had put on Toby Coffey, who testified that Petitioner did not take possession of his white pickup truck until the end of 1986 – almost a year after the attack on Ms. Butler.

These facts, in combination with what the jury knew about Ms. Butler's drug use and her penal status, would have been enough in themselves to support a reasonable doubt that Petitioner was the person who attacked Ms. Butler. As Mr. Lorenz acknowledged at the reference hearing, such an argument would not have conflicted with the argument that he did make (RHRT 1511) – namely, that Petitioner was mostly a good person who, due to terrible mental problems caused by childhood abuse, had committed two murders that were "not crimes of torture . . . ." (RT 5959).

The fact that Mr. Lorenz did not essay any such argument regarding Ms. Butler's identification of Petitioner was mirrored by the fact that he also did not request the standard jury instruction regarding eyewitness identification, CALJIC 2.92.[172]

C. Trial Counsel Failed to Provide Competent Representation

As this Court reiterated in the context of a capital penalty phase proceeding, "[w]ell-established legal criteria govern the assessment of an ineffective counsel claim":

> Both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant effective assistance of counsel. The right of a criminal defendant to counsel "entitles the defendant not to some bare assistance but rather to *effective* assistance." "Specifically, he is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. This means

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[172] The instruction will be discussed more fully in the context of its potential bearing on the jury's considerations.

that before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation."

In re Gay (1998) 19 Cal. 4th 771, 789-790 [emphasis by the Court, citations omitted].

As noted above, the Referee, in answer to this Court's detailed questions, found that trial counsel failed to competently represent Petitioner in every aspect of his response to Ms. Butler's testimony. This began with counsel's failure to conduct an adequate investigation; continued through his failure to challenge Ms. Butler's evidence either pretrial or when she was on the stand; included his failure to adduce affirmative evidence that would have effectively contradicted her testimony; and ended with his complete failure to make any argument whatsoever to the jury regarding Ms. Butler's fatally significant – and fatally flawed – assertion that Petitioner was the vicious animal who had attacked her. The Referee's findings in this regard are amply supported by the record evidence and the testimony provided at the reference hearing by Mr. Lorenz himself, his investigators, eyewitness identification expert Dr. Kathy Pezdek and veteran capital defender David Coleman.[173]

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[173]Mr. Coleman served for 20 years as the Public Defender for Contra Costa County. (RHRT 2209-10). During his 35 years in that office, Mr. Coleman tried scores of criminal cases, including 20 to 25 homicides, eight of which were capital trials. (RHRT 2205-06). His first death penalty case to go to trial was in 1980; his last, in 2000. (RHRT 2208). Upon appointment by the Chief Justice of this Court, Mr. Coleman served for 10 years on the Judicial Council's Criminal Justice Commission, and helped formulate California Rule of Court 4.117, which sets standards for appointed counsel in capital cases. (RHRT 2211-12). Mr. Coleman thoroughly acquainted himself with the penalty phase record and the evidence regarding Ms. Butler in existence at the time of trial, as well as trial counsel's records, the Court's opinion on direct appeal, a summary of the entire guilt phase record as well as verbatim portions of that record, and other documents pertinent to trial counsel's work in the penalty phase. (RHRT 2214-15). Despite his considerable experience and expertise, Mr. Coleman made every effort to ensure that the lens through which he examined trial counsel's representation was *not* what the best possible lawyer would do, but rather what would be done by a diligent advocate of reasonable competence. (RHRT 2219-20).

The Referee indicated that he "*found Mr. Coleman to be a very credible witness*," (R&F at 16), and repeatedly concurred with Mr. Coleman's analysis as to how a reasonably

1. Trial Counsel's Failure to Conduct an Adequate Investigation

a. What A Reasonably Competent Attorney Would Have Done

As criminal defense expert David Coleman observed: Because Ms. Butler's testimony could well have meant the difference between his client being sentenced to death or life, a competent trial attorney would have approached it in much the same way as if a (new) client had come in, charged with rape and assault. (RHRT 2225, 2293-95). That approach would, perforce, begin with a competent investigation. (RHRT 2224-25).

At least as soon as counsel received the "notice of aggravation" (in this case, in October, 1987), he should have looked for "every possible . . . source of prior statement by that witness regarding the identity of who her assailant was." (RHRT 2225). That would start with the police reports (which, by Mr. Lorenz's estimate, he had been given in discovery in March, 1987) – but would expand to the actual taped statement given by Ms. Butler, which was noted in that report, and which competent counsel would have immediately obtained and had transcribed. (*Ibid*).

In this case, the victim gave an extremely detailed description of the attack and of her attacker.[174] (RHRT 2226). As such, "it provided a rich target of opportunity to test her as to whether or not her identification was accurate and truthful. So that's where the case should have started and the investigation should have started." (*Ibid*). Counsel would have investigated and attempted to establish that his client did not have the salient characteristics so specifically described by Ms. Butler: The dark, black moles located right above the attacker's buttocks (a marking so distinct as to be "like a signature" (RHRT 2241); the prominent chest and abdominal hair; the big hands. (RHRT 2241-45). The list would also,

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competent lawyer would have handled the matter and how trial counsel fell short of that standard. (R&F at 16, 17, 19, 23).

[174] Mr. Coleman testified that: "When I read that statement, I was astonished at the extent of the detail in that statement. It was far more than I was used to seeing in my 35 years of reading police reports." ((RHRT 2226; see also, RHRT 2241, 2320).

of course, include the attacker's thick, bushy mustache – but that was perhaps the least crucial defining characteristic because, unlike the others, it was not "immutable." (RHRT 2242). This aspect of the investigation would necessarily have led to the discovery that Petitioner had a large tattoo – prominently visible in the pictures taken of him by the police, after his arrest – which Ms. Butler presumably would have included in her description if Petitioner was the man who attacked her, but which, if anything, she disavowed.[175] (RHRT 2243).[176]

Competent counsel would similarly have investigated the many details that Ms. Butler gave regarding her assailant's truck and its contents – beginning with whether Petitioner even possessed such a vehicle at the time of the attack. (RHRT 2235-36). As Mr. Coleman pointed out when queried on cross-examination, the fact that Ms. Butler described seeing the attacker with that same truck several times over the course of weeks made it implausible that Petitioner had just borrowed such a truck, and thus it became highly probative that he did not own that or any similar vehicle at the time. (RHRT 2318).[177] As for the contents described by Ms. Butler – the toolbox, the large thermos, the big key ring and of course the stun gun, as well the distinctive watch and other items worn by the attacker – Mr. Coleman pointed out that none of those things was found when Petitioner was arrested. (RHRT 2235,

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[175] The Court may recall that Ms. Butler told the detectives at Lerdo that she had seen her attacker with his shirt off, but when asked if he had any other markings on his body, she said there were none. (RHRT 1077).

[176] As Mr. Coleman put it: "There is every reason to believe that if she could describe, with the detail she did, so many of the physical characteristics of her assailant, she would have included in that description a description of a tattoo of this size and significance on a white male." (RHRT 2243).

[177] "[T]o say that he had borrowed the truck doesn't make any sense because he would have had to borrow it over and over and over and over again. . . . And so the thesis that he borrowed the truck and had it on the day of the assault against Ms. Butler is undercut by the number of times that it was alleged that the truck was seen by her on other occasions. That's why the 'borrowing' thesis, I think would not have been advanced by the prosecutor." (*Ibid*).

2294; 2324). Given the thoroughness of the searches of Petitioner, his home, his vehicles and his locker, that fact would provide strong circumstantial evidence that he was not in fact Ms. Butler's attacker. (RHRT 2235, 2294).

Given the mismatch between Ms. Butler's description and Petitioner, competent counsel would also have sought to investigate both the possibility that her identification of him was the result of other contacts between them, and the evidence that she might have had an improper motive for testifying against him.

Both of those investigations could have commenced with a measure that any competent attorney would have taken: sending an investigator to search every court file in every case Mr. Butler had in Kern County. (RHRT 2238-39). One thing that such a search would have uncovered was the "Notice to Appear," that Ms. Ermachild turned up in just such a search a decade later. That demonstrates Ms. Butler had indeed interacted with Petitioner in his capacity as a law enforcement officer, long before she was attacked (and thus even longer before she identified him). (RHRT 72-75; 1 RH Exhs. 59). According to Mr. Coleman, "[t]hat type of material is a basis for an argument about transference, of having once seen Mr. Rogers in some capacity and having an opportunity to transfer" his image onto her memory of the man who attacked her. (RHRT 2237).

