Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID KEITH ROGERS,

Petitioner,

No. S084292
CAPITAL CASE

On Habeas Corpus.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO REFEREE'S FINDINGS

— oo0oo —

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TABLE OF CONTENTS

I. The Decisive Evidence Used Against Petitioner To Obtain The Death Penalty Was False 12

A. Introduction 12

B. The Legal Standards 13

1. The Referee's Findings and "Substantial Evidence" 13

a. Deference to the Referee 13

b. What Is, And What Is Not, Substantial Evidence 14

i. The Selective Use of "Facts" 14

ii. Circumstantial Evidence, Inferences, and Speculation . . . 20

2. Standards Governing False Evidence and Newly Discovered Evidence Claims 22

a. False Evidence 22

b. Newly Discovered Evidence 25

C. The Overwhelming Weight of the Evidence, Some Newly Discovered, Demonstrates That Tambri Butler Testified Falsely When She Identified Petitioner As Her Assailant 27

1. David Rogers Did Not Fit the Description Ms. Butler Gave of Her Attacker 27

a. The Attacker's "Thick Brush Mustache" 27

b. The Attacker's "Big, Rough Hands" 31

c. The Attacker's Big, "Hairy" Chest 33

d. Petitioner Has a Tattoo; The Attacker Did Not 34

e. The Attacker's "Thicker" Hair 36

f. The Line of Moles Across the Assailant's Lower Back 36

g. The Attacker's Children, Wife and Dog 38

h. The Assailant's Truck 40

i. The Assailant's Stun Gun 45

j. The Many Very Specific Ways In Which Petitioner Did Not Match the Perpetrator Outweigh the Few, Generic Ways In Which He Did 46

2. Unlike Petitioner, Michael Ratzlaff Matched Butler's Description of the Perpetrator 48

a. Characteristics Shared By Ratzlaff and the Perpetrator 49

i. His Mustache 49

ii. The Layer of Hair On His Chest and Abdomen 51

iii. His Big Hands 52

iv. His Thick Hair 53

v. His Big Chest 54

vi. His Big, Crowded Keychain 55

vii. His Truck and Its Contents 56

viii. The Stun Gun 60

ix. Other Respects In Which Ratzlaff Matched the Perpetrator 61

x. The Purported Differences On Which Respondent Relies Are Based On Either Non-Existent Evidence Or Ambiguous Evidence, And Are Too Generalized To Be Meaningful.. 62

b. The Evidence Regarding Ratzlaff's Other Crimes Against Women Points Unerringly To The Conclusion That He Assaulted Ms. Butler 67

i. The Common Features of the Attacks On Butler And Imperatrice Demonstrate That the Same Person Committed Both Crimes 68

ii. Respondent's Attempts to Distinguish the Butler and Imperatrice Attacks Fail 71

3. The Identification of Petitioner As the Perpetrator Was Suggested to Ms. Butler Before She Made It 78

a. The Identification Conducted At Lerdo Was Extraordinarily Suggestive 78

b. Ms. Butler Had Not Previously Identified Petitioner 79

i. The Encounter on "A" Deck 81

ii. The Recently Fabricated Jailhouse Molestations 83

iii. The Conversation With Deputy Lockhart 93

4. Ms. Butler Was Biased In Favor Of The Prosecution 95

a. Ms. Butler's Bias 95

b. Ms. Butler's False Testimony At Trial, Which Reflected Her Bias 100

i. Her Discussions With Other Inmates 100

ii. Whether She Saw Petitioner on Television 102

iii. Whether Ms. Butler Knew She Would Be Released Early If She Testified 107

iv. The Crime for Which Ms. Butler Was in Custody 110

v. "I Think He Told Me His Name Was David" 112

5. Ms. Butler Repeatedly And Persuasively Recanted Her Trial Testimony.. 113

D. Petitioner Is Entitled To Relief On His False Evidence And Newly Discovered Evidence Claims 126

II. Trial Counsel's Failure To Respond Competently To The Butler Evidence Deprived Petitioner Of The Effective Assistance Of Counsel 129

A. The Failures of Trial Counsel to Effectively Investigate, Impeach, Rebut, and Present Argument Regarding Tambri Butler Were Not the Result Of Any Objectively Reasonable Strategic Decision 131

1. The Legal Question Is Not Whether Counsel's Choices Were "Strategic" – It Is Whether They Were Objectively Reasonable 131

2. Pertinent Facts 132

3. Assuming, *Arguendo*, That Trial Counsel Made A Strategic Choice Not To More Fully Investigate And More Forcefully Respond To Ms. Butler's Evidence, That Choice Was Objectively Unreasonable 137

B. Counsel's Investigation Into the Butler Assault Was Grossly Inadequate and A Competent Investigation Likely Would Have Changed the Outcome of Petitioner's Penalty Trial 140

1. No Presumption Can Overcome the Demonstrable Inadequacy of Trial Counsel's Investigation 140

2. What The Evidence Demonstrates About Counsel's Deficient Investigation 143

a. Regarding the Identity of Ms. Butler's Assailant 143

i. The Failure to Review the Actual Contents of the Lerdo Interview. 144

ii. The Complete Failure to Interview Any Pertinent Witnesses 146

iii. The Failure to Establish That Petitioner Did Not Have a Light-Colored Truck 148

b. Regarding Whether Ms. Butler Saw Petitioner On Television .. 149

c. Regarding Ms. Butler's Criminal History 153

d. Regarding Prior Law Enforcement Encounters Between Petitioner and Ms. Butler 157

C. Trial Counsel's Failure to Bring a *Phillips* Motion 160

D. Trial Counsel Failed To Respond Effectively To Ms. Butler Either Through Cross-Examination Or Adducing Impeaching Evidence 163

1. The Referee's Findings Regarding Deficient Performance Are Amply Supported 163

2. Respondent's Reliance on Counsel's "Limited, Targeted Attacks" Is Both Logically and Factually Insupportable 164

3. Competent Counsel Would Have Called An Eyewitness Identification Expert 168

4. Respondent's Argument Regarding Sheila Bilyeu Is A Red Herring . . . 177

a. The Bilyeu Evidence 178

b. Concern About the Bilyeu Evidence Was Not A Reasonable Tactical Justification For Taking It Easy On Tambri Butler 181

