In the Supreme Court of the State of California

In re **DAVID KEITH ROGERS,** **On Habeas Corpus**	Case No. S084292

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

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

Rogers was tried, convicted, and sentenced to death for the first-degree murder of 15-year-old Tracie Clark and the second-degree murder of 20-year-old Janine Benintende, both of whom worked as prostitutes. Rogers, who worked as a deputy sheriff, murdered Clark and Benitende "in part to save himself from embarrassment and the adverse personal and employment consequences that might have ensued had his involvement with prostitutes become known." (*People v. Rogers* (2006) 39 Cal.4th 826, 895.)

During the penalty phase, the prosecution relied in large part on the aggravated nature of the underlying offenses. The prosecution also introduced evidence that Rogers had previously abused his authority as a deputy sheriff by directing prostitute Ellen Martinez to undress and then by taking photographs of her breasts and vaginal area. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 845.) And, the prosecution introduced evidence that Rogers had previously committed uncharged acts of sexual violence on prostitute Tambri Butler in 1986. (*Ibid*.)

On collateral review, Rogers raises a host of claims focused solely on the uncharged acts involving Butler. Based on the referee's factual findings and record on habeas corpus, including the extensive briefing, this Court should deny collateral relief for the following reasons.

First, Rogers fails to show by a preponderance of the evidence that Butler testified falsely when she expressed her opinion that he was the person who had sexually assaulted her in 1986. Although he attempts to impeach her credibility and the basis of her opinion, such impeachment is insufficient to establish that the opinion itself was false.

Second, Rogers fails to show that most of the evidence he cites, and not merely its materiality, was newly discovered. And for the evidence that may be considered newly discovered, he fails to show that the evidence would have rendered a different result probable.

Third, Rogers fails to establish that trial counsel was constitutionally deficient under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) because trial counsel made reasonable tactical choices about how to defend him against a death sentence. And

regardless of whether counsel performed deficiently, Rogers fails to show a reasonable probability that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." (*Id.* at 695.)

Fourth, Rogers fails to show that the prosecution violated its duty under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) to disclose material exculpatory evidence that was either actually or constructively in its possession.

Lastly, the focus on the uncharged acts involving Butler misses the forest for the trees. The errors that Rogers alleges, individually or cumulatively, did not significantly influence the fairness of his penalty phase trial or detrimentally affect the jury's determination of the appropriate penalty. Simply put, the aggravating circumstances surrounding the underlying murders of Clark and Benintende warranted the death penalty by themselves, and a relentless attack on Butler would not have changed the jury's determination.[1]

Accordingly, respondent respectfully requests that this Court discharge the Order to Show Cause, and deny the petition for writ of habeas corpus.

ARGUMENT

I. ROGERS FAILS TO ESTABLISH THAT BUTLER'S OPINION AS TO THE IDENTITY OF HER ASSAILANT WAS FALSE

A. Introduction

During the penalty phase of Rogers's trial in 1988, the prosecution called Tambri Butler to testify about a rape and assault she suffered in early 1986. Butler identified Rogers as the perpetrator. Nearly ten years later, an investigator confronted Butler by surprise with allegations that she had identified the wrong assailant. (ROB 49-53.)

[1] This Respondent's Reply Brief is only intended to address points raised in Petitioner's Opening Brief Following Reference Hearing (hereinafter "petitioner's opening brief" or "POB") that were not adequately addressed in Exceptions to Referee's Findings of Fact and Brief on the Merits (hereinafter, "respondent's opening brief" or "ROB"). The omission of any rebuttal in this reply is not intended as a waiver or concession of any arguments in petitioner's opening brief.

Butler had never second-guessed the identity of the assailant prior to the ambush. (3 RH RT 510-511.) The investigator told Butler that Rogers had never worn a mustache and had never owned a white pickup truck or a stun gun. The investigator also told Butler that another man, Michael Ratzlaff, owned a white pickup truck and looked strikingly similar to Rogers. (3 RH RT 517; 6 RH RT 1175.) The investigator showed Butler a photograph of Ratzlaff, but Butler did not believe that Ratzlaff resembled her attacker.[2] (3 RH RT 521; 6 RH RT 1153.) Nevertheless, she declared to the investigator, "*I now believe my identification of Rogers was wrong*." (Pet. 43, italics in the petition, quoting 1 Pet. Exhs. at p. 257; Pet. 60; cf. POBR 184 ["recanted recantations"].) This declaration serves as the primary basis of the false identification claim.

B. Rogers Fails to Establish That the Evidence Was False

A significant portion of the briefing in this case revolves around the details of Butler's description of the perpetrator, events surrounding her interview with detectives in 1987, and events that occurred a decade or more after she testified at the penalty phase. (POB 16-34, 34-103, 135-138; ROB 23-115.) Through the passage of time, Butler's memory of the facts and events became less reliable. By 2008, when she appeared at the reference hearing, so many different versions of the events had materialized that the referee could not help but find that her credibility had suffered for it. The referee wrote:

> Tambri Butler's trial testimony lacked credibility on many issues (seeing petitioner on TV, crime in custody for, and reference hearing issues moles across petitioner's lower back characterized by Butler as dark splotches, (RH Exhs. 48-49) then switched to "ugly pimples," (RHRT 1077) jail molestations, inconsistent stories changed numerous times.) Specifically, in describing the jail molestations (the Court finds to be incredible that she remembers the detail that she did after some twenty years). And she was thoroughly impeached by Ms. Lockhart's (Jeanine Ibarra) and Mr. Simon's testimony. In many respects, her testimony was sincere and she attempted to respond, but the problem was so much time had passed. She admitted being confused, and her credibility suffered for it.