Even more significant in this regard would have been evidence that Ms. Butler had seen Petitioner on television after he was arrested and charged with the murders of Tracie Clark and Janine Benintende. Knowing that Ms. Butler was in custody at the time she made the identification, a competent attorney would have sent an investigator to determine what access she had to televisions, and what was being broadcast. (RHRT 2238-39). Mr. Coleman noted that, in the 35 years he had interacted with inmates, they tended to spend most of their time watching television, and spend a lot of time talking to each other about cases like Petitioner's – a law enforcement officer arrested for killing people in their own line of work, people that some of the inmates likely knew. (*Ibid*). The investigator would have found that there were indeed televisions – two of them – in the dormitory in which Ms. Butler was held; that those televisions were on throughout the waking hours; and that

television coverage of Petitioner's case was ubiquitous.[178] (RHRT 1528-29; 2430-31).

A thorough search of Ms. Butler's court files would also have revealed the full extent of her criminal history, of her precarious position vis-a-vis the criminal justice system, the fact that she had been arrested and charged with furnishing narcotics and had pled guilty to felony possession for sale (which Mr. Coleman described as "a substantial reduction in the probability of what Ms. Butler faced"); and the (arguable) lenity with which she had been treated in regard to that offense, while she was also on (and had violated) two grants of misdemeanor probation. (RHRT 2232-33). According to Mr. Coleman: "That would have provided impeachment of Ms. Butler as to what her motivation for testifying was. And it could have led to further investigation such as talking to Ms. Butler to find out what had gone on with regard to those proceedings and what her expectations were, which I think would have been a very fruitful thing to do." (RHRT 2233-34).

That last observation points to yet another investigative step that a competent attorney would have undertaken, namely, to have at least attempted to interview Ms. Butler. (RHRT 2251-52). As Mr. Coleman explained, it was "somewhat fortuitous that she was at the jail," and thus easy to find. (RHRT 2251). His experience has been that inmates are generally cooperative and quite willing to talk with defense investigators – more so when they are in custody. Such an interview would have produced more data regarding the accuracy of the identification, her contacts with law enforcement, and her reasons for testifying, and thus could have "produced more potential fodder for cross-examination." (RHRT 2252).

b. What Petitioner's Trial Counsel Did (And What He Neglected To Do)

Mr. Lorenz did virtually nothing in the way of investigation. All he did (aside from his abortive request to interview Ms. Butler the day before trial) was to order a search of the criminal cases filed against her and to obtain a general discovery packet containing (among other, unrelated things) Det. Soliz's report summarizing what Ms. Butler told him at Lerdo.

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[178] As discussed above, Mr. Lorenz was firmly convinced of all of these facts (see, RHRT 1528-29), making his failure to develop proof and argue them all the more baffling.

As Mr. Coleman indicated, and as Mr. Lorenz's own investigator confirmed, the records search – limited to the cases actually filed, along with dates and charges – was superficial at best. (RHRT 350). As the investigator explained, the more thorough search that he would have done, if requested, would have included the sort of data that a reasonably competent attorney would have sought, including the dates on which she was arrested, the circumstances of the arrest, what the police arrested her for, how each case was initially charged, how it was disposed of (*e.g.*, by plea or by trial), the probation status of the defendant, *etc.* (RHRT 350-51; 2232-33).

But the most telling fact demonstrating the inadequacy of even the little investigation that was done was the timing: Mr. Lorenz did not even start to seek the information about Ms. Butler's criminal history until Friday, March 18, 1998 (the last court day before the penalty phase was to commence), and he did not obtain the little that he got until the same morning that she took the stand – Wednesday, March 23, 1988. (RHRT 2230-31). As Mr. Coleman put it, "no diligent reasonable attorney would prepare for trial requesting material to impeach such a crucial witness the day before that witness testifies" – much less on the day of her testimony. Thus, he concluded, "these dates and the critical nature of this information speak volumes about a lack of preparation and investigation." (*Ibid*). Moreover, "the timing is interwoven with the lack of results. So the information that he got at such a late hour, so to speak, in the development of the trial was incomplete, inaccurate, wrong, and he therefore had no available ammunition for cross-examination on important impeachment topics regarding Ms. Butler." (RHRT 2231-32).

Nor was Mr. Lorenz even marginally competent in following up on the significant piece of evidence that was literally handed to him – Det. Soliz's report of the Lerdo interview. The report made clear that there was a recording of that interrogation. (2 RH Exhs. 315) ["Taped interview with TAMBRI BUTLER"]). As Mr. Coleman observed, while any competent attorney would have obtained, transcribed and studied the tape Ms. Butler's interview at Lerdo, two things make it clear that trial counsel never acquired (much less transcribed or analyzed) that tape: The complete lack of any indication of the tape or

a transcription in trial counsel's files and (even more significant) the fact that Mr. Lorenz did not use any part of its contents, even though it was replete with specific indications that Petitioner was *not* the person who assaulted Ms. Butler.[179] While he noticed the most blatant (literally, facial) disparity – namely, the "thick, brush mustache" – it is apparent that trial counsel never investigated even such obvious, and easy to determine, points as whether his client had a "line of dark moles" on his back; or abundant chest and abdominal hair; or "big hands." As Mr. Coleman put it, the actual interview "was chock full of material that he should have used. So, any . . . defense counsel that I know of, who was aware of such rich potential for cross-examination would have employed it." (RHRT 2228-29). Trial counsel's failure even to look at or listen to that interview was utterly incompetent.

Another, closely related part of the investigation that a competent lawyer would have undertaken was to contact an eyewitness identification expert, who would have told counsel that the identification procedure in this case did not meet minimal standards (and was unfair and biased) and who would have helped counsel home in on factors – including the ones just discussed – that could have led to a false identification.

But perhaps counsel's signal act of negligence in regard to his investigation was in

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[179] The State attempted to counter this inference at the hearing by eliciting Ms. Ryals' testimony that – although she had no specific memory of it – her unfailing policy was to turn over everything she had (RHRT 2000), and Mr. Lorenz's testimony that he never had a problem with Ms. Ryals withholding discovery materials. (RHRT 1536). A fly in this ointment was an (accidentally disclosed) note from Ms. Ryals to Investigator Hodgson regarding various penalty phase matters, in which she instructed him to "write me a memo telling me you have contacted Lorenz about tapes and videos (Use today's date – say it has been done – no date given) (to cover our knees)." (RHRT 1990-91 & 5 RH Exhs. 1206). Thus, as the Referee found, Ms. Ryals' naked assertion – even with the support of Mr. Lorenz's correspondingly unspecific testimony – was not sufficient to demonstrate that she had in fact turned over the pertinent material. (R&F at 14). But even if Ms. Ryals' generalized testimony was accurate, it begs the question, for there is nothing in the record to demonstrate that Ms. Ryals herself had the Lerdo tape or transcript. Her testimony was that she paid scant attention to Ms. Butler's evidence until the day she put Ms. Butler on the stand, and everything in her examination of Mr. Butler could have come from the Soliz report. (See RHRT 1949-50).

failing to ascertain whether Petitioner had, or had access to, a truck that met Ms. Butler's extremely specific description (a fairly late model white or light-colored Chevrolet pickup, with a bench seat , and messy interior) or any of the several items that Ms. Butler described as being in the truck (the thermos, the large set of keys, the stun gun). Two things make this failure particularly perplexing. First the *prosecution* had put on evidence in the guilt phase showing that Petitioner did not acquire his off-white pickup truck until almost a year after the assault on Ms. Butler. Second, Petitioner himself attempted to tell counsel that he "didn't have the pickup then" but "got it in January." (RHRT 1545-46).

Mr. Lorenz did absolutely nothing to ascertain whether Ms. Butler had seen Petitioner on television before she identified him – even though he firmly believed that she had. He did not seek to interview her, nor did he attempt to interview people she knew, people she was in jail with, or the jailors. He did not develop any evidence regarding the fact that she was housed in a room with two televisions sets and that those sets were on almost constantly. Nor did he even attempt to show that (as he himself testified) coverage of Petitioner's arrest was on the air frequently during that time period.

Counsel's sole investigative effort was in regard to Ms. Butler's criminal history – and it was utterly inadequate. A few days before the hearing, he ordered the most superficial possible search of the court records, and he received the results of that search late on the very same morning that Ms. Butler started her testimony. As a result he knew nothing of the particulars of her arrests, of the initial charges against her, of plea negotiations, or of the final dispositions. He was thus unarmed to impeach her testimony when she said that she had received nothing, and expected nothing, from the prosecution.

Counsel's failure to do a complete, standard search of Ms. Butler's records also means that he never knew that Ms. Butler and Petitioner had interacted – as criminal and police officer – when Petitioner issued her a "Notice to Appear" in 1985, long before any of the events in question took place. (The only reason we know of that now is that Melody Ermachild did just such a standard search of Ms. Butler's court records a decade later).