E. The Only Sense In Which It was "Reasonable" For Counsel to Fail To Request A Jury Instruction Regarding Eyewitness Identification Was That He Had Failed to Develop The Evidence Necessary to Make The Instruction Helpful . . 183

F. Trial Counsel's Failure To Even Mention Tambri Butler In His Closing Was Not Reasonable Strategy – It Was Incompetent Representation 185

G. There Is A Reasonable Probability That Counsel's Egregious Failure To Deal With the Crucial Penalty Phase Evidence Affected the Outcome 189

III. The Many Acts Of Misconduct By The Prosecuting Authorities Deprived Petitioner Of A Fair Penalty Trial 190

A. The Repeated Failure To Correct Crucial False Testimony 190

B. The Prosecution's Failure to Disclose Material Evidence to the Defense 191

1. Failure to Disclose Ms. Butler's Criminal Record 191

2. Failure to Provide the Tape Recording of the Lerdo Interview. 194

3. Failure to Disclose Ratzlaff's Other Attacks 195

C. The Prosecution's Failures to Disclose Were "Material;" Petitioner Is Entitled to Relief 196

Conclusion 198

TABLE OF AUTHORITIES

Cases

Alford v. United States (1931) 282 U.S. 687. . . . . 95, 98

Amado v. Gonzalez (9th Cir. 2013) 734 F.3d 936. 96

Baldwin v. Adams (N.D. Cal. 2012) 899 F. Supp. 2d 889. 96

Berger v. United States (1935) 295 U.S. 78. 19

Brady v. Maryland (1963) 373 U.S. 83. 194-197

Burr v. Sullivan (9th Cir. 1980) 618 F.2d 583. 98

Carrillo v. Perkins (5th Cir. 1984) 723 F.2d 1165. . . . . 96, 98

Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc. (Fed. Cir. 1989) 892 F.2d 1021. . 141

Chapman v. California (1967) 386 U.S. 18.. . . . . 24, 25, 127

Davis v. Alaska (1974) 415 U.S. 308.. 95

Deas v. Knapp (1981) 29 Cal.3d 69.. 143

Farkas v. United States (6th Cir. 1924) 2 F.2d 644.. 98

Foreman and Clark Corporation v. Fallon (1971) 3 Cal.3d 875. . . . . 16, 19

Greene v. Wainwright (5th Cir. 1981) 634 F.2d 272. 98

Hamilton v. Pacific Eastern R. Company (1939) 12 Cal. 2d 598. 141

Helvering v. Mitchell (1938) 303 U.S. 391. 75

In re Anderson (1951) 107 Cal. App. 2d 670. 75

In re Bacigalupo (2012) 55 Cal.4th 312. . . . . 14, 23, 26, 95

In re Boyette (2013) 56 Cal. 4th 866. . . . . 14, 38, 40, 47, 193

In re Brown (1998) 17 Cal.4th 873. 194

In re Champion (2014) 58 Cal. 4th 965.. . . . . 189, 190

In re Crew (2011) 52 Cal.4th 126. 189

In re Dunham (1976) 16 Cal. 3d 63. 75

In re Hall (1981) 30 Cal.3d 408.. . . . . – *passim* –

In re Jones (1996)13 Cal. 4th 552. 132

In re Lucas (2004) 33 Cal. 4th 682. . . . . 132, 137

In re Malone (1996) 12 Cal.4th 935. 23

In re Marquez (1992) 1 Cal.4th 584. 193

In re Marriage of Fink (1979) 25 Cal.3d 877. 19

In re Price (2011) 51 Cal.4th 547. . . . . 14, 110, 123

In re Richards (2012) 55 Cal.4th 948. . . . . 23, 26, 95, 123, 124

In re Richards (2016) 63 Cal.4th 291. . . . . 22, 23, 24, 124, 127

In re Roberts (2003) 29 Cal.4th 726. . . . . 14, 122, 126

In re Sixto (1989) 48 Cal.3d 1247. . . . . 132, 133, 134, 135

In re Welch (2015) 61 Cal. 4th 489. 14

Knowles v. Mirzayance (2009) 556 U.S. 111. 162

Kyles v. Whitley (1995) 514 U.S. 419. 197

Merrick v. Paul Revere Life Insurance Company (9th Cir. 2007) 500 F.3d 1007.. 143