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[2] Respondent's opening brief provides more details about the initial meeting between the investigator and Butler. (See ROB 49-53.)

(Report of Proceedings: Findings of Facts Pursuant to Appointment as Referee (the "Findings") at p. 7.)

However, it is important not to lose sight of the crucial issue: whether Butler gave false evidence to the jury at the penalty phase itself. (See Pen. Code, § 1473, subd. (b)(1) [referring to evidence "introduced against a person at a hearing or trial relating to his or her incarceration"].) Indeed, it appears that Rogers hoped to use the false-evidence claim as a pretext to retry Butler's penalty phase testimony anew, with the referee essentially reweighing the jury's credibility determination. But, "[i]t is not the function of a referee or an appellate court to reweigh credibility determinations made by the jury." (*In re Roberts* (2003) 29 Cal.4th 726, 744.)

1. Trial testimony

Butler testified at the penalty phase that a white man driving a white pickup truck had approached her and solicited acts of prostitution in exchange for $40. (22 RT 5780-5782, 5794.) Butler needed the money, so she got inside the truck and drove with the man to an isolated area. (22 RT 5781-5782.) The man pulled out a "stinger," put it to her neck, shocked her with it, and forced her to have sexual intercourse. (22 RT 5784.) After that, the man pulled out a small gun and demanded that Butler have anal sex, which she did after he placed the gun across the bridge of her nose and fired it. (22 RT 5785-5786.) After sexually assaulting Butler, the man robbed her and shoved her out of the truck on the way back into town. (22 RT 5787-5790.) The man then tried to run over her with the pickup truck. (22 RT 5790.)

Shortly after the assault, Butler was arrested and taken to the main jail in Bakersfield. (22 RT 5791.) While waiting to get booked into jail, Butler recognized Rogers, who was in uniform. (22 RT 5791-5792.) When she asked Rogers whether they knew each other, he told her that he had previously arrested her in Arvin. But, she knew that she never been arrested in Arvin. (22 RT 5792.) She then recognized Rogers as the man who assaulted her and said, "You son-of-a-bitch." (22 RT 5792.) Rogers told her to "turn around and keep her mouth shut." (22 RT 5792.) Butler first informed police that she had been assaulted by a Sheriff's deputy after her September 25, 1986, arrest when

she was in the main jail having a conversation with Deputy Jeannine Lockhart in which Lockhart asked about the dangers from being a prostitute. (22 RT 5807-5808 [Lockhart]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1054-1055 [Butler].) Butler said she had been raped by a Sheriff's deputy who worked on a lower floor. (22 RT 5792, 5796-5799 [Butler], 5806-5808 [Lockhart]; 3 RH RT 475-485, 528 [Butler]; 5 RH RT 910, 919-923 [Lockhart]; 6 RH RT 1091 [Butler].)

On cross-examination, Butler admitted that she initially told Lockhart that the perpetrator had a name "sort of like Birch." (22 RT 5796.) Butler also admitted that she described the perpetrator as having a "mustache, thicker hair." (22 RT 5798.)

2. Butler's testimony was not false

Nothing about Butler's description of the perpetrator's appearance at trial has been shown to be false. For all the inconsistencies in her story throughout the years, the description she provided of the perpetrator at trial, including those descriptors that were obviously inconsistent with Rogers, have remained the same. Indeed, Rogers does not dispute that Butler was assaulted in 1986, or argue that Butler has been lying about the appearance of the perpetrator. In essence, Rogers's claim is that he does not agree with Butler's ultimate deduction that he was the person who assaulted her in 1986. (POB 134-137.) He essentially attempts to retry Butler's trial testimony under the guise that it was false. This Court should reject such a gambit. The jury heard Butler's testimony, including the obvious inconsistencies in her description of the perpetrator, and ultimately made the decision to believe her or not. Due to the general nature of the verdict, there is no way to determine whether the jury ultimately credited Butler's testimony. But what is clear is that the jury was in the best position to make that determination. Rogers's attempts to reweigh the jury's determination should be rejected.

C. Rogers Fails to Establish a Reasonable Probability That the Result Would Have Been Different Had Butler's Testimony Not Been Introduced

Regardless of whether Butler provided false evidence, Rogers fails to show that there is a reasonable probability that the result would have been different had Butler's

testimony not been introduced. (See *In re Richards* (2016) 63 Cal.4th 291, 312-313; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) "The requisite 'reasonable probability' is a chance great enough, under the totality of the circumstances, to undermine [the] confidence in the outcome." (*Sassounian*, 9 Cal.4th at p. 546.) The outcome is this case, a sentence of death, was inevitable regardless of Butler's testimony. This Court got to the heart of the matter on direct appeal:

> [T]he jury found that defendant, acting alone, shot to death two young women, one of whom was only 15 years of age, in part to save himself from embarrassment and the adverse personal and employment consequences that might have ensued had his involvement with prostitutes became known. Defendant not only was a mature man in his forties at the time of the crime; he was also a deputy sheriff who was knowledgeable concerning the law and was charged with protecting the public. The jury rejected defendant's mental state defense.

(*People v. Rogers*, *supra*, 39 Cal.4th at p. 895.)