The "results of that investigation" were that Petitioner's trial counsel had no

ammunition with which effectively to impeach the testimony of the single most important witness presented by the prosecution at the penalty phase. This failure perhaps would have been less dismaying if Ms. Butler's testimony had not been – to quote the trial judge – what "probably influenced the jury, in my view, and the court more than any other" (RT 5995) in making their respective decisions between life and a death sentence for Petitioner. It certainly would have been less dismaying if it were not for the fact that the impeachment material was right there for the taking, like low-hanging fruit on a tree.

c. Pertinent Findings By The Referee

The Court finds the investigation was not conducted in a manner to be expected of a reasonably competent attorney acting as a diligent advocate. The Court shares the concern that the expert Mr. Coleman had as to the timing of Mr. Lorenz's investigation: "nothing speaks louder than timing ... no diligent reasonable attorney would prepare for trial requesting material to impeach such a crucial witness the day before that witness testifies ..." The Court found Mr. Coleman to be a very credible witness.

[Counsel's failures in] not investigating 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) are all indicators of an inadequate investigation.

An adequate investigation would have produced the following credible evidence:

- *Petitioner did not match Ms. Butler's description (in police reports)*
- *Petitioner had small hands (not big)*
- *Petitioner had no access to the 1966 truck the jury associated with petitioner until almost a year after Butler was attacked (establish through Toby Coffey)*

– *Establish Butler saw petitioner on television before identifying petitioner (use televisions available in her cell area in jail), plus amount of television coverage of petitioner's arrest*

– *Ms. Butler could be impeached with a felony conviction of H&S 11351 (use Court conviction records)*

– *Show previous encounter with petitioner while on duty as a deputy sheriff regarding notice to appear.*

[The foregoing evidence would have been] highly credible.

The following investigative steps would have led to the additional evidence:

– *The attorney should have obtained every possible prior statement that Ms. Butler had made regarding the assault, including the actual tape and the transcript of the Lerdo interrogation itself and he should have listened to the tape and read the transcript. Had that been done it would have led him to the additional evidence: did not have the moles, big hands and hairy chest, and that there were no other markings on the assailant when in reality, the petitioner had a significant tattoo on his right arm.*

– *He should have located Toby Coffey and should have gone through the Department of Motor Vehicles to establish that petitioner did not own the white pickup truck until a year after the assault on Ms. Butler.*

– *He should have obtained and gone through all of the searches that were conducted by law enforcement on the case and found that none of the items described by Ms. Butler of an incriminating nature were found.*

– *He should have checked and obtained from the local news 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.*

- *He should have had obtained a complete and thorough criminal record of Ms. Butler.*
- *Finally, he should have personally, or at the very least had an investigator, interview other people who knew Ms. Butler such as Kay Davis and William Wisey, if still alive, and at the very least interviewed Ms. Butler herself.*

(R&F at 16-18 [text of reference questions omitted]).

2. Trial Counsel's Failure to Contest the Admissibility of the Butler Evidence

Closely related to counsel's nearly total failure to investigate Ms. Butler or her accusation against Petitioner was his concomitant failure to move, pretrial, to challenge the admissibility of her testimony. As such, trial counsel both forfeited the possibility of preventing the State from putting on its most potent aggravation evidence, and – perhaps more important – let slip the opportunity to test and pin down Ms. Butler's (ever-changing) account when doing so could have been invaluable to impeaching her trial testimony.

Even at the time of Petitioner's trial, California law recognized a procedure known as a "*Phillips* hearing"(after the decision in *People v. Phillips* (1985) 41 Cal.3d 29), allowing for bench hearings to determine whether proposed aggravation evidence was legally sufficient to be presented to a penalty phase jury. (See, *People v. Boyer* (2006) 38 Cal. 4th 412, 476). Criminal defense expert Coleman testified that, after conducting an adequate investigation, a reasonably competent capital defense attorney would have moved for a *Phillips* hearing to exclude Ms. Butler's evidence on the ground that a reasonable juror could not find beyond a reasonable doubt that her identification of Petitioner was "true" (*i.e.*, accurate). (RHRT 2249-50, 2297). According to Mr. Coleman, after an adequate investigation Ms. Butler's credibility would be "in tatters," and he believed that many reasonable judges would grant a *Phillips* motion in this circumstance. (RHRT 2297-98).

But there was a more fundamental basis for the conclusion that a *Phillips* hearing should have been sought – namely that, whether it succeeded or not, it would likely be very valuable to the defense. As Mr. Coleman explained: "one of the collateral benefits from

making that motion would have been for Ms. Butler to have testified at the . . . hearing. And given the number of times that she changes her statements, I think there is a reasonable probability that the testimony at the . . . hearing would be in significant ways at variance with her other statements." (RHRT 2250).

Mr. Lorenz did not seek a *Phillips* hearing. At the reference hearing, Mr. Lorenz testified that he knew of the procedure, but if he had any reason for failing to utilize it, he could not recall. (RHRT 1501). In this respect, as well, Mr. Lorenz failed to provide the representation that must be expected of reasonably competent counsel.

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> **Pertinent Finding**: *Reasonably competent counsel, after conducting an adequate investigation into the 1986 assault, would not have brought the [*Phillips*] motion [solely] on the basis he had nothing to lose; however, with that basic exception, the benefit of having Ms. Butler on the record would have warranted an attempt by reasonable counsel to bring the motion.*

(R&F at 20).

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3. Counsel's Failure to Effectively Cross-Examine Ms. Butler and Rebut Her Testimony

As a result of Mr. Lorenz's failure to investigate the wealth of available evidence, and his failure to pay attention to and utilize the evidence that he did have, he was unable to – and indeed, barely attempted to – meaningfully challenge Ms. Butler's testimony either through cross-examination or by developing evidence of his own. (RHRT 2228-29, 2231-32). Trial counsel clearly did not make any decision *not* to impeach or rebut Ms. Butler's evidence; on the contrary, he made a few attempts to do just that. It is just that those attempts were feeble and ineffectual, and the only truly material point he was able to establish – the fact that Petitioner did not have a mustache – was arguably the least probative of the weaknesses in the identification she made.[180] As defense expert David Coleman commented,

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[180]The Referee found that, in addition, Mr. Lorenz "*brought out Butler's drug problems with the use of heroin, her prostitution problems, and that she associated her*

"if you ask me about the mustache, it could have been contended by the prosecution that you can shave a mustache off. But, you don't shave off moles and you don't change the nature of the chest hair that the good Lord gave us or didn't give us." (RHRT 2242).

As Mr. Coleman's comment imports, any competent attorney would have brought to the jury's attention the many specific – and immutable – features of Ms. Butler's description of her attacker that did not match Petitioner: that **he did not have big hands**, or **"thick hair"** or **a big chest**, or **hair on his abdomen**; or **a line of moles across his back**; and that **he did have a prominent tattoo** (contrary to Ms. Butler's recollection that the perpetrator had no "other body markings"). Competent counsel would have proved up that **Petitioner did not own a white or light-colored pickup truck** until long after Ms. Butler was attacked, and even then did not own a Chevrolet with sideboards fitted on the back, but instead drove a Ford that always had a camper on it. A defense attorney doing an adequate job would have brought out that the specific items identified by Mr. Butler – the **stun gun, big silver thermos, watch with an expandable band, tool box, *etc.* – were never found** in the many searches of Petitioner's effects, although he clearly had not tried to dispose of incriminating weapons or other material that would inculpate or just embarrass him – and that **Petitioner's family did not consist of the young daughter, son, wife and dog** described by the assailant.

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assailant with the name 'Burch,' while she thought Deputy Lockhart had suggested the name 'Lenski' or Loski'" – an exchange that Deputy Lockhart said never took place. (R&F at 20-21). In addition, the Referee noted: "*He questioned whether Ms. Butler saw the petitioner in the media before she picked out his picture from the lineup.*" (*Id.* at 21).

While the balance of the Referee's findings make quite clear that this was *not* anything resembling an adequate cross-examination, the foregoing itself requires some clarification. Ms. Butler's prostitution and heroin use had been clearly established in the direct examination conducted by the prosecutor (RT 5779), and Mr. Lorenz's attempts to expand on them failed badly. (See, RT 5795-96). The business about the names could have been telling, but without more context – or explicatory argument – appeared to be no more than a "innocent misrecollection" of the sort described in the standard jury instruction. (See CALJIC 2.21 (1988)). And counsel's questions about "whether Ms. Butler saw the petitioner in the media" backfired when she stoutly denied it and he presented absolutely nothing to impeach that denial.

If counsel had been doing his job adequately, he would have established that Ms. **Butler had been issued a summons by Petitioner** long before the assault. Similarly – but more crucially – counsel would have shown, convincingly, that Ms. Butler **must have seen Petitioner on television** while she was in jail, immediately before she identified him as the perpetrator. It is certainly possible (as Mr. Coleman suggested) that Ms. Butler would have admitted the truth in this regard, if defense counsel had bothered to interview her before she took the stand. And there is a reasonable possibility that a good investigator could have located some of the women who were in jail with Ms. Butler at the time, finding them either back in jail or back on Union Avenue. Those witnesses could also have established that – contrary to her testimony – **Ms. Butler did indeed discuss the case with others in jail.**

What is certain is that there was a mass of circumstantial evidence to be had regarding how available televisions were to Ms. Butler, how much time inmates typically spent watching television, and how much television coverage there was of Petitioner's arrest. At a minimum, a reasonably competent attorney would have gathered this readily available proof and so would have been prepared to *effectively* cross-examine Ms. Butler on the subject. He would have been able to argue persuasively that it was absurd for Ms. Butler to claim she had not seen Petitioner when there were two television sets on all the time, watching television was what inmates did most, his face was shown frequently, and his case – involving the killing of Union Avenue prostitutes by a police officer – obviously excited great interest among the women inmates, particularly those who worked on Union Avenue.