People v. (Glen) Rogers (2013) 57 Cal. 4th 296. 49

People v. Alexander (2010) 49 Cal. 4th 846. 68

People v. Avila (2009) 46 Cal.4th 680.. 16

People v. Babylon (1985) 39 Cal.3d 719. 25

People v. Battle (2011) 198 Cal. App. 4th 50. 19

People v. Boyer (2006) 38 Cal.4th 412. . . . . 161, 162

People v. Brooks (2017) 2 Cal. 5th. 20

People v. Brown (1988) 46 Cal.3d 432. 24

People v. Bunyard (1988) 45 Cal. 3d 1189. 68

People v. Castro (1985) 38 Cal. 3d 301.. 111

People v. Davis (2013) 57 Cal. 4th 353. . . . . 20, 21

People v. Delgado (2008) 43 Cal. 4th 1059.. 184

People v. Dillwood (1895) 39 P. 438.. 95

People v. Edwards (2013) 57 Cal. 4th 658. 72

People v. Ewoldt (1994) 7 Cal.4th 380. . . . . 67, 68, 70

People v. Fairley 135 Cal.App.3d 182. 43

People v. Gonzalez (1990) 51 Cal.3d 1179. 25

People v. Hamilton (2009) 45 Cal. 4th 863. . . . . 24, 127, 128

People v. Hill (1998) 17 Cal. 4th 800. 19

People v. Jones (2013) 57 Cal. 4th 899. . . . . 70, 76

People v. Lynch (2010) 50 Cal.4th 693. 72

People v. Manson (1977) 71 Cal. App. 3d 1. 141

People v. McCary (1985) 166 Cal. App. 3d 1. . . . . 132, 161

People v. McDonald (1984) 37 Cal.3d 351. 177

People v. Medina (1995) 11 Cal. 4th 694. . . . . 49, 62, 64, 65

People v. Miller (1990) 50 Cal. 3d 954. 70

People v. Miller (1990) 50 Cal.3d 954. 49

People v. Morrison (2004) 34 Cal. 4th 698. . . . . 190, 191

People v. Palmer (2001) 24 Cal. 4th 856.. 75

People v. Phillips (1985) 41 Cal.3d 29. . . . . 160 - 166, 176

People v. Rivera (2003) 107 Cal. App. 4th 1374.. 111

People v. (David Keith) Rogers (2006) 39 Cal.4th 826. . . . . – *passim* –

People v. Scott (1959) 176 Cal. App. 2d 458.. 141

People v. Smallwood (1986) 42 Cal.3d 415.. 126

People v. Standard (1986) 181 Cal. App. 3d 431. . . . . 111, 112

People v. Story (2009) 45 Cal. 4th 1282. 16

People v. Sully (1991) 53 Cal. 3d 1195. 70

People v. Superior Court (Greer) (1977) 19 Cal.3d 255. 19

People v. Superior Court (Sparks) (2010) 48 Cal. 4th 1. 75

People v. Watson (1956) 46 Cal.2d 818.. 24

People v. Wright (1998) 62 Cal. App. 4th 31. . . . . 70, 194

Pontiac 2-Door Coupe (1961)193 Cal. App. 2d 216.. 75

Pope v. Babick (2014) 229 Cal.App.4th 1238. 16

Rayii v. Gatica (2013) 218 Cal. App. 4th 1402. 16

Roe v. Flores-Ortega (2000) 528 U.S. 470. . . . . 131, 177, 179, 180, 184, 188

Smith v. Lewis (1975) 13 Cal.3d 349. . . . . 132, 161

Standefer v. United States (1980) 447 U.S. 10. 75

Strickland v. Washington (1984) 466 U.S. 668. . . . . 131, 189, 197

United States v. Bagley (1985) 473 U.S. 667. . . . . 196, 197

United States v. La Salle National Bank (1978) 437 U.S. 298. . . . . 151, 153, 156

United States v. Lankford (11th Cir. 1992) 955 F.2d 1545. . . . . 96, 98

Wiggins v. Smith (2003) 539 U.S. 510.. 137

Constitutions, Statutes and Rules

United States Constitution, Sixth Amendment . . . . . – *passim* –

United States Constitution, Eighth Amendment . . . . . – *passim* –

United States Constitution, Fourteenth Amendment . . . . . – *passim* –

California Constitution, article I, section 15 . . . . . – *passim* –

Evid. Code § 604.. . . . . 143, 147, 150

Evid. Code § 660 184

Evid. Code § 664 184

Pen. Code § 190.3 . . . . . – *passim* –

Pen. Code § 1473 . . . . . – *passim* –

Other Authorities

CALCRIM 315 (2017 ed.) 27

CALJIC 2.92 (5th ed. 1988) 27, 183, 184

I. THE DECISIVE EVIDENCE USED AGAINST PETITIONER TO OBTAIN THE DEATH PENALTY WAS FALSE

A. INTRODUCTION[1]

According to the trial judge, the evidence that made the critical difference in the decision to sentence Petitioner to death was Tambri Butler's testimony about the brutal rape and torture she suffered, allegedly at his hands. What the evidence now shows is that – while Ms. Butler was almost surely the victim of a vicious assault – Petitioner was not the monster who did those things to her.

Rather, after taking evidence for nearly a month (including several days of Ms. Butler's testimony) and reviewing thousands of pages of exhibits, the Court's Referee concluded that "*Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial*" (R&F 5) and that the evidence "*support[s] the fact that another assailant other than the petitioner committed the assault on Ms. Butler.*"[2] (R&F 11.) In legal terms, the Referee's findings, and the evidence on which they are predicated, demonstrate that Petitioner is entitled to relief because "[f]alse evidence that is substantially material . . . on the issue of . . . punishment was introduced against [him]," (Pen. Code §1473(b)(1)); because "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial" (Pen. Code §1473(b)(3)); and because the judgment of death imposed upon Petitioner, obtained through false evidence, deprived him of his federal constitutional rights to due process and to be free from cruel and unusual punishment.

Respondent contends that the Referee's findings are not supported by substantial evidence. As shown in Petitioner's Opening Brief before this Court, there is actually a wealth of evidence supporting the Referee's conclusions, which can be grouped under five

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[1]Citations will again be as adopted by the Referee, with the additions set out in Petitioner's Opening Brief (henceforth "POB") at p. 1 fn. 1. Respondent's Opening Brief will be cited as "ROB."

[2]As in Petitioner's Opening Brief, quotations of the Referee's findings are italicized.

general headings: (1) the detailed description Ms. Butler gave of her attacker did not fit Petitioner; (2) the description did, however, fit another man, Michael Ratzlaff, who committed an almost identical crime against another young woman; (3) Ms. Butler's identification of Petitioner as her assailant was suggested to her in the crudest fashion before she made it; and (4) Ms. Butler was (and continues to be) demonstrably biased in favor of testifying in whatever manner would be helpful to the prosecutorial authorities; and – last but far from least – (5) Ms. Butler has repeatedly stated, under penalty of perjury and with full awareness of what she was saying, that she lied under oath about critical aspects of her testimony and that she was *not* convinced that Petitioner was her attacker – and she later reaffirmed key portions of those recantations even after she attempted to repudiate them.[3] While any one of those groups of facts are arguably enough to compel relief from the judgment of death, taken together they are overwhelming.

We will summarize the record evidence falling under each of those headings and respond directly to the contrary assertions set forth in Respondent's Brief. First however, we will set out the pertinent legal standards and discuss, briefly, the differences in the parties' understanding of those standards and how they apply to presenting and interpreting the record evidence.

[3]Among the significant points about Ms. Butler's cycle of recantations, repudiations of those recantations, reiterations of the repudiated recantations, *etc*. is that – regardless which of Ms. Butler's many versions one accepts – she has freely and repeatedly admitted to perjuring herself. She either lied under oath at trial, or in her declarations, or at the reference hearing, or all three. More remarkable is the fact that she is apparently without shame or remorse about (admittedly) giving false testimony in a death penalty proceeding.