Nonetheless, Rogers claims that the trial court said that it was Butler's testimony that ensured he would receive a death sentence. (POB 1.) But, even under the standard for federal constitutional error, "[t]o say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Ibid*.) Here, although Butler's testimony was impactful, it was unimportant in relation to all of the other aggravating evidence. The jury was well aware of the aggravating circumstances of the underlying murders of Clark and Benintende. The jury also heard testimony from Ellen Martinez, who described how Rogers abused his position of authority to take nude photographs of her. (22 RT 5763-5778.) And the jury heard testimony from Katherine Hardie, another woman working as a prostitute, who described her harrowing experience when Rogers attempted to drive her to a isolated location against her will. (18 RT 4913-4916, 4918.) She had to jump out of Rogers's moving pickup to escape. (18 RT 4913-4916, 4918.)

In other words, Rogers was going to receive the death penalty regardless of whether Butler testified or not. His crimes were too heinous and callous to excuse; his past violent behavior towards other women were too numerous to ignore. In comparison with the circumstances of Rogers's crimes, the defense evidence had little or no tendency to warrant a penalty less than death. As a result, the exclusion of Butler's testimony would not have resulted in a different verdict.

D. Rogers Fails to Show That the Admission of Any Other Supposedly False Evidence Was Prejudicial

There are other matters the referee and Rogers note as "false evidence." Those matters include (1) whether Butler saw Rogers on television before she formally identified him; (2) whether Butler truthfully identified her in-custody offense; (3) whether Butler had received any promise of leniency, either explicitly or implicitly, in exchange for her testimony; and (4) whether Butler spoke to other inmates extensively about the case.

1. Butler's false testimony about seeing Rogers on television before she formally identified him was not substantially material

Defense counsel asked Butler at the penalty phase whether she saw photographs of Rogers in the news before she talked to the police. (22 RT 5795.) Butler replied, "No, sir, none whatsoever." (22 RT 5795.) Years later, Butler contradicted this statement and admitted that she had seen Rogers on television before she formally identified him. (3 RH Exhs. 702; 6 RH RT 1025; cf. 6 RH RT 1224.) The trial testimony, while false, was not substantially material because Butler's recognition that Rogers was the perpetrator occurred informally at the jail before Rogers was arrested for the murders. (ROB 120-122.)

The informal recognition of Rogers was the crucial moment in Butler's identification. The informal recognition was so important that the prosecutor's questions at trial focused almost exclusively on it. (22 RT 5780, 5791-5793.) The formal

identification was only a formality, something to officially confirm what Butler already had established before Rogers had been arrested.

2. Butler's false testimony about her in-custody offense was not substantially material

Butler did not correctly specify the offense for which she was in custody. When asked what she was in custody for, she said it was for "possession of heroin." (22 RT 5779.) The correct offense was possession of a narcotic *for sale*, a crime involving moral turpitude. It is not reasonably probable, however, that a correct response would have caused the jury to decide the issue of punishment differently. To put it plainly, Butler was a drug addict who prostituted herself to feed her addiction. The jury was well aware that she was not a model citizen. And even if the jury was unaware, defense counsel reminded them about Butler's 13 arrests for drug and prostitution-related offenses. (22 RT 5801.) A modification of one crime out of Butler's already extensive criminal history would have done little or nothing to change the jury's opinion of her as a witness.

3. Butler truthfully testified about any promises of leniency

The prosecution did not promise Butler, either expressly or impliedly, leniency for her testimony. So when Butler was asked whether "any promises of leniency or any type of deal been made with you to testify?" Butler truthfully stated, "None whatsoever. I have been told I had nothing coming." (22 RT 5794.)

Rogers attempts to conflate Butler's "hope" of early release with a "promise" of early release. (POB 142; ROB 122-128.) It appears that Butler, based on statements she made years after testifying, had hoped that she would be released early from jail. But there was no express promise nor an implied promise made to her that early release would occur if she testified. Indeed, Butler own behavior after she was released strongly indicates that she had not expected early release. (ROB 126.) There is no evidence to support a finding that Butler testified falsely about any promises of leniency.

4. Butler never denied speaking to inmates about the case

Butler never denied speaking to other inmates about details of her case. When asked if "the details of" "this case" were "discussed amongst other people in the jail," Butler said, "Not really. I didn't discuss it with a *whole lot of people*. It's not something I really wanted to discuss." (22 RT 5803, italics added.) Lorenz further asked whether "inmates in jail were talking about it, you know, at length. One of the sheriff's officers arrested, worked in the jail, the details of it and everything else"? (22 RT 5803.) Butler again truthfully responded, "Some of the girls knew that I was raped, yeah, but as far as the details, no, I didn't get into details. It's something that I haven't really wanted to think about it." (22 RT 5803.) There is nothing false about Butler testimony on this issue. Contrary to the referee's finding, Butler never denied talking to other inmates about the case. (Findings, at p. 7; POB 137.)

II. PETITIONER FAILS TO SHOW THAT NEWLY-DISCOVERED EVIDENCE REQUIRES REVERSAL OF THE JURY'S DEATH SENTENCE

A. Introduction

During the penalty phase trial, defense counsel cross-examined Butler about the identity of the perpetrator. (22 RT 5795-5805.) Within his arsenal of information, defense counsel had a report of the interview Butler had with detectives in 1987. (4 RH Exhs. 1037-1044.) The report memorialized the details of Butler's statement to detectives. That report included, among other details, a thorough description of the perpetrator. (ROB 147-148.) This information serves as the basis, in part, of Rogers's newly-discovered-evidence claim. (POB 144-145.) As noted in respondent's opening brief, this evidence does not qualify as being "newly discovered." (*In re Hall* (1981) 30 Cal.3d 408, 420.)