Having adduced compelling evidence calling into question the reliability of Ms. Butler's testimony, a reasonably competent attorney attempting to save his client from a death sentence would have introduced the testimony of an expert on eyewitness identification, like Dr. Pezdek. See, *People v. McDonald*, 37 Cal.3d at 361-364, 367-69 [discussing value of expert testimony regarding eyewitness evidence].[181]

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[181]Given that this Court, in *McDonald*, had already described in some detail the contributions that an eyewitness identification expert could make in a case like this, there is no tenable explanation for counsel's failure even to consult such an expert. See, *Hinton*

Perhaps the most important contribution an expert could make would be to clarify the crucial distinction between Ms. Butler's detailed description of her assailant – which on the whole was highly reliable – with her manifestly unreliable identification of the Petitioner. On the one hand (as Dr. Pezdek explained) the very specific descriptors that Ms. Butler gave of the rapist – his big hands, his mustache, his thick hair, his big chest and her fairly precise recollection of the amount of hair on his chest and abdomen, his short brown boots and plaid shirt – and of the truck, were of exactly the sort that tend to lodge accurately in the memory, particularly when the witness has had a clear and extended opportunity to view the perpetrator. On the other hand, an expert would have testified that the procedure by which the identification was obtained – beginning with the fact that no effort was made to match the participants lineup with the witness's descriptors – deviated considerably from accepted procedures and was quite likely to produce an inaccurate result.

As an expert would have made clear, the fact that the subject "identified" by the witness did not fit any of the specifics of her description was a very strong indication that the result could not be trusted. That conclusion (an expert would have said) that was not substantially ameliorated by the few, relatively generic descriptors (race, average height, average weight) that did correspond. An expert would have clarified that neither the fact that the event was a highly traumatic one for the witness, nor the degree of certainty expressed by the witness, provided any meaningful support for the accuracy of the identification. A qualified expert would have described to the jury the process of confabulation and the effect of "source monitoring;" how the fact that the witness has previously seen the identified subject in some unrelated capacity could cause a false identification, and how having seen the subject, accused of crime, on television would decisively corrupt any identification procedure that followed. And an expert would surely have explained that, for much the same

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v. Alabama (2014) ___ U.S. ___, 134 S. Ct. 1081, 1089 ["An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."]

reasons, in-court identifications are utterly unreliable and – due to the fairly rapid degradation of memory – an identification made years after the fact is more so.

In addition to establishing that Ms. Butler's identification of Petitioner was unreliable, counsel had rich opportunities to demonstrate that she simply was not a credible witness.[182] One such opportunity – establishing that Ms. Butler lied when she said she had not seen Petitioner on television – has already been discussed. Similarly, a competent, prepared defense attorney would have demonstrated for the jury that Ms. Butler lied on the stand when she said that her most recent conviction was simply for drug possession – and that it was in fact a drug trafficking offense which (the jury would have been instructed) was a crime of moral turpitude, itself a basis for rejecting her testimony. See *Clerici v. DMV* (1990) 224 Cal.App.3d 1016, 1028.

Counsel also would have shown the jury (a) that Ms. Butler was arrested for that crime after she spoke with the authorities, but before she testified; (b) that the specific offense for which she was arrested (violation of Health and Safety Code, § 11352) was an even more serious narcotics felony, for which she could have served several years in the state prison; (c) that – despite the fact that the charge actually filed (under § 11351 of the same Code) could have carried a prison sentence, *and* the fact that she was under two grants of probation at the time of her arrest – she received the quite lenient sentence of "up to a year" in the County Jail; and (d) that after her release from jail she would be on felony probation for at least two more years, and thus particularly vulnerable to law enforcement.

We can put aside, for now, whether these facts positively established that Ms. Butler received favorable treatment in exchange for her testimony, or whether she shaded her testimony to avoid unfavorable treatment in the future. At an absolute minimum they would

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[182]In fact, Mr. Lorenz tried to take some of these opportunities, but his lack of preparation rendered his efforts not only ineffectual but counterproductive. Because he was unable to adduce contrary evidence, the jury was left with no basis to doubt Ms. Butler's (false) assertions that was in jail for a minor drug offense; that she had no expectation of early release in exchange for her testimony; and, again, that she had never seen Petitioner on television before she identified him.

have given powerful support for counsel to argue to the jury that Ms. Butler had reasons of her own to testify in a manner that would please the prosecution and law enforcement – in other words, that she was biased. See, *Davis v. Alaska*, 415 U.S. at 318.

That Mr. Lorenz did not do more, and better, than he did in his weak efforts to challenge Ms. Butler's testimony was primarily a function of his lack of investigation and preparation. He simply was not aware of how readily and thoroughly she could have been impeached and rebutted. "As our Supreme Court succinctly stated, '"There is nothing strategic or tactical about ignorance."'"[183] *People v. McCary* (1985) 166 Cal. App. 3d 1, 12; quoting, *Smith v. Lewis* (1975) 13 Cal.3d 349, 359; quoting, *Pineda v. Craven* (9th Cir. 1970) 424 F.2d 369, 372.

Expert David Coleman also pointed out the fresh opportunities for devastating cross-examination Ms. Butler provided in her testimony on direct – such as her assertion, for the very first time, that her attacker said his name was "David." (RHRT 2253, 2324). "It stands to reason that if she had known it was David, she might have shared that information with Inspector Soliz or Mr. Hodgson or any of the people who talked with her. Yet, now, on the day of trial, she is now able to testify that she knows the name of the person who assaulted her." (RHRT 2253). A prepared, competent lawyer would have used that anomaly prominently, either as the place to start his cross-examination or as a platform for showing the jury the inconsistencies in Ms. Butler's testimony and her apparent bias in shading her

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[183]As the Referee reported, to the extent that Mr. Lorenz had any explanation for his failure effectively to attack Ms. Butler's evidence it was that "*[h]e indicated 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.*" (R&F at 20). As Mr. Lorenz himself testified, however, there was no conflict between presenting his mitigation evidence and opposing the prosecution's case in aggravation, and thus no reason why he could not do both. (RHRT 1511). And David Coleman pointed out both that the mitigation case was itself minimal, and that there was no excuse for failing to meet the most crucial evidence presented by the prosecution at the penalty phase; indeed, "it would have been a good thing if the time had been taken and it outweighed [the mitigation portion]. Because it would have negated the major factor in the decision on the death penalty." (RHRT 2296-97). Even Mr. Lorenz allowed, in his testimony at the reference hearing, that "in retrospect" he should have done much more to challenge Ms. Butler. (RHRT 1468).

testimony to make it more inculpatory of Petitioner and more favorable to the prosecution – all of which would have greatly compromised her credibility. (RHRT 2324-25).

In short, trial counsel failed to respond in any effective fashion to Ms. Butler's testimony despite having a cornucopia of ways and means to demonstrate to the jury that it should be not be credited. Given the decisive part that testimony played in the death sentence that was imposed, trial counsel's inadequacies deprived Petitioner of the effective assistance of counsel guaranteed by the Constitution.

* * *

Pertinent Findings: *[T]rial counsel [had no] tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony.*

However, Lorenz tried to attack certain areas of Butler's testimony that he felt were highlights. He indicated 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. [¶] Lorenz made repeated attacks to bring out that the assailant [had] a mustache and then he called petitioner's wife to show petitioner never had a mustache.[184] *[¶] Lorenz brought out Butler's drug problems with the use of heroin, her prostitution problems, and that she associated her assailant with the name "Burch," while she thought Deputy Lockhart had suggested the name "Lenski" or "Loski" [an exchange that Deputy Lockhart said never took place]. He questioned whether Ms. Butler saw the petitioner in the media before she picked out his picture from the lineup.*

A summary of the impeaching evidence available to counsel upon reasonable investigation, and that would have been utilized by a reasonably competent attorney acting as a diligent advocate is the following: petitioner

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[184]In the quoted passage, the Report and Findings recite that Mr. Lorenz brought out "*that the assailant did* not *have a mustache*" – but in context (and given the undisputed record) it is clear this was a typographical error.

did not have big hands, big chest or a line of moles across his back, had never worn a mustache, did not own a white or light-colored pickup truck until long after Ms. Butler was attacked, and even then did not own a Chevrolet with sideboards fitted on the back, but instead drove a Ford pickup with a camper on it.