B. THE LEGAL STANDARDS

1. The Referee's Findings and "Substantial Evidence"

a. Deference to the Referee

As Respondent correctly observes, this Court "'generally defer[s] to the referee's factual findings and "give[s] great weight" to them when supported by substantial evidence.'" (*In re Welch* (2015) 61 Cal. 4th 489, 501; quoting, *In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) Respondent contends, however, that this deference does not extend to the Referee's findings on the key issue, namely, whether Ms. Butler testified falsely at Petitioner's trial when she identified him as her assailant. (ROB at 20, citing, *In re Roberts* (2003) 29 Cal.4th 726, 743-744.) Rather (Respondent suggests) the Court is obliged to credit Ms. Butler's testimony because the jury did so at trial. (ROB at 19, citing *In re Roberts*, *supra*.)

Respondent is incorrect, and the case upon which it relies demonstrates why. In *Roberts* the Court declined to defer to the referee's finding (that a witness's testimony at trial "should not be treated as believable") because the witness refused to testify at the reference hearing; the referee accordingly had no opportunity to observe the witness's demeanor and judge his credibility. (*In re Roberts*, 29 Cal.4th at 742.) Thus, the Court concluded, "[w]e are in as good as a position as the referee to assess [those matters]." (*Ibid*.)

In the instant case, the Referee heard days of testimony from Tambri Butler, and listened carefully as she was confronted with, and tried to explain away, her many statements – some sworn, some not, some prior to her trial testimony, some later – that conflicted with what she said on the stand at Petitioner's trial. Thus this is the paradigmatic situation illustrating the rule that "'[d]eference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee ha[d] the opportunity to observe the witnesses' demeanor and manner of testifying.'" (*In re Boyette* (2013) 56 Cal. 4th 866, 876-877; quoting, *In re Price* (2011) 51 Cal.4th 547, 559.)

b. What Is, And What Is Not, Substantial Evidence

i. The Selective Use of "Facts"

While the parties generally agree that the Referee's findings should be given deference if they are supported by substantial evidence, their respective opening briefs reveal very different notions about what that term means. Throughout its brief, Respondent challenges the Referee's findings as not being supported by substantial evidence because it is able to point to other evidence in the record that conflicts with the evidence credited by the Referee. This is particularly easy to do in regard to Ms. Butler's evidence in the instant case because, as to virtually every statement she has made, she has at some point said exactly the opposite. As counsel for the Respondent put it – and as the witness herself agreed – in those various versions, Ms. Butler "contradicted [her]self so many times [and] said so many things that were inaccurate . . . ." (6 RHRT 1038-39; see also, 3 RHRT 586 [". . . there is so many things I don't remember clear. And I have contradicted myself several times ...."]; 6 RHRT 1232 ["I know I have said different stories."].)[4]

Given that the Attorney General is typically in the position of defending the outcome below, it is understandable that he may be accustomed, when framing an appellate brief, to rely solely on those record facts that support the judgment of conviction and thus favor his position. But this case is in a different posture, for the Court has asked the Referee to determine certain facts and those determinations are entitled to deference. Thus the situation is the reverse of what the Attorney General usually faces, and analogous to one in which the judgment below is in favor of Petitioner. In that circumstance, "[t]he fact that there was substantial evidence in the record to support a contrary finding does not compel the

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[4]Ms. Butler's many contradictory statements are detailed in Petitioner's Opening Brief (at pp. 16-103.) To make it easier to compare Ms. Butler's various versions regarding each specific point, Petitioner has attached, as the appendix to this brief, a set of charts tracking what Ms. Butler said regarding a number of the most essential matters and referring to other evidence regarding David Rogers and Michael Boyd Ratzlaff in regard to the points at issue. These charts were similarly presented as an appendix to Petitioner's reply brief to the Referee, and thus are already part of the record before this Court.

conclusion that there was no substantial evidence to support the judgment." (*Rayii v. Gatica* (2013) 218 Cal. App. 4th 1402, 1408; see also, *e.g.*, *People v. Story* (2009) 45 Cal. 4th 1282, 1296.) Thus even where there is some evidence to support Respondent's position, deference is due the Referee's contrary findings so long as they in turn are supported by substantial evidence – *i.e.*, "evidence that is reasonable, credible and of solid value . . . ." (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Fairly viewed, the evidence is not just adequate to support the Referee's findings, but does so overwhelmingly. But Respondent's brief repeatedly fudges the required analysis by omitting to mention testimony by Ms. Butler, as well as other evidence, that contradicts the given assertion upon which Respondent has chosen to rely. In doing so, Respondent has violated its "'fundamental obligation to this court . . . to 'set forth the version of events most favorable to [the findings below].' '[I]f, as [Respondent] here contend[s], "some particular issue of fact is not sustained, [it is] required to set forth in [its] brief all the material evidence on the point and not merely [its] own evidence. Unless this is done the error is deemed to be waived."'" (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1246; quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

To give just one important example: Ms. Butler signed several sworn declarations that effectively recant her trial testimony and indeed admit that she testified falsely when she identified Petitioner as the perpetrator of the attack she suffered. This is arguably enough in itself to validate the Referee's findings regarding the truthfulness of her testimony, and Respondent attacks the declarations forcefully. It does so by constructing a narrative in which the defense investigator, Melody Ermachild "ambush[ed]" Ms. Butler by coming to her house just once, unannounced, and convincing the unwitting witness to sign a document that really consisted of Ms. Ermachild's version of events – which Ms. Butler had scant chance to review. (ROB 49-53, 59-64, 114.) Some time later (Respondent contends) Ms. Ermachild mailed Ms. Butler a revised version of the declaration, which Ms. Butler signed and sent back, because she was fearful and just wanted to be done with it. (ROB 53.)