The other part of Rogers's claim is information related to assaults Michael Ratzlaff had committed against prostitutes around the same time that Rogers murdered Clark and Benintende, and assaulted Butler. (POB 144-145.) The description of the assaults Ratzlaff had committed is vague and general and, sadly, all too common. (ROB 148-159

[discussion of the details of Ratzlaff's assaults].) There is nothing in this evidence that "so clearly changes the balance of aggravation against mitigation that its omission more likely than not altered the outcome." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1197, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; see, e.g. *Strickland*, *supra*, 466 U.S. at pp. 693-694 ["new" evidence should not disturb a penalty judgment unless the evidence, if true, so clearly changes the balance of aggravation against mitigation that its omission "more likely than not" altered the outcome].)

B. Butler's Description of the Perpetrator and the Extent to Which it Did Not Match Rogers is Not "Newly Discovered" Evidence

Defense counsel had in his possession, and readily available to him, Butler's interview with detectives. (4 RH Exhs. 1037-1044.) In that interview, Butler provided a thorough description of the perpetrator. (4 RH Exhs. 1037-1044.) Petitioner argues that this description constitutes newly-discovered evidence. (POB 145.) He is wrong.

To obtain a new penalty phase trial based on newly discovered evidence, it must first appear that the evidence, and not merely its materiality, is newly discovered; second, that the evidence is not merely cumulative; third, that it is such as to render a different result probable on retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at trial; and, fifth, that these facts be shown by the best evidence which the case admits. (*People v. Williams* (1962) 57 Cal.2d 263, 271-272.)

Here, the description of the assailant that Butler gave to the law enforcement officers, and the extent to which the description did not match Rogers, was not only available at trial but also in defense counsel's actual possession. Thus, the claim is not that the evidence is newly discovered, but that its materiality is newly discovered. This fails to meet the standard for newly-discovered evidence.

C. Evidence that Ratzlaff Was Assaulting Prostitutes at the Same Time That Rogers Allegedly Assaulted Butler Would Not Have Likely Altered the Outcome

Rogers asserts that similarities between Ratzlaff's crimes and the one Butler reported "point inescapably to the conclusion that Michael Ratzlaff—and not petitioner David Rogers—was the man who horribly assaulted Tambri Butler in 1986 . . . ." (POB 145.) But as discussed in respondent's opening brief, the details of the crimes Ratzlaff committed against other prostitutes are too general and vague to establish that Ratzlaff was the person who assaulted Butler in 1986. Sadly, the violent nature of Ratzlaff's attacks on other prostitutes was common. There was nothing unique about the brutality Ratzlaff inflicted on his victims. The evidence certainly did not make it less likely that Rogers committed the attack on Butler.

Moreover, Butler's description of the perpetrator seems to exclude Ratzlaff as the person who assaulted her. When Butler was given a full description of Ratzlaff's appearance—including his height—she adamantly denied that Ratzlaff was the person who assaulted her. (3 RH Exhs. 792-794, 802.) Standing well-over six feet tall, Ratzlaff was much taller than person Butler described. (3 RH Exhs. 792-794, 802.) Butler also described the assailant as being in his late forties or early fifties (2 RH Exhs. 309-310); again, a descriptor that clearly does not match Ratzlaff's appearance in 1986. In contrast, Rogers's general appearance—height, weight, and age—all matched Butler's description, making more likely that Rogers, and not Ratzlaff, assaulted Butler. (ROB 92-94 [discussion of inconsistencies in Ratzlaff's appearance and Butler's description].)

Even assuming, for the sake of argument, that the evidence was presented to the jury, there was enough evidence excluding Ratzlaff that the jury would have rejected the defense theory of Ratzlaff as an alternative assailant, especially considering that Butler was so adamant after seeing Ratzlaff's picture that he was not the person who assaulted her. Taken together with the other aggravating evidence, it is not likely that the Ratzlaff evidence would have altered the outcome.

III. PETITIONER'S TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE DURING THE PENALTY PHASE TRIAL

Rogers argues that his trial counsel's assistance was ineffective because he failed to adequately investigate (POB 151-154) or impeach Butler's testimony (POB 154-159, 172-178), or seek to exclude it entirely (POB 171-172). Respondent provided a thorough response to Rogers's claims in its opening brief.[3] (ROB 168-232.) This Court should deny the claim because the record shows that counsel's conduct can be attributed to sound trial strategy that relied on Rogers's past physical and emotional abuse as a means to garner sympathy from the jury and avoid a death sentence, a fact that Rogers has never disputed. Rogers may rely on his own after-the-fact assessment of the penalty phase trial and conclude that his newly proffered strategy would have been the best option, but in the end he fails to overcome the presumption that counsel's conduct was a result of competent tactical decisions and that his penalty phase trial was reliable.

A. Governing Legal Standard

For a convicted defendant to make a claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence, two components must be proven: "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) Unless both components are proven, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable. (*Ibid.*) Here, Rogers fails to prove either component.