A reasonably competent attorney would have followed this up by impeaching Ms. Butler during cross-examination or arguing the impeachable evidence in his final arguments. Mr. Lorenz failed to address Ms. Butler's testimony or any of this evidence in his final argument. ....

(R&F at 20-21).

A reasonably competent attorney acting as a diligent advocate would have called an eyewitness identification expert. In this case there is great difference between the descriptors given by Ms. Butler and those of the petitioner. Dr. Kathy Pezdek, who testified at the reference hearing, would have explained these differences and demonstrated to the jury the difference and how Ms. Butler's descriptions of the assailant were reliable, but in contrast, her identification of the petitioner was unreliable.

(R&F at 22).

4. Competent Counsel, Having Made the Necessary Record, Would Have Requested the Eyewitness Identification Instruction, CALJIC 2.92

The courts have long viewed trial counsel's duty to propose necessary jury instructions as an essential component of the constitutional right to effective assistance. See, *e.g.*, *United States v. Span* (9th Cir. 1996) 75 F.3d 1383, 1389; *Harris ex rel. Ramseyer v. Blodgett* (W.D. Wash. 1994) 853 F. Supp. 1239, 1266, *aff'd* (9th Cir. 1995) 64 F.3d 1432 ("Counsel's failure to object or propose jury instructions in a capital case fell below the objective standards of reasonableness and amounted to a deficient performance"). In this case, a competent – and adequately prepared – attorney would have asked that the jury be instructed regarding how to evaluate eyewitness identification, pursuant to CALJIC 2.92.

That instruction sets out a (non-exclusive) list of factors for the jury to consider in evaluating the accuracy of an eyewitness identification, including: (a) the witness's opportunity to observe the perpetrator; (b) the witness's level of stress at the time; (c) the witness's ability to provide a description of the perpetrator; (d) "the extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;" (e) whether the identification was "cross-racial"; (f) the witness's capacity; (f) whether the witness was able to identify the alleged perpetrator in a lineup; (g) the period of time between the crime and the identification; (h) whether the witness had prior contacts with the alleged perpetrator; (i) the extent to which the witness is either certain or uncertain of the identification; and (j) whether the identification is in fact the product of the witness's own recollection. (See 2 RH Exhs. 462-63).

In tandem with the testimony of a qualified eyewitness identification expert, those factors would have greatly assisted the jury in understanding the two crucial points regarding Ms. Butler's identification of Petitioner: That her description of the perpetrator was probably quite accurate, and that her identification of Petitioner as that perpetrator was not. Thus the factors concerning Ms. Butler's opportunity to observe the rapist and her ability to provide a very detailed description of him (as well as the absence of any "cross-racial" confusion) would point very strongly to that description being true and reliable.

As the instruction would remind the jurors, however, the fact that the Petitioner "does not fit the description of the perpetrator previously given by the witness" was a damning fault in Ms. Butler's identification of him. Interwoven with that point would be the indisputable fact that the witness did have "prior contacts with the alleged perpetrator" – the Petitioner – both in his capacity as a police officer and, far more likely than not, when she saw him on television, accused of murdering other young women like her. (See factor (h)).

The reliability of the identification made from the photographic lineup – and definitely, of the in-court identification – would also be undermined by the fact that they occurred so long after the event (see factor(g)), and the fact of Ms. Butler's heroin use could suggest that her capacity to make an accurate identification was impaired (factor (f)). A

superficial reading of factor (i) – regarding the witness's level of "certainty" – could cut both ways, but any qualified expert would have explained that while Mr. Butler's testimonial expression of great confidence in the identification was essentially meaningless. Rather, her comments at Lerdo, to the effect that the picture of Petitioner did *not* match her stored image of her attacker, were a strong evidence that in fact he was not the man. (See, RHRT 793-95).

Finally in this regard, adequate preparation and expert testimony would support a devastating argument, based on the final factor of the instruction, that Ms. Butler's identification of Petitioner was not "in fact the product of [her] own recollection," but was rather the confabulated result of a biased and unfair photographic lineup procedure, her unrelated encounter with Petitioner, the likelihood that she saw him on television, and whatever suggestions (conscious or unconscious) the investigators at Lerdo may have made when they showed her the photographs, before the tape began to roll.

In short, instruction pursuant to CALJIC 2.92 could have been very helpful to the jury in parsing Tambri Butler's evidence, and understanding that, although her description of her attacker was reliable, her identification testimony was anything but. The Referee nonetheless found that "*a reasonably competent attorney acting as a diligent advocate would not have requested CALJIC No. 2.92.*" (R&F at 23). While that would seem to be contrary to Petitioner's argument, read in the context of the finding that preceded it, the conclusion is unexceptionable. As the Referee first, quite accurately, observed:

> *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 facts favoring the Butler identification exceed those for the petitioner, so the instruction would most like have hurt rather than benefitted the petitioner's case.*

(R&F at23 [emphasis supplied]).

In other words, the reason – and the only reason – why trial counsel was not incompetent for failing to request CALJIC 2.92 was that his prior incompetence in failing to develop a record ensured that the instruction would not be meaningful to the jury, and in

fact would harm Petitioner's cause. While that is undoubtedly true, Petitioner respectfully submits that a more appropriate way to view counsel's failure to seek this instruction was as a failure that not only grew out of, but exacerbated, the very many failures that preceded it. All of these derelictions, cumulatively and ultimately, led to counsel's most indefensible moment of incompetence: his failure to even mention Ms. Butler in his jury argument. Taken together, they lead ineluctably to the conclusion that Petitioner was denied the effective assistance of counsel guaranteed every criminal defendant – and certainly every one on trial for his life – by the Sixth Amendment.[185]

5. Trial Counsel's Inexcusable Failure To Challenge The Butler Testimony In Closing Argument

As the Referee concluded, any reasonably competent advocate would have addressed Ms. Butler's testimony in closing argument. (See R&F at 23). The law is clear:

> Included in the Sixth Amendment guarantee of assistance of counsel is the accused's right to have a closing summation made to the jury. It is elementary that the right to counsel means the right to effective representation. In our opinion an accused is denied effective representation if her trial attorney is unable to effectively argue the case.... An integral part of argument includes fair comment on the credibility of witnesses.

People v. Manson (1976) 61 Cal. App. 3d 102, 198-199; *citing, Herring v. New York* (1975) 422 U.S. 853; accord, *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1526 see also, *Gentry v. Roe* (9th Cir. 2002) 320 F.3d 891, 901-902. In this case trial counsel was "unable to effectively argue the case" because his lack of investigation and preparation, and resulting failure to impeach and rebut Ms. Butler's testimony, left him with virtually nothing that he *could* argue about it.

A diligent, prepared defense lawyer could have and would have delivered a

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[185]As we have just reviewed the "pertinent findings" regarding the failure to seek a jury instruction, in this instance we will not set them out again separately.

devastating response to Ms. Butler's testimony. That attorney would have gone through each of the descriptors of her assailant that Ms. Butler had provided to the detectives, pointed out that (according to the science of memory) they were the most reliable aspects of Ms. Butler's recollection. Counsel would then have reminded the jury of the evidence showing that not one of the truly specific descriptors matched Petitioner – not the bushy mustache, and not the immutable ones like abdominal hair, chest size, moles, big hands, *etc.*

Competent counsel would have reminded the jury of the evidence that, at the time of the assault and the stalking that followed, Petitioner did not own a truck like the one described by Ms. Butler and that none of the specific things she saw in the truck – including the stun gun – were found in his possession. Referring to the expert identification testimony that had been adduced, and CALJIC 2.92, the attorney would have explained to the jury why the fact that Petitioner did not match Ms. Butler's very specific description rendered her identification of him dubious at best.

She or he would have expanded on that critique by bringing up the objective inadequacy of the identification process that was involved, and the room for suggestiveness and error within it. Referring again to the expert testimony and the jury instruction, counsel would have reminded the jury that the suggestiveness – and unreliability – of Ms. Butler's identification was multiplied by the proven prior contact between Ms. Butler and Petitioner, and increased exponentially if, as the evidence showed, she had seen Petitioner on television.

Counsel would have argued that Ms. Butler had a bias to please the prosecution by testifying that Petitioner was the man who raped her; that, given her criminal history and the severity of her current crime of confinement, Ms. Butler likely had already received favorable treatment and – in any event – as an habitual offender and drug addict due to be on felony probation, she had every reason to seek the favor of the authorities lest she end up serving several years in a state prison.

The proof of bias (counsel would have argued) was in the pudding: When she took the stand, Ms. Butler altered her previous statement in ways sure to make her testimony more inculpatory. The most obvious was her "recollection" that her attacker had said his name was

"David" – something she had never told the detectives, or Deputy Lockhart, and that in fact was contradicted by what she *had* told them (*i.e.*, that she did not know his name, but thought it was "Birch"). Similarly, her memory of the attacker's truck had drifted from it being a recent-model Chevrolet to it being a 1960's Ford – just like the one that Petitioner owned when he was arrested.