In support of this narrative, Respondent cites Ms. Butler's initial testimony at the

reference hearing, which contained some (though not all) of Respondent's assertions. But Respondent never deigns to mention that, on cross-examination, Ms. Butler admitted that Ms. Ermachild came to her house not once *but on two occasions*, a year-and-one-half apart; that the second visit, and the signing of the final complete declaration, occurred some time *after* Ms. Butler had been in touch with District Attorney's Investigator Tam Hodgson regarding Ms. Ermachild's first visit; that both visits were lengthy and amicable (including a dinner invitation from Ms. Butler); that before the second visit Ms. Ermachild got in touch in advance and asked and received Ms. Butler's permission to visit; that each time Ms. Butler had the declaration read to her, read it herself, or both; that on each occasion Ms. Butler made corrections, including interlineations and deletions to ensure that the declaration accurately reflected her own account; and that she understood clearly that she was signing them under penalty of perjury for use in a capital case. (6 RHRT 988-1000, 1172-1185, 1197; see also 1 RHRT 132-133, 135-140 [testimony of Melody Ermachild]; 1 Exhs. 218-225, 244-251, 253-259 [signed declarations, with interlineations and cross-outs].)

These facts dispel any notion that Ms. Butler was somehow hoodwinked into executing the declarations.[5] But even though Ms. Butler conceded all of these facts in her testimony at the reference hearing, and even though Ms. Ermachild herself gave detailed testimony to that same effect, supported by contemporaneous notes and correspondence, Respondent not only fails to acknowledge this evidence but insists on a different story – alternative facts, as it were – that are indisputably false.

Again, this is but one example of dozens in which Respondent is so selective (or flatly inaccurate) in discussing the facts as to obscure the actual nature of the evidence presented

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[5]Moreover, despite Respondent's dark insinuations that Ms. Ermachild was somehow dishonest with Ms. Butler, Respondent is unable to point to a single thing the investigator said that was untrue. That does not stop Respondent from fabricating, and assigning to Ms. Ermachild, statements she never made under any version of the evidence – such as supposedly telling Ms. Butler "that she had identified the wrong person as her attacker" (ROB 49), and that "Rogers could not possibly have been the man who attacked Butler." (ROB 61-62.)

to the Referee.[6] While Respondent is of course free to present the facts in whatever manner

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[6]Some of the other significant examples that will discussed in the text, *post*, include: Treating as undisputed fact one of Ms. Butler's (many) versions of her jail conversation with Deputy Jeannine Lockhart without acknowledging that Deputy Lockhart has repeatedly contradicted Ms. Butler's account; stating flatly that Ms. Ermachild misleadingly showed Ms. Butler pictures of an "older" Petitioner, without mentioning either that Ms. Ermachild testified she had no such pictures, or the proof that no such pictures existed; asserting that it was "not true that [Ms. Butler] had worried about whether her identification of Rogers was correct" (ROB 57) but never mentioning that she said the opposite to Investigator Hodgson; referring to "booking photos" of an unshaven Petitioner to prove that he did not shave on his days off (and hence might have had the "mustache" described by Ms. Butler), Respondent does not mention its own evidence showing that the photos were taken some days after Petitioner's arrest, and after he had given up shaving (apparently for the first time); contending that Ms. Butler never had an opportunity to see whether the perpetrator had a tattoo (like the prominent one on Petitioner's arm) while omitting to mention her sworn statement that "the man took off his shirt, so I saw most of his body . . . I did not see a tattoo anywhere . . . ." (1 RH Exhs. 267) or her testimony on cross-examination that she "saw him with his shirt off" and "never noticed a tattoo on his arm . . ." (9 HRT 1882); attacking the Referee's finding that Petitioner had small hands (unlike the assailant, how had notably large hands), Respondent never mentions expert evidence demonstrating that Petitioner's hands were smaller than 95% of the adult male population; similarly, in arguing that Ms. Butler's "objective descriptors" of the perpetrator were "inconsistent" with Michael Ratzlaff, Respondent never mentions the evidence that Ratzlaff's hands were enormous, nor the evidence that (like the perpetrator, and unlike Petitioner) Ratzlaff had a moderately hairy chest and abdomen, nor proof regarding contents of Ratzlaff's truck that matched the perpetrator's, including the large thermos and oversize key ring; asserting that Michael Ratzlaff's truck did not match Ms. Butler's description of a white pickup because it was white with a black top – but not acknowledging that witnesses who saw Ratzlaff's truck, including police officers, described it simply as "white," as did the Attorney General himself in earlier briefing; representing to the Court that, at the time of the assault Ratzlaff was just 31 and Petitioner was 40 (thus much closer in age to Ms. Butler's description of the perpetrator), when in fact Ratzlaff was just shy of 37 and Petitioner had just turned 39; contending that Toby Coffey was "unsure" whether he had loaned Petitioner his truck, while Mr. Coffey was in fact adamant that he had not; asserting that when Ms. Butler was last arrested prior to her testimony she was initially charged with only "simple possession" of heroin (ROB 39), when in fact the initial charges included possession of heroin for sale (1 RH Exhs. 128); repeatedly treating as proven fact that Petitioner was the man in a white truck who attempted to kidnap Katherine Hardie while never mentioning that, at trial, Ms. Hardie testified that she could *not* identify Petitioner (who was sitting right there) as the perpetrator; asserting that Petitioner – rather than Ratzlaff – must have been the man who

is helpful to its case, these distortions (and, in some instances, outright misrepresentations) do not aid the process of reasoned judicial determination and are particularly dismaying when tendered by a representative of the State for the purpose of securing a man's execution.[7] And perhaps more to the point: Under established precedent, by failing to discuss *all* of the pertinent evidence – including that favoring Petitioner's claims and the Referee's findings – Respondent has forfeited consideration of its assertion that those claims and related findings are unsupported by substantial evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888; *People v. Battle* (2011) 198 Cal. App. 4th 50, 62.)

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attacked Ms. Butler because that man knew what heroin looked like, without acknowledging testimony that Ratzlaff repeatedly watched another prostitute inject heroin, and was himself later convicted of dealing drugs; contending that "nothing in the evidence proves [the Referee's finding] that Ratzlaff was 'obsessed with anal sex'" (ROB 150), but omitting the evidence that Ratzlaff asked for anal sex from several women, one of whom he choked to unconsciousness when she refused, another of whom he beat into a coma; arguing that Ratzlaff "only assaulted prostitutes he had dated previously" (ROB 155) without mentioning that he had never dated Lavonda Imperatrice before savagely assaulting her. Perhaps the most absurd omission comes near the end of Respondent's brief, when it argues that Petitioner would have been condemned to death even if Ms. Butler never testified (ROB 229-232), and purports to discuss the trial judge's remarks in that regard, but fails to include the trial judge's emphatic conclusion that the Butler evidence *"probably influenced the jury, in my view, and the court more than any other.*" (RT 5995 [emphasis added].)