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[3] The exact responses to each allegation are as follows: (1) failure to investigate (ROB 178-187); (2) failure to impeach (ROB 187-199, 212); (3) failure to exclude testimony (ROB 199-201); (4) eyewitness identification (ROB 213-218); (5) jury instruction (ROB 219-223); and (6) closing argument (ROB 224-229).

A. Rogers Fails to Overcome the Presumption That Counsel's Conduct Was Attributable to Sound Trial Strategy

In examining claims of ineffective assistance, this Court has recognized well-settled principals that trial tactics are ordinarily within the sound discretion of trial counsel. (*People v. Wright* (1990) 52 Cal.3d 367, 412.) It is presumed that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. (*Strickland, supra,* 466 U.S. at p. 690.) Moreover, there is also a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Id*. at p. 689.) Therefore, in reviewing the conduct of counsel in hindsight, great deference must be given to counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070.)

Here, counsel's decision to focus on a psychological-type defense and not to distract the jury with an attack on Butler was reasonable. Rogers had admitted to the murder of 15-year-old Tracie Clark; there was undisputed evidence strongly linking him to the murder of Janine Benintende; and there was evidence that he abused his authority by taking nude photographs of Ellen Martinez in a cemetery (22 RT 5765-5768) and that he attempted to kidnap Katherine Hardie (18 RT 4913-4916, 4918). Thoroughly attacking Butler and making a significant part of the penalty phase about her would have done almost nothing to mitigate these other factors.

Instead, the record shows that counsel approached the penalty phase trial with an intent to focus on Rogers's past emotional and physical abuse as a means to garner sympathy from the jury and avoid the death penalty. (22 RT 5760-5763 [defense's penalty phase opening statement].) Counsel spent most of the guilt phase trial laying out the ground work for this defense, calling three mental health professionals to discuss Rogers's mental state. He called at the penalty phase the primary mental health professional, Dr. David Bird, (22 RT 5815-5818) to discuss Rogers's past emotional and physical abuse and how this abuse could have contributed to his future violent behavior toward prostitutes (22 RT 5898-5904); played a video for the jury where an emotional Rogers—under sodium amytal—recounted past abuses (22 RT 5819-5898); and used

family and friends to portray a different "side" of Rogers, the good husband, father, and friend. (22 RT 5905-5948.)

As respondent's opening brief demonstrates, the record makes clear that counsel had a sound trial strategy. (ROB 173-177.) Rogers has not undercut respondent's fundamental point, which is that counsel made reasonable strategic decisions about how best to defend his client against a death sentence. Instead, Rogers relies on an after-the-fact assessment of the penalty phase, using his *Strickland* expert, David Coleman, to conclude that a different strategy would have been best. (POB 162-165.)

But Coleman's testimony only highlights the problems with Rogers's claim: it evaluated counsel's performance in a vacuum and relied heavily on hindsight to substitute his own judgment for that of trial counsel. For example, Coleman approached his evaluation of counsel's performance by assuming that Butler was the most important piece of evidence in the People's case. (POB 162.) It appears from the record that Coleman never reviewed the entire guilt phase evidence, but was instead given a "summary" of that evidence along with the entire record on Butler's testimony, even though the guilt phase evidence plays an integral part in evaluating counsel's overall performance. (See *People v. Bolin* (1998) 18 Cal.4th 297, 314 [counsel's performance is "a question of judgment and degree that must be assessed in light of all circumstances of the case and with a view to fundamental fairness"]; 12 RH RT 2213-2215, 2264-2265.) This helps explain why Coleman's preferred strategy for counsel was to "hit the ground running with respect to this case . . . as if he had been retained on an assault case where Tambri Butler was an assault victim and he had a client not charged with homicides or anything like that, but simply was a straightforward felony criminal case involving oral -- forced oral copulation and, you know, the litany of offenses that were testified to by Ms. Butler." (12 RH RT 2225.) The Butler-centric approach Coleman advocated simply does not take into consideration the overall context under which counsel was working.

Indeed, counsel appears to have considered Coleman's strategy and decided against it, choosing instead to selectively attack Butler's credibility without distracting too much from his chosen strategy. (ROB 201-202.) Counsel said at the reference hearing, "You

know, I don't have a clear memory of what [my] thoughts were at the time. But I do recall basically thinking, you know, if we are going to go with a psychiatric type of defense, we are going to go with a psychiatric defense, we cannot totally dig a hold on some other aspect of the case. But . . . if it was her and he and that was a single case and that's what it is, you dig in more detail I would think." (8 RH RT 1515.)

Optics may have also played an important part in how counsel dealt with Butler. If counsel's strategy was to garner sympathy for his client, viciously attacking a vulnerable witness who had just finished describing a brutal assault could have worked to undermine or undo this strategy. Instead, counsel explains that he "would normally pick out highlights of things that didn't work [apparently, in an opposing witness' testimony] and go with that. But not make an entire mini trial over one witness where . . . maybe that's not going to be favorable." (8 RH RT 1514-1515.) So it appears that counsel approached the penalty phase with a strategy that considered all the evidence in the record. Coleman's evaluation was based on the flawed assumption that Butler should have been treated as if she was the only witness in the case.