A competent lawyer could also, quite fairly, have argued as follows: Ms. Butler was an unfortunate person, who lived a hard life and was almost certainly the victim of a horrendous crime. But that did not make everything she said true. She was also someone who had been convicted of a crime of moral turpitude, who had used multiple aliases in her dealings with the authorities – and who had lied to the jury. She lied when she said that her current conviction was for simple possession when in fact it was for a far more serious drug trafficking charge; she lied about the very important questions of whether she had seen Petitioner on television and whether she had discussed the case with others in jail; she lied about her attacker saying his name was "David."

Thus the argument could have been made that Ms. Butler was a biased and less than honest witness who had made an identification of Petitioner that was unreliable by any objective measure. There was nothing whatever to corroborate her testimony. A competent lawyer would have argued that no juror could fairly conclude, beyond a reasonable doubt, that Petitioner was responsible for the atrocious assault on Tambri Butler.

The Referee found that Mr. Lorenz did not have any cognizable "tactical reason" for not even mentioning Ms. Butler in his jury argument. (R&F at 23). The only explanations that Mr. Lorenz could provide for his thoroughgoing failure to deal with the most powerful of the aggravation evidence presented by the prosecution were a general notion that short arguments can be better than long ones, and the suggestion that he was really concentrating on the mitigation and psychological aspects of the defense. (RHRT 1459-60; 1515).

The responses to those generalities are fairly obvious: As discussed above (and as Mr. Lorenz himself acknowledged) there would have been no contradiction between the mitigation and psychological defense he presented and an argument to the effect that some

of the worst things the jury heard about Petitioner were actually crimes committed by someone else. (RHRT 1511). As for preferring short arguments: Mr. Lorenz's closing – consuming 10 transcript pages and certainly less than 15 minutes – was astonishingly brief, especially for the final argument submitted to a jury about to decide whether his client was to live or die. Surely it would not have overly burdened the jury to hear *something* about the elephant in the room – Ms. Butler's account of the horrible rape and torture suffered (she said) at the hands of the defendant.

In its cross-examination of criminal defense expert David Coleman, the State asked whether the fact that the prosecutor had not emphasized Ms. Butler's evidence justified Mr. Lorenz's failure even to mention Ms. Butler in his closing argument. (RHRT 2282-84). We note that the query was based on a false predicate: Although the prosecutor discussed Ms. Butler only briefly in her closing, she did so dramatically (RT 5951), and her entire penalty phase closing argument was extremely short, amounting to little more than six pages of transcript. (RT 5949-56). But Mr. Coleman's response was even more to the point: Regardless of what the prosecutor did, it was trial counsel's job to foresee and respond to this devastating piece of aggravation evidence. (HRT 2283). Mr. Lorenz did neither. Thus he "could not have had a tactical reason" for failing to discuss Ms. Butler in closing, because his precedent failures to investigate, to cross-examine, and to adduce rebuttal evidence regarding Ms. Butler had left him with no material from which to compose an effective closing argument.[186] (HRT 2255).

* * *

Pertinent Findings: *Tambri Butler was a crucial witness whose testimony impressed not only the Jury but also the trial judge, The Honorable Gerald K. Davis. Mr. Coleman also indicated Butler was the most important witness in the entire penalty phase of the trial. There was a wealth of evidence to argue*

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[186] Moreover – as will be discussed further in the Analysis portion of this brief – even to the extent that there was some evidence in the record to support an argument challenging Ms. Butler's testimony, trial counsel failed to make use of it.

from (see summary of impeachable evidence [ante] and the evidence listed below [as] to what a reasonably competent attorney would have addressed).

A reasonably competent attorney acting as a diligent advocate, having made an adequate investigation and presentation of evidence, would have addressed Butler's testimony in the following manner:

- *Impeach her credibility and identification of petitioner as her assailant*
- *Bring up and argue that the specific descriptors she gave (attacker's mustache, large, hairy chest, moles, exceptionally big hands, thick hair, lack of body markings such as tattoos, white pickup truck, stun gun, etc.) failed to match petitioner*
- *Point out the overwhelming likelihood that she had seen the petitioner's image on television the night before she identified him*
- *Bring up the fact that she misrepresented to the jurors the offense for which she was in custody*
- *Re-emphasize she changed statements which hurt the petitioner's case, such as Chevrolet to Ford, and the most incriminating statement of all she said for the first time in her testimony, "I think he told me his name was David."*

(R&F at 23-24)

C. There Is A Reasonable Probability That, But For Counsel's Failings, Petitioner Would Not Have Been Sentenced To Death

The Court is well-acquainted with the standard that governs claims of ineffective assistance of counsel:

> To obtain relief, [Petitioner] "must prove '"that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, *i.e.*, that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant."'" A reasonable probability, the

high court has said, "is a probability sufficient to undermine confidence in the outcome."

(*In re Champion* (2014) 58 Cal. 4th 965, 1007; quoting, *In re Crew* (2011) 52 Cal.4th 126, 150; and *Strickland v. Washington*, 466 U.S. at 694).

As already demonstrated, a reasonably competent attorney functioning under prevailing professional norms would have performed the necessary investigation, proved to the jury, and cogently argued: (1) that Ms. Butler's description of her assailant did not and could not fit Petitioner in virtually every significant specific respect; (2) that her identification of him was corrupted by having viewed him on television the night before, in jail clothes, accused of murdering another prostitute; (3) that in light of everything that science had learned about the process of eyewitness identification, her assertion that petitioner was the man who attacked her was unreliable; (4) that her true penal status – as someone convicted of a drug trafficking offense, with a number of priors – made her an unreliable witness both because of moral turpitude and because it tended to bias her in favor of the prosecution; and (5) that she had misrepresented a number of these facts in her testimony to the jury on direct, and had quite obviously made up new "facts" (*e.g.*, the attacker "said his name was David" and drove an older Ford truck) transparently designed to inculpate the Petitioner.

We respectfully submit that, had trial counsel thus provided adequate representation, there is at least a "reasonable probability" – one sufficient to "undermine confidence in the outcome" – the jury would not have credited Ms. Butler's testimony. In an earlier portion of our argument, we discussed the "false evidence" claim, which employs an essentially identical test for prejudice.[187] As explained there, it is at least "reasonably probable" that Ms. Butler's testimony made the difference for both the jury and the trial court in their respective decisions to condemn Petitioner to death by execution. To reiterate the finding of the Referee: "*Tambri Butler was a crucial witness whose testimony impressed not only the*

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[187]See *In re Malone* (1996) 12 Cal. 4th 935, 965-966; citing, *inter alia*, *Strickland v. Washington, supra*, 466 U.S. at 695; see also, *Richards II*, 63 Cal.4th at 312.

Jury but also the trial judge . . . [she] was the most important witness in the entire penalty phase of the trial." (R&F at 23).

Because Petitioner did not receive the effective assistance of counsel guaranteed by the Sixth Amendment and the California constitution the judgment of death imposed upon him should be vacated.

III. PROSECUTORIAL MISCONDUCT THROUGHOUT THE PENALTY PHASE VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR JURY TRIAL

As this Court cautioned, in reiterating the prosecution's obligation to disclose testimony favorable to the defense:

> The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented. In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth.

(*In re Ferguson* (1971) 5 Cal.3d 525, 531; see also *Berger v. United States* (1935) 295 U.S. 78, 88 ["It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."]

The State's case in aggravation was infected with the misconduct of its agents from the very beginning until well after it succeeded in obtaining a death sentence. The misconduct perhaps started with the initial, improperly-conducted photo "identification" (conducted before a tape recorder was turned on), and proceeded through the investigators' failure to include pertinent details of the Lerdo interview in the report provided to the defense *and* the prosecutor's failure to turn over the actual tape of that interview; the failure to provide the defense with Ms. Butler's criminal history and the concomitant failure to

correct Ms. Butler's misrepresentations about it on the witness stand; the fact that the State did not inform the defense when Michael Ratzlaff – the obvious alternative perpetrator – was arrested and prosecuted by the very same law enforcement agencies but instead immediately sought out Ms. Butler to ensure that she would disappear before a defense investigation could begin; and the successful efforts of the State's investigator to bring Ms. Butler back into the prosecution's camp after she recanted, and to reshape her story using manipulation and outright lies.

Throughout the entire process, the agents of the State acted with a shameful indifference to the truth and to the integrity of the criminal justice system, and with an appalling determination to ensure by any means necessary that Petitioner would be put to death. While not all of this reprehensible conduct was specifically prohibited by the Constitution, enough of it did violate explicit constitutional guarantees to require that Petitioner be given a new, fair penalty trial.