[7]"Nor is the role of the prosecutor in this regard simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy. In all his activities, his duties are conditioned by the fact that he 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . .'" (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 266, quoting, *Berger v. United States* (1935) 295 U.S. 78, 88; accord, *People v. Hill* (1998) 17 Cal. 4th 800, 820; see also, *People v. Sivongxxay* (2017) 3 Cal.5th 151, 206-207 (concurring & dissenting op. of Liu, J.) and authorities discussed therein.)

ii. Circumstantial Evidence, Inferences, and Speculation

It is fundamental that "[s]ubstantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*People v. Brooks* (2017) 2 Cal. 5th 674, 729 [citation omitted].) Yet Respondent repeatedly attacks the Referee's findings (and the parallel arguments tendered by Petitioner) as unsupported when they are based on circumstantial evidence and reasonable inferences drawn from that evidence. At the same time, Respondent insists that the Court accept its own contrary assertions regarding the facts, contending (for instance) that "it is possible" that a thing occurred, or that it "could have" happened that way, or that "it would have been reasonable," or that Petitioner or some one else "might have thought" or "could have believed" something. (See, e.g., ROB 85, 86, 99, 207.) This mode of argument falls afoul of the Court's repeated instruction that """"a reasonable inference 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence.'""" (*People v. Davis* (2013) 57 Cal. 4th 353, 360 [citations and internal signals omitted].)

The conflicting approach to what constitutes adequate proof is illustrated in how the respective parties, and the Referee, discuss the matter of the perpetrator's mustache. The uncontroverted facts are that Ms. Butler described her attacker as having a "thick brush mustache,"[8] while Petitioner never grew a mustache until after he was arrested and stopped

[8]That was what Ms. Butler told the investigators at Lerdo and the jury at Petitioner's trial, what she swore to in her several declarations, what she ultimately testified to at the reference hearing, and what she said in her first two recorded conversations with Investigator Hodgson in 1998 and 2001. (1 RH Exhs. 219, 253-54; 2 RH Exhs. 381; 3 RH Exhs 680, 698, 723; 4 RH Exhs. 889; 9 RHRT 1877, 1883.) However, in a pair of subsequent conversations with Mr Hodgson in 2008 (some 22 years after the assault) Ms. Butler insisted that her attacker did *not* have a mustache and that she never thought he did until Melody Ermachild put that idea in her head. (3 RH Exhs. 791-92, 795; 819.) At the reference hearing in 2011, Ms. Butler variously: (a) reaffirmed that her several initial statements about the mustache were true; (b) said she could not remember one way or the other; and (c) claimed that she only described the mustache as thick and bushy after Ms. Ermachild showed her pictures of Michael Ratzlaff. (3 RHRT 517, 523, 547; 10 RHRT 1877, 1883, 1900, 1943, 1967, 1969.)

shaving altogether. Together these facts provide persuasive evidence that Petitioner was not the assailant, and the Referee so found. (R&F pp. 6-7.) Respondent counters that "[t]he referee's opinion on this point should be given no weight because none of the habeas corpus evidence proved that Rogers could not have worn a false mustache when he picked up Butler while prowling the prostitution area off-duty." (ROB 86; see also ROB 99 fn. 58 ["Clearly, Rogers could have worn a fake mustache."].)

Of course, it would be nigh impossible to prove that Petitioner "*could not have* worn a fake mustache" – but the preponderance of the evidence demonstrates that he *did* not. As the Referee summarized, rejecting the same contention: "*As to the mustache, petitioner never had a mustache. Respondent's argument that petitioner could have used a theatrical mustache is not persuasive. Extensive searches of his property uncovered many items of incriminating evidence such as gun and tire tracks, but nothing to indicate a mustache or stun gun.*" (R&F 7.) Given that the "gun" mentioned by the referee was the weapon used to kill Tracie Clark and the "tire tracks" demonstrated that Petitioner's truck was at the scene of the killing, and that (a) Petitioner, as a police officer, knew that those items would implicate him in a homicide, but he made no effort to hide or dispose of them; (b) the searches also uncovered a trove of other embarrassing and inculpatory evidence that he similarly had made no effort to secret; (c) that none of the other prostitutes with whom Petitioner had dealings said that he wore a mustache, false or otherwise; and (d) Ms. Butler saw the perpetrator again on at least two, apparently random occasions, still sporting a mustache – what was before the Referee was a mass of circumstantial evidence from which the only reasonable inference was that "petitioner never had a mustache," real or fake.

Respondent not only refuses to acknowledge this textbook example of "substantial evidence" established circumstantially and by inference, but offers in its stead the naked assertion that Petitioner "could have" had a false mustache – and faults Petitioner for not disproving it. This is, in turn, a textbook example of "'mere speculation as to probabilities without evidence.'" (*People v. Davis*, *supra*, 57 Cal. 4th at p. 360 [citations omited].)