Coleman and Rogers also relied heavily on hindsight in evaluating counsel's performance.[4] To show the importance of Butler's testimony, for instance, Rogers cites the judge's sentiments about her testimony after the jury had rendered its death sentence. (POB 146, 187-188.) Coleman similarly stated, "Butler's evidence essentially was a surrogate for the two victims." (12 RH RT 2217.) It is not coincidental that both Rogers and Coleman use this explanation as the reason Butler's testimony should have been treated differently: the trial judge essentially provided them with the reason Butler's testimony was impactful (22 RT 5995). But this reason was apparent in hindsight only, since both the prosecutor (10 RH RT 1948-1951) and defense counsel (8 RH RT 1517-1518) did not find Butler to be a particularly convincing or powerful witness at the time.

[4] It also appears that the referee's finding that Butler was the most important witness during the penalty phase is based on hindsight: "Tambri Butler was a crucial witness whose testimony *impressed not only the Jury but also the trial judge . . . .*" (Referee's findings, at p. 23.)

Indeed, Coleman's own opinion is largely based on the jury's verdict and the judge's remarks at sentencing, which he used to "buttress" his opinion that counsel was deficient. (12 RH RT 2283.) It is wrong to fault trial counsel based on the impact Butler's testimony had on the trial judge, which was not disclosed until the sentencing hearing.

The more appropriate approach, and the one supported by case law, was to view Butler's suggested testimony within the context of the evidence already introduced at trial. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 216 [in determining whether counsel's performance was deficient, courts exercise deferential scrutiny and "assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act"].) Rogers had already provided a detailed confession to the murder of 15-year-old Clark; the ballistics evidence proved his role in Benintende's murder; no one refuted his role in exploiting Martinez; and there was little or no reason to question Hardie's story about jumping from Rogers's pickup truck. So the jury heard evidence showing that Rogers had a history of violence against and exploitation of women in vulnerable positions in life, such as prostitutes, and the defense had to accept that fact to a degree (20 RT 5240, 5405 [Rogers describing his "compulsion" to be with prostitutes]; 17 RT 4697 [Rogers liked to "drive around" and "look at the whores"]). Butler represented one of a number of examples of an already established "pattern of violence." It would be reasonable for counsel to adopt an approach in the penalty phase that did not focus on one victim's story, but create a larger narrative that mitigated Rogers's overall despicable behavior towards prostitutes. In this case, counsel's narrative was that Rogers's abuse history affected how he reacted towards prostitutes in general. This strategy was reasonable under the circumstances.

B. Rogers Fails to Prove Prejudice

Rogers similarly fails to prove prejudice under *Strickland.* To show prejudice under *Strickland*, a petitioner must prove that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694; *In re Sixto* (1989) 48 Cal.3d 1247,

1257.) Rogers only points to two instances in the record that he claims shows that Butler's testimony likely undermined the confidence in the outcome: (1) the juror who was "dabbing her eyes" and (2) the sentencing judge's comments in affirming the jury's death sentence. (POB 146.) Neither shows that there was a reasonable probability that Butler's testimony undermined the confidence in the jury's sentence.

First, there is no way to know why the juror in the back was "dabbing her eyes" during Butler's testimony. She may have been thinking of the fate of the two murder victims that Butler avoided. It is also possible that something happened in her life, outside of Butler's testimony, that affected her emotional state that day. There is equally no way to know that Butler's testimony was the decisive factor in her decision, since Rogers committed other horrible acts against women during his time as a deputy sheriff. To claim that the juror's behavior was due to Butler's testimony about a non-fatal assault is pure speculation.

Second, while the sentencing judge did mention Butler testimony in deciding whether the jury's sentence was unreasonable, the judge also cited other aggravating evidence against Rogers. The judge mentioned the two murders and how they involved a "high degree of callousness." He mentioned that Rogers engaged in "a pattern of violence," mentioning the two murders, and Roger's treatment of Ellen Martinez, and Tambri Butler.

In contrast, the sentencing judge discounted any notion that Rogers acted "under the influence of extreme mental or emotional disturbance," explicitly rejecting the mental health defense. The only remaining mitigating evidence was Rogers's age and lack of criminal record, though the judge mentioned that his exploitation of Ellen Martinez was close to criminal. So, even if counsel had successfully excluded Butler's testimony from the penalty phase, there was overwhelming evidence in aggravation that warranted the death penalty. Rogers cannot prove prejudice in this case.

IV. THE EVIDENCE DOES NOT SHOW THAT THE PROSECUTION VIOLATED ITS DUTY UNDER *BRADY*

The referee determined, with regard to the *Brady* claim, "that none of the individual law enforcement officers who possessed information regarding Ratzlaff were involved in petitioner's prosecution. The prosecution in petitioner's case was not aware and should not have been aware of the information." (Findings, at p. 13.) The referee's finding, in essence, forecloses the *Brady* claim.

It is not surprising then that Rogers focuses on the information obtained after the trial concluded in order to establish a *Brady* violation. (POB 194-196.) Rogers brazenly, and without evidence, attacks the character of District Attorney Investigator Tam Hodgson, accusing him of taking "affirmative steps to make it as difficult as possible for Petitioner to investigate and reopen the case." (POB 195.) Rogers specifically asserts that he "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." (POB 195.)

At the reference hearing, Hodgson was asked about the letter Rogers sent him in 1988. Hodgson acknowledged that he received and explained that he acted on it by driving to San Quentin to meet with Rogers the very next day. When Hodgson got to the prison, Rogers refused to see him, claiming that his attorney had advised him to not speak with Hodgson. (12 RT RH 2407-2409.) As a result, the record supports the referee's conclusion that Hodgson attempted to discuss the matter with Rogers and that Rogers refused. (Findings, at pp. 12-13.)