A. The Prosecutor's Failure to Correct False Testimony

As discussed above, a "false evidence" claim pursuant to section 1473(b) does not require any showing that "the testimony was perjured or that the prosecutor or his agents were aware of the impropriety." *Hall*, 30 Cal.3d at 424; *accord*, *Richards I,* 55 Cal.4th at 961-62. That does not, however, render it irrelevant that the prosecution in this case was well aware that its star witness in the penalty phase was misrepresenting critical facts in her testimony to the jury. As this Court has summarized:

> Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution and applies even if the false or misleading testimony goes only to witness credibility.

People v. Morrison (2004) 34 Cal. 4th 698, 716-717; citing, *inter alia*, *Napue v. Illinois, supra,* 360 U.S. 264, 265–272 [remaining citations omitted]; see also, *People v. Vines* (2011) 51 Cal.4th 830, 873.

As the Referee found – and as is really undeniable – the prosecutor was well aware that Ms. Butler was not speaking the truth when she testified (in response to the prosecutor's question) that the offense for which she was in custody was "possession of heroin." (See R&F 9-10). The prosecution knew, of course, that Ms. Butler was in fact doing time for a drug trafficking crime – possessing heroin with the intent to sell it. As the Referee observed, this was a very big difference: "simple possession" is a comparatively innocuous offense, as likely to engender the jurors' sympathy for the addict as it would their disapprobation – but selling narcotics is a felony and a paradigmatic crime of moral turpitude. (*Ibid.*; see *People v. Castro* (1985) 38 Cal. 3d 301, 317 ["while simple possession of heroin does not necessarily involve moral turpitude [citations], possession for sale does"]; *People v. Rivera* (2003) 107 Cal. App. 4th 1374, 1382 (2003); *People v. Standard* (1986) 181 Cal. App. 3d 431 ["'While it is no doubt true that there may be technical, inadvertent and insignificant violations of the laws relating to narcotics, which do not involve moral turpitude, there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic.'" *Id.* at 435, quoting, *United States ex rel. De Luca v. O'Rourke* (8th Cir. 1954) 213 F.2d 759, 762.)

Nor was that the only – or even the most serious – of Ms. Butler's testimonial misrepresentations that were known to the prosecution but left uncorrected. As she admitted in nearly every one of her many post-trial statements, Ms. Butler perjured herself when she denied having seen Petitioner on television before she identified him to the detectives at Lerdo. (R&F at 8, citing, 3 RH Exhs. 497,702; 6 RHRT 1025, 1224; see also 2 RH Exhs. 221-22; 3 RH Exhs. 724-25, 786, 806-07, 839, 841). Ms. Butler adamantly insisted that she had informed the detectives interviewing her at Lerdo – including District Attorney Investigator Hodgson – of that fact. (3 RH Exhs. 838, 841; RHRT 1023-24). That knowledge was perforce imputed to the prosecutor. (*See, Giglio v. United States* (1972) 405 U.S. 150, 154; *People v. Morrison,* 34 Cal. 4th at 716-717.) Moreover, even if Ms. Butler

had not directly said so to a member of the prosecution team, they certainly *should have known* that she saw the Petitioner on television. See, *Morrison*, *supra* [reiterating the prosecution's "duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading."]. The undisputed evidence from the law enforcement officers who testified was that there were multiple television sets visible for all parts of the women's lockup and they were on during virtually all waking hours (RHRT 913, 917); typically inmates spend nearly all of their time watching television (RHRT 2239; see also R&F at 19); and that, during that period, the television news coverage of Petitioner's arrest was ubiquitous in Kern County. (RHRT 1528).

In short, the record compels the conclusion that the prosecutor was aware, or at least should have been aware, of the fact that Ms. Butler was lying when she denied seeing Petitioner on television – just as the prosecutor was undeniably aware of Ms. Butler's misrepresentation regarding her crime of conviction. Yet the prosecutor made no effort to correct these falsehoods. Under well-established principles, this amounted to a denial of Petitioner's right to due process, guaranteed by the United States Constitution. See *Napue v. Illinois,* 360 U.S. at 265–272.

B. The Prosecution's Failure to Turn Over Impeachment Evidence

The defense went into the penalty phase of Petitioner's trial, and the cross-examination of the crucial witness Tambri Butler, without having seen at least two key pieces of impeachment evidence that were in the possession of the prosecution: The details of Ms. Butler's crime of conviction, and the tape of the interview conducted by detectives at the Lerdo Jail, immediately after she picked Petitioner's photograph from the array they presented. Moreover, if Ms. Butler's consistent post-trial statements in this regard are to be credited, the State failed to inform the defense of another, potentially devastating bit of impeachment – namely that she told the detectives, when she picked out Petitioner's photograph (before the tape recorder was turned on), that she had seen Petitioner on television the night before.

Each – and certainly all – of these failures by the prosecution to provide exculpatory

evidence to the defense violated Petitioner's federal constitutional rights as articulated in *Brady v. Maryland* and its progeny. As this Court has explained:

> Pursuant to *Brady*, *supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*id.* at p. 87), a general request, or none at all. The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf ...." Courts have thus consistently "declined 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.'" "A contrary holding would enable the prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.' Thus, 'whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.'"

(*In re Brown* (1998) 17 Cal.4th 873, 879 [footnote and remaining citations omitted]). There is no difference between evidence that would impeach a prosecution witness and other "exculpatory" evidence for purposes of the *Brady* rule. (*United States v. Bagley*, *supra*, 473 U.S. at 682; *Giglio v. United States* (1972) 405 U.S. 150, 154 ["When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."]; *In re Sodersten* (2007) 146 Cal. App. 4th 1163, 1225).

The Referee specifically found that "*[t]he prosecution did not disclose information about Tambri Butler's criminal history to the defense.*" (R&F at 14). And, while the Referee was not asked to make a finding as to whether the prosecution turned over the tape of the Lerdo interview, the fact that it did not do so is established by the same record evidence that

confirms the Referee's finding in regard to the failure to disclose Ms. Butler's criminal history. Defense counsel was clearly unaware of the nature and extent of Ms. Butler's prior convictions, and in particular the fact that she was then serving time for possessing heroin with intent to sell: he tried, and failed, to challenge Ms. Butler in this regard and was unable to impeach her false statement that she was merely doing time for simple possession. Similarly, although trial counsel made some effort to impeach and rebut Ms. Butler's identification testimony,[188] he made no mention of the significant details contained in the tape but omitted from the written report that was turned over to the defense – immutable descriptors including that the assailant had "big hands," a "large chest," and lacked body markings (such as Petitioner's large tattoo). Nor did counsel appear to be aware of Ms. Butler's specific statements – recorded on tape, but not in the disclosed report – that the assailant's vehicle was a late-model Chevrolet truck, not the "older" Ford she described in her testimony. And, obviously, counsel did not know that Ms. Butler told the investigators that she had seen Petitioner on television.

These inferences regarding the prosecutor's failure to make discovery are confirmed by the documentary evidence in the record. None of these things – Ms. Butler's criminal history, the tape of the Lerdo interview (or a transcription thereof), nor any information regarding Ms. Butler having seen Petitioner on television – were included in the materials listed in the "Receipt for Discovery," which was the *only* such record in the prosecutor's files. (RHRT 1994; 4 RH Exhs. 1027, *et seq.*). Similarly, although Mr. Lorenz turned over his complete case files to successor counsel, none of those things were found in counsel's files. (See RHRT 1467, 1542m 1063, 2448-49). What *was* discovered in Mr. Lorenz's files, however, was an "Index" prepared by one of his investigators, setting out all of the discovery materials received by the defense. (RHRT 1485-86; 4 Exhs. 1024-25). Neither a criminal history, nor the Lerdo tape or transcript, nor anything in regard to Ms. Butler having seen

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[188]As discussed these efforts were generally confined to confirming that the perpetrator had a mustache, and establishing that Petitioner did not.

Petitioner on television are included in that (otherwise comprehensive) list. (*Ibid*).

In short, the evidence is clear that the State failed to disclose to the defense crucial impeachment evidence concerning the most important of its witnesses in aggravation. Because – as will be reviewed presently – that evidence was "material" to the penalty phase proceedings and the resulting sentence of death, the State's failure to meet its constitutional obligations violated Petitioner's rights to due process and a fair trial. *Kyles v. Whitley* (1995) 514 U.S. 419, 445; *In re Brown*, 17 Cal.4th at 892.

> **Pertinent Findings:** *The prosecution did not disclose information about Tambri Butler's criminal history to the defense. [¶] [Prosecutor Sara] Ryals contradicted herself with regard to [a different witness] being on her witness list; she appeared to be overly defensive in her testimony. 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. 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 and the bare support of Mr. Lorenz.*[189]

(R&F at 14).