Again, this point is raised now for purposes of illustration. The business about the

mustache is not the only – or even necessarily the most persuasive – proof that Petitioner was not the perpetrator. It does, however, exemplify a mode of analysis and argumentation that pervades Respondent's brief, and that again does a disservice to the process of ascertaining the truth.[9]

2. Standards Governing False Evidence and Newly Discovered Evidence Claims

a. False Evidence

To obtain relief on his principal state law claim, Petitioner must show by a preponderance of the evidence that "'[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against [him] at a hearing or trial relating to his . . . incarceration.'" (*In re Richards* (2016) 63 Cal.4th 291, 307 (*Richards*

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[9]Just a few of many other examples that will be discussed include Respondent's assertion that "Rogers has not proven that he did not, or could not, have borrowed or rented a truck described by Butler in early 1986" (ROB 98) – despite the lack of evidence that Petitioner did any such thing, and the affirmative testimony of close neighbor (and prosecution witness) Toby Coffey that Petitioner never borrowed Coffey's white truck and that no such white truck had ever been parked at Petitioner's house; the rank speculation that Petitioner did not dispose of the weapon used to kill Tracie Clark because "he might . . . have had enough interest for public safety to be concerned that a discarded firearm might be discovered and used by another criminal" (ROB 86); the contention that there was nothing distinctive about the Michael Razlaff's truck with the grey, weathered sideboards attached to the back because – Respondent asserts, without proof – "[o]bviously they would be simple to make and could not be much less common than white pickup trucks were." (ROB 98 fn. 57.) This approach becomes fairly constant in regard to the ineffective assistance of counsel claim, where (for example) Respondent asserts that there is no evidence to support the Referee's findings that trial counsel failed to complete even a basic investigation, including obtaining the tape recording of Ms. Butler's Lerdo interview and a complete record of her criminal history. Respondent thus ignores the established facts that, although trial counsel turned over his entire file to successor counsel, none of that material was in there; that the file did contain what purported to be a complete index of materials obtained in investigation, with neither of those things listed; and that trial counsel made no use – and was quite apparently unaware – of their unique contents, even though they contained valuable impeachment evidence. Rather than acknowledge this circumstantial evidence and the reasonable inferences to be drawn therefrom, Respondent insists (with no supporting evidence) that trial counsel "may well have" obtained the materials from the District Attorney's office. (ROB 183.)

II), quoting Pen. Code, §1473(b) and citing, *inter alia*, *In re Malone* (1996) 12 Cal.4th 935, 962.) Significantly, the Petitioner has no "obligation to show that the testimony was perjured or that the prosecutor or his agents were aware of the impropriety." (*In re Hall* (1981) 30 Cal.3d 408, 424) 30 Cal.3d at 424. Thus even the most honest and sincere identification can be mistaken and constitute "false evidence." (*Id*. at pp. 417-418.)

Respondent proposes a different standard – or at least a different interpretation of the statutory language. According to Respondent, Petitioner can only prevail if he demonstrates that Ms. Butler's identification testimony was "'actually' and 'objectively' 'false.'" (ROB 24, citing *In re Richards* (2012) 55 Cal.4th 948, 966 & fn. 5 (*Richards I*).) What Respondent appears to mean by this is that Petitioner can only prevail if he shows that it is not even "possible" that Ms. Butler was correct in her "subjective opinion" that Petitioner was the perpetrator. (See *Richards I*, *supra*, 55 Cal.4th at p. 966 & n.5.)

Respondent is confused. First of all, the cited holding in *Richards I* was explicitly limited to expert opinion testimony, which the Court explicitly held to a different and higher standard than "eyewitness testimony." (*Id*. at p. 966 fn. 5.) As to the latter – even under *Richards I* – a petitioner need only show that the testimony was more likely false than true and that it was material to the outcome. (*Ibid*.) Second, the portion of *Richards I* on which Respondent relies is no longer good law even in regard to expert opinion evidence; as the Court has recognized, it was explicitly overruled by statutory amendment to Penal Code, section 1473. (*Richards II*, *supra*, 63 Cal.4th at pp. 309-311.) In short, the pertinent test remains simply: Does the weight of the evidence show that Ms. Butler was wrong when she testified that Petitioner was the man who attacked her?[10]

The instant case does present an unresolved question regarding the standard of prejudice applicable to a claim, like this one, that false evidence influenced the jury's penalty

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[10]This of course subsumes the related questions regarding the falsity of specific aspects of her testimony, such as whether she had seen Petitioner on television before she identified him; whether she had discussed the matter with other inmates; for what offense she was serving time; and whether the perpetrator ever said his name was "David."

determination in a capital case. The Court has reiterated the prejudice standard generally applicable to false evidence claims under Penal Code, section 1473, as follows:

> "'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.'" This required showing of prejudice is the same as the reasonably probable test for state law error established under *People v. Watson* (1956) 46 Cal.2d 818, 836.

(*Richards II*, *supra*, 63 Cal.4th at p. 312 [emphasis by the Court; remaining citations and internal signals omitted].)

But while the "reasonable probability" test certainly applies to false evidence presented at the guilt phase of a capital proceeding, the Court's precedent suggests that a different standard should be applied where, as here, the evidence was used to obtain a judgment of death:

> The state standard of review for error at the penalty phase, which is a more "exacting standard" than that employed for state law errors at the guilt phase, is set forth in *People v. Brown* (1988) 46 Cal.3d 432, 447–448: "[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Id*. at p. 448.) "When evidence has been erroneously received at the penalty phase, this court should reverse the death sentence if it is 'the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die.'" The federal standard of review for constitutional error is set forth in *Chapman v. California* (1967) 386 U.S. 18, 24: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." We recently reiterated that "'"*Brown*'s 'reasonable possibility' standard and *Chapman*'s 'reasonable doubt' test … are the same in substance and effect." ' "

(*People v. Hamilton* (2009) 45 Cal. 4th 863, 917 [remaining citations omitted].)

Thus it appears that the same prejudice test applies regardless of whether the use of

Ms. Butler's false testimony is treated as a state law claim under section 1473, or (as Petitioner asserts in the alternative) as a violation of his federal constitutional rights to due process and a reliable capital verdict; under either theory, the State bears the burden of establishing beyond a reasonable doubt that the false testimony did not contribute to the decision to sentence Petitioner to death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

b. Newly Discovered Evidence

Respondent is also wrong about the law governing "newly discovered evidence" claims, in several respects. As to one of them – the applicable prejudice standard – Respondent's error is understandable, for the law has recently changed.

As of January 1, 2017, the pertinent statute compels habeas corpus relief when '[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.'" Pen. Code, §1473, subd. (b)(3)(A) (as amended).) To the extent that this alters the test for prejudice, Petitioner should receive the benefit of that change.[11] (See *People v. Babylon* (1985) 39 Cal.3d 719, 722 ["absent a saving clause [in the statute], a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal."].)

More significantly, Respondent is mistaken about what evidence may be considered in reviewing a "newly discovered evidence" claim. Respondent asserts that the reviewing court (or in this case the referee) is limited to considering only "evidence which was not known, or could not have been discovered by diligent investigation, prior to judgment."