Rogers also misrepresents Hodgson's motives behind asking Butler to leave the state. Hodgson was not trying to convince Butler to violate her felony probation and flee the jurisdiction in order to prevent Rogers from investigating the Ratzlaff connection, as Rogers now alleges. Rather, Hodgson told Butler to leave the state on May 2, 1988, before he received Rogers's letter, for her own safety. Hodgson testified: "[S]he needed

to leave the state, there were unknowns here that I could not control and she needed to get away." (12 RH RT 2434.) He further clarified:

> It isn't -- it isn't difficult when you are trying to address situations, I have done dozens of them where in court you make arrangements, you change the sentence, you amend the probation status in order to facilitate the safety of a witness where you have got legitimate concerns. I have done dozens of them. That's why I feel certain, you know, this type of terminology -- there is no reason for a file to fall behind the cabinet. Everything is right on top of the table. If she needs to be out of jail for her safety, the court's responsive to that. It always has been. We are concerned about getting people injured because they have testified.

(12 RH RT 2415-2416.) After this, Hodgson did not speak with Butler until 1998, when Butler was confronted by the defense investigator. There is simply no evidence to support Rogers's pernicious attacks on Hodgson's character.

Thus, with regard to *Brady*, there is no evidence that Hodgson, or anyone else on the prosecution team, was aware of, or should have known of, any Ratzlaff connection before Hodgson received the letter from Rogers in September 1988. The referee's findings support this conclusion. (Findings, at pp. 12-13.) It was Rogers, not Hodgson, who had information regarding Ratzlaff. Therefore, the record does not show that any material, exculpatory evidence was withheld from the appropriate authority during or after the trial.

A. The Allegedly Undisclosed Evidence Was Not Material under *Brady*

Assuming for the sake of argument that the prosecution team knew, or should have known, about the Ratzlaff evidence, the evidence would not be material under the *Brady* standard.

Evidence is material under the *Brady* standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) Here, as mentioned above and in respondent's opening brief, even if Rogers had been excluded as the perpetrator, enough aggravating evidence existed that the jury would have still returned a verdict of death. Moreover, based on Butler's description of the perpetrator,

Ratzlaff would have been excluded as a possibility. Indeed, when Butler was shown Ratzlaff's picture, she adamantly denied that he was her attacker. The jury would have heard this opinion and likely excluded Ratzlaff as the perpetrator. Therefore, the Ratzlaff evidence, even if presented to the jury, was not material under the *Brady* standard.

V. THE CLAIM OF PROSECUTORIAL MISCONDUCT IS NOT PROPERLY BROUGHT AND IS WITHOUT MERIT

Rogers claims three instances of misconduct: (1) the prosecutor's failure to correct false testimony (POB 189-191); (2) the prosecutor's failure to turn over impeachment evidence (POB 191-194); and (3) the state's failure to reveal the existence of "the alternative perpetrator" (POB 194-196). And he alleges that the prosecution intentionally allowed Butler to perjure herself.

The claim is not properly raised because it was not included in the Order to Show Cause and the People have not been given a fair opportunity to address it in their Answer or Return, by evidence, or in prior briefing.

It is established that the People have a right to due process. (Cal. Const., art. I, § 29; *In re Large* (2007) 41 Cal.4th 538, 511-552.) Due process requires "'notice and opportunity for hearing appropriate to the nature of the case.' . . . The very purpose of giving the parties notice and the opportunity to be heard is to give them a chance to present information that may affect the decision." (*In re Large, supra,* 41 Cal.4th at p. 551.) "A fundamental requirement of due process is 'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552; accord *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.) As a result, the new argument should not be considered. In any event, it is without merit.

A. There is No Evidence to Show That the Prosecutor Knowingly Failed to Correct Butler's False Testimony

As previously discussed, Butler testified on direct examination by the prosecutor that she was in custody for "possession of heroin" when, in actuality, she was in custody for possession *with the intent to sell*. (22 RT 5778-5779.) But there is no evidence to

suggest that the prosecution knowingly allowed Butler to perjure herself. Butler was asked for a general description of the reason she was in custody and not for the precise offense for which she had been sentenced; she answered the question in the same general way in which it was asked. (22 RT 5778; see RBR 39-40; ROB 128-131.) The prosecutor could have reasonably believed that defense counsel knew the precise offense of conviction based on the discovery provided, in addition to counsel's own investigation, and that he would ask about it if he so chose. However, it was apparent that both the prosecution and the defense were interested not in the exact crime but in the overall picture that Butler was a drug addict who used prostitution as a means to feed her addiction.

And contrary to Rogers's claim, there is no evidence to indicate the prosecution withheld Butler's criminal history from the defense. The only evidence Rogers can cite to as proof is the lack of evidence in defense counsel's files. But, as discussed in respondent's opening brief, the condition of defense counsel's files strongly indicate that they were not complete at the time they were relinquished to post-conviction counsel. Indeed, the only affirmative evidence with regard to the records disclosed by the prosecution came from the prosecutor, who unequivocally stated that she disclosed all her files to the defense. So, based on this testimony, the defense was able to impeach Butler on cross-examination but decided the exact crime was unimportant. Defense counsel's focus instead was on the multiple crimes—drug and prostitution-related—Butler had committed through the years to suggest that she had concocted a story about Rogers to win early release from jail.