C. The State's Failure to Reveal the Existence of the Alternative Perpetrator

Just weeks after the Kern County District Attorney obtained a death judgment against Petitioner on the basis of Kern County Sheriff Department's investigation into the assault on Tambri Butler's, those same law enforcement authorities arrested and then successfully

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[189]Please note that the Referee was not instructed to make a finding regarding the failure to turn over the tape of the Lerdo Jail interview, nor in regard to whether the prosecuting authorities knew but failed to disclose that Ms. Butler had seen Petitioner on television.

prosecuted Michael Ratzlaff for a virtually identical attack on another woman. It is shocking that they never informed the defense of this explosive new information, but what they *did* do is far more shocking. Petitioner himself – having been alerted by a newspaper article about Ratzlaff – wrote to District Attorney Investigator Hodgson, pleading for him to look into the possible connection with the Butler assault. Mr. Hodgson did nothing of the sort. Instead, he sought out Tambri Butler and convinced her to violate her felony probation and flee the jurisdiction – to disappear.[190] Thus, instead of investigating whether (as is clearly the case) Petitioner was sentenced to death on a false premise, Investigator Hodgson took affirmative steps to make it as difficult as possible for Petitioner to investigate and reopen the case.

The State's "duty of disclosure . . . does not end when the trial is over. 'After a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.'" *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179; quoting, *Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25; *accord, People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; see also, *City of Los Angeles v. Superior Court* (2002) 29 Cal. 4th 1, 7-8 [reiterating that "*Brady* disclosure issues may arise 'in advance of,' 'during,' or 'after trial']; *quoting, United States v. Agurs* (1976) 427 U.S. 97, 107-108.

Petitioner respectfully submits that there could be no clearer, or more egregious,

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[190]The Referee pointed out something else Mr. Hodgson did in response to Petitioner's letter, as follows: "*Contrary to the petitioner's argument, Mr. Hodgson traveled to San Quentin to interview the petitioner, and petitioner, on advice of counsel, refused to talk with him.*" (R&F at 13). The meaning of the introductory ("contrary to") clause is unclear, for Petitioner agrees with the rest of that sentence and has never claimed otherwise. Perhaps the Referee meant his finding as a refutation of Petitioner's assertion that the State never attempted to investigate the connection between Ratzlaff and Butler – but if so, it misses the mark. Given that (as Petitioner had written in the letter) everything Petitioner knew about Ratzlaff he had learned from a newspaper clipping, Mr. Hodgson's attempt to interview Petitioner could not possibly have furthered such an investigation. If anything, it was a cynical and transparent effort to take advantage of that opening to obtain an uncounseled interview with the condemned defendant.

violation of this duty than the State's failure to inform the defense that it had apprehended and successfully prosecuted someone else who matched the description of the perpetrator and who had committed a crime identical to the one charged to Petitioner – a crime which convinced the jury and trial judge to put Petitioner to death.

D. The State's Misconduct Undermines Confidence In The Outcome And Petitioner Is Entitled To A New, Fair Penalty Proceeding

The due process violations sketched above would be sufficient in and of themselves to warrant relief, even if there was not the mass of evidence present in the record showing that Ms. Butler's identification testimony was false in its entirety, and even if Petitioner had not been deprived of the effective assistance of counsel.

Where, as here a prosecutor's failure to correct false testimony has deprived the petitioner of due process, "reversal is required if there is any reasonable likelihood the false testimony *could* have affected the judgment of the jury. This standard is functionally equivalent to the '"harmless beyond a reasonable doubt"' standard of *Chapman v. California* (1967) 386 U.S. 18." *People v. Dickey* (2005) 35 Cal. 4th 884, 909 [emphasis by the Court]; citing, *In re Jackson* (1992) 3 Cal.4th 578, 597–598. Similarly, the failure to disclose exculpatory evidence is prejudicial "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [191] *United States v. Bagley,* 473 U.S. at 682; *City of Los Angeles v. Superior Court*, 29 Cal. 4th at 7-8. Again, a "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Bagley*, 473 U.S. at 678; *In re Brown*, 18 Cal.4th at 884.

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[191] Although this Court has generally treated the "materiality" standard for failing to disclose exculpatory evidence (under *Brady*) and for failing to correct false testimony (under *Napue*) as being identical, the Ninth Circuit recently reiterated a different view – namely, that "[t]he *Napue* materiality standard is less demanding than *Brady*. Under *Napue*, a conviction must be set aside 'whenever there is "*any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury."' *Reis-Campos v. Biter* (9th Cir. Aug. 8, 2016) ___ Fed.3d ___, 2016 U.S. App. LEXIS 14519, *20[emphases by the Court; citations omitted]. We need not linger on this distinction, however, for the pertinent evience in this case was "material" – and thus the misconduct prejudicial – under either standard.

Even if the Court limits its examination to the portions of Ms. Butler's testimony that the prosecution surely knew were perjurious, but failed to correct, there is a "reasonable likelihood the false testimony could have affected the judgment of the jury." When the fact that Ms. Butler was doing time for drug trafficking – a crime of moral turpitude that would lead a properly instructed jury to view her testimony with distrust – was combined with the fact that she had lied to jury about it, the effect could well have led the jurors to the (absolutely correct) conclusion that she was an unreliable witness and that her testimony implicating Petitioner should not be credited. Certainly, it cannot be concluded "beyond a reasonable doubt" that the result would have been the same had the prosecution performed its duty to correct that misrepresentation. If the jury had additionally been informed of the several specific descriptors of her assailant, mentioned in the taped Lerdo Jail interview (but left out of the report supplied to counsel) – details which clearly did not match Petitioner – it is far more than "reasonably probable" that the jurors would have formed a reasonable doubt about the reliability of Ms. Butler's testimony against him. And the undisclosed fact that Ms. Butler actually saw Petitioner on television, in jail clothing and accused of having murdered one of her Union Avenue colleagues, just before she picked him out of the photo array is really enough in itself to impeach the reliability of her identification testimony under any pertinent standard. "As outlined above, this 'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *In re Brown*, 18 Cal.4th at 891; quoting, *Kyles*, *supra*, 514 U.S. at 435.

Finally, the fact that there was an alternative perpetrator who matched the description given by Ms. Butler in all the ways that Petitioner did not, and who committed another crime that was a near duplicate of the horrible assault she suffered, would have been (and is) more than sufficient to make the State's case in aggravation untenable. While the facts regarding Michael Ratzlaff did not fully emerge until after Petitioner's trial concluded, the State's continued suppression of that evidence greatly impeded Petitioner's efforts to garner a new penalty proceeding, and further deprived him of due process. Accordingly, the judgment of death should be vacated.

CONCLUSION: THE VIOLATIONS OF PETITIONER'S RIGHTS UNDER CALIFORNIA LAW AND THE UNITED STATES CONSTITUTION, WHETHER EXAMINED INDIVIDUALLY OR AS CUMULATIVE ERROR, REQUIRE HE BE GRANTED RELIEF FROM THE JUDGMENT OF DEATH

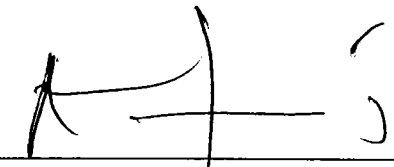
We have traced how the penalty verdict in this case was obtained through false evidence – Tambri Butler's (perhaps innocently) mistaken assertion that he was the man who committed an unspeakable assault upon her, cemented by her clearly intentional misrepresentations about key facts that would have undermined the jury's confidence in her testimony. We have shown that trial counsel's constitutionally ineffective representation of Petitioner ensured that those falsehoods would prevail. And we have described how that result was further guaranteed by the prosecutorial misconduct that infected the penalty phase of Petitioner's trial.

As set forth above, each of those claims is sufficient in itself to require reversal of the judgment. If there could be any uncertainty in that regard, however, it is vanquished by viewing the effects of all of the errors we have described cumulatively – as they should be, for they are intimately interrelated and together formed the fabric of a death penalty proceeding that was an embarrassment to our criminal justice system.

For each and all of the reasons set forth above, the judgment should be reversed.

Dated: September 16, 2016

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States. I am over the age of 18 and not a party to the within action; my business address is PO Box 5138, Berkeley, California 94705.

On September 19, 2016, I served the enclosed Petitioner's Opening Brief Following Reference Hearing and Exceptions to Referee's Report in the action entitled *In re David Keith Rogers on Habeas Corpus*, No. S084292 on the following parties, by placing it in sealed envelopes with postage thereon fully prepaid, in the United States mail, at Berkeley, California, addressed as follows:

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David Rogers
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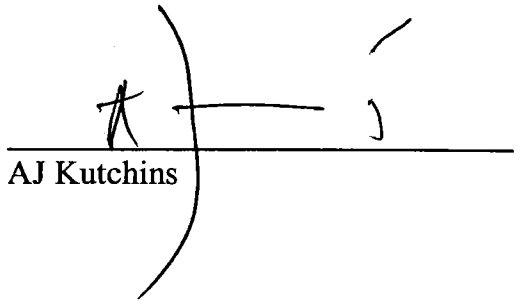
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 19, 2016, at Berkeley, California.



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