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[11]The law formerly provided that "[a]t the guilt phase, such [new] evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. By analogy, 'new' evidence should not disturb a penalty judgment unless the evidence, if true, so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 (citations omitted).) The change in the law clearly affects the consideration of claims pertaining to the guilt phase; it is less clear whether the alteration in phrasing regarding penalty phase claims makes any difference.

(ROB 147, citing *In re Hall, supra*, 30 Cal.3d at p. 420.) Thus Respondent contends that the Referee erred in (and this Court is precluded from) considering any evidence that was known or should have been known at the time of trial – including all of the details of Tambri Butler's description that matched Michael Ratzlaff but did not match Petitioner.

While it is true that the Court's opinion in *Hall* defined "newly discovered evidence" in essentially the terms reported by Respondent, a few paragraphs later the Court made clear that – once a petitioner has presented any evidence that meets that definition – the reviewing court can and should *also* "consider [whatever] additional evidence of innocence that was known or could have been discovered before trial." (*In re Hall*, *supra*, 30 Cal.3d at p. 420.) Respondent does not dispute that Petitioner presented some proof that does meet the "newly discovered evidence" definition – including, notably, the evidence of Ratzlaff's attack on Lavonda Imperatrice. (See ROB 148 *et seq*.) Thus the Referee quite appropriately looked at all of the other exculpatory evidence presented, as well as the newly discovered material, to determine whether together they warranted relief.

Respondent separately insists that "newly discovered evidence does not include statements Butler made which allegedly undermine her trial testimony." (ROB 159.) That is simply incorrect, as demonstrated by the Court's opinion in *Hall* in which the "newly discovered evidence" on which relief was granted consisted of the post-trial (partial) recantations of the key eyewitnesses. (See, *In re Hall*, *supra*, 30 Cal.3d at p. 421.)[12] *Hall* is precisely on point: for exactly the same reason that the recantations in that case were

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[12]Respondent relies on *Richards I*, *supra*, 55 Cal.4th at pp. 956-968, for the contrary proposition, but that reliance is misplaced. Respondent asserts that the Court chose to address the claim in *Richards* (which was based on an expert's change of opinion) solely as a false evidence claim, and thus somehow implicitly held that the tendered evidence could not qualify as "newly discovered evidence." (ROB 159.) In fact, *Richards I* adjudicated *both* a "false evidence" and a "newly discovered evidence" claim, and denied the latter because the evidence in question did not meet the (formerly) very high prejudice standard for such claims. (*Richards I*, *supra*, 55 Cal.4th at pp. 967-968.) Putting aside that *Richards I* has been overruled on two scores, the fact remains that in that case the Court neither purported to overrule *Hall* nor did it do so *sub silentio*.

properly considered "newly discovered evidence," Tambri Butler's many statements (sworn and unsworn), casting doubt on her trial testimony, were appropriately considered by the Referee and should be considered by this Court.

In short: All of the evidence presented to the Referee was and is properly included in the evaluation of both the "false evidence" and "newly discovered evidence" claims, as well as the corresponding federal constitutional claims.

C. THE OVERWHELMING WEIGHT OF THE EVIDENCE, SOME NEWLY DISCOVERED, DEMONSTRATES THAT TAMBRI BUTLER TESTIFIED FALSELY WHEN SHE IDENTIFIED PETITIONER AS HER ASSAILANT

1. David Rogers Did Not Fit the Description Ms. Butler Gave of Her Attacker

As the standard jury instructions regarding eyewitness identification have long reiterated, a key factor in assessing the accuracy of such an identification is "[t]he extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness . . . ." CALJIC 2.92 (5th ed. 1988); *accord*, CALCRIM 315 (2017 ed.); *accord,* 4 RHRT 649-50 [testimony of eyewitness identification expert Dr. Kathy Pezdek]. And, as Dr. Pezdek stressed, when the witness has had an extended time to view the perpetrator and has provided very specific descriptors of that perpetrator, those very specific elements of the description are almost sure to be accurate: "when people are that specific in their description, they are rarely wrong." (4 RHRT 657.) Ms. Butler had an extended period of time – somewhere between 45 minutes and two hours by her various accounts – to view her attacker, and she gave a remarkably detailed description of his appearance and his effects. (See 12 RHRT 2226 [testimony of criminal defense expert David Coleman, noting that he was "astonished" at the level of detail in Ms. Butler's description "far more than I was used to seeing in my 35 years of reading police reports."].) Yet, as the Referee found: *"None of the descriptors given by Ms. Butler of her assailant fit the petitioner.*" (R&F 6.) As Dr. Pezdek concluded, "there is such a significant mismatch here that it would raise question about whether this could possibly be the same person." (4 RHRT 656.)

a. The Attacker's "Thick Brush Mustache": The very first thing Ms. Butler recalled about her assailant was his "thick, brush . . . mustache" (6 RHRT 1072; 4 RH Exhs.

889.) As the Referee found, and as the uncontroverted evidence showed, "*petitioner never had a mustache*." (R&F 7; JR RT 50-51.)

We have already noted Respondent's principal response, namely that it should prevail on this point because "none of the habeas corpus evidence proved that Rogers could not have worn a fake mustache . . . ." (ROB 86.) The argument, as phrased, is absurd.[13] Its more coherent underlying premise – that Petitioner "could have" had a false mustache which he disposed of after the fact – rests entirely on unsupported speculation.

In fact, the only actual evidence in the case strongly suggests that Petitioner did *not* dispose of or hide any 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. The Referee accordingly concluded that "*Respondent's argument that petitioner could have used a theatrical mustache is unpersuasive.*" (R&F 7.)

Respondent acknowledges only one of these items of proof – namely that Petitioner had not disposed of the murder weapon[14] – and offers a series of unavailing counter-

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[13]Such negatives are by their nature impossible to prove; it would be equally accurate, and equally meaningless, to say none of the evidence proved that Petitioner "could not have been" abducted by space aliens.

[14]Respondent's failure even to mention the tire tracks or the other incriminating things that Petitioner made no effort to hide is yet another instance of