Rogers also contends that the prosecution allowed Butler to perjure herself when she denied having seen Rogers on television before she identified him to the detectives at the Lerdo jail. Nothing in the record indicates that the prosecution knew that Butler had

seen Rogers on television the night before she identified him. As such, the prosecutor had no reason to believe that Butler's trial testimony was false.[5]

And while Rogers asserts that the prosecution should have known that Butler saw him on television based on the "multiple television sets visible for all parts of the women's lockup and they were on during virtually all waking hours," he does not explain how it can be assumed the prosecution would automatically know that Butler had been watching television during the precise moment when Rogers's face was shown on the news. It would be unreasonable to impart that knowledge on the prosecution. Moreover, as respondent noted at the beginning of this Argument, respondent had no opportunity to address the issue with evidence and the trial prosecutor had no opportunity to address the question in her testimony at the reference hearing.

B. There is No Evidence in the Record That Proves the Prosecution Did Not Disclose Impeaching Evidence

As discussed in respondent's opening brief, there is no reliable evidence that proves that the prosecution failed to disclose Butler's criminal history to the defense. The reference hearing evidence presented by Rogers is vague and inconclusive about whether the prosecution disclosed Butler's criminal history. The prosecutor, however, testified at the reference hearing that she disclosed everything she had in her files to the defense. Trial counsel did not dispute this fact but instead spoke positively of the prosecutor's integrity.

Rogers relies heavily on the fact that the file, which was found in "disarray" (1 Pet. Exh. at p. 7 (¶ 4) [habeas counsel, Alan W. Sparer, describing the case file as "in a state

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[5] Rogers asserts that "Butler adamantly insisted that she had informed the detectives interviewing her at Lerdo—including District Attorney Investigator Hodgson—of that fact." (POB 190.) Nothing in the record, other than Butler's less than adamant declaration (3 RH Exhs. at p. 841), suggests that detectives knew that Butler saw something about the case on television before they interviewed her in 1987. Indeed, Hodgson tape-recorded post-trial conversations with Butler seem to suggest that investigators never asked Butler about whether she saw Rogers on television before she formally identified him in 1987. (3 RH Exhs. at pp. 726-727.)

of complete disarray," noting that some documents "bear the impression of an automobile tire"]) did not include the criminal records. But taking into account the condition the files were in when they were turn over to appellate counsel, the absence of a document can be no guarantee that the document never existed.

With regard to Butler's taped interview, the record shows that the prosecution alerted the defense to the existence of the tape recordings and made them available for him to view. The police report of Butler's interview with detectives—a report that the defense had in its possession—alerted the defense to existence of tape recording of the interview (2 RH Exhs. at p. 315) and further noted that the tapes were available in evidence. Thus, there is nothing in the record that establishes that the prosecution suppressed this information. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1049 [evidence is not suppressed when it "is available to a defendant through the exercise of due diligence"].)

C. There is No Evidence That the Prosecution Knew, or Should Have Known, about the Existence of an Alternative Perpetrator

Lastly, Rogers contends that the prosecution hid the existence of an alternative perpetrator from the defense. The referee's finding on this issue is unequivocal: "The Court finds that none of the individual law enforcement officers who possessed information regarding Ratzlaff were involved in petitioner's prosecution. The prosecution in petitioner's case was not aware and should not have been aware of the information." (Findings, at p. 13.) Yet Rogers continues to assert that the prosecution withheld information regarding the attacks Ratzlaff committed on prostitutes in Bakersfield, and accuses the district attorney's investigator of taking "affirmative steps to make it difficult as possible for Petitioner to investigate and reopen the case." (POB 195.) Rogers specifically mentions that he "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." (POB 195.) As

discussed in the previous Argument, the evidence is to the contrary. The referee's findings support this conclusion. (Findings, at pp. 12-13.)

VI. THE CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT

Rogers contends the cumulative effect of errors requires reversal of the death penalty. Respondent disagrees. None of the instances of alleged misconduct nor any of the alleged trial errors, considered singly or together, requires reversal. Rogers is entitled to a "fair trial" but not a "perfect one." In other words, petitioner's punishment was fairly adjudicated.

"Under the cumulative error doctrine, the reviewing court must 'review each allegation to assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effects of errors deprive the defendant of a fair trial and due process, reversal is required." (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

Here, as discussed previously, no such prejudicial errors occurred. Rogers fails to show that he would have received a result more favorable had any alleged errors not occurred. Simply put, Rogers would have received the death sentence regardless of Butler's testimony. Rogers attempts to overstate Butler's importance to the jury's decision because it is the only way he could rationalize the fact that his crimes alone warranted the death sentence. This Court got it right when it concluded that his death sentence was not disproportionate to his individual culpability based on the circumstances of the crime, the characteristics of the defendant, and the jury's rejection of his mental state defense. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 895.)

CONCLUSION

Accordingly, respondent respectfully requests that the order to show cause be discharged and the petition for a writ of habeas corpus be denied.

Dated: September 29, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF uses a 13 point Times New Roman font and contains 8,229 words.

Dated: September 29, 2017

XAVIER BECERRA
Attorney General of California

/s/ Henry J. Valle
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Keith Rogers** No.: **S084292**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 29, 2017, I served the attached **RESPONDENT'S REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29, 2017, at Sacramento, California.

L. Lozano	*/s/ L. Lozano*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ROGERS (DAVID KEITH) ON H.C.**
Case Number: **S084292**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

09-29-2017
Date

/s/Henry Valle

Signature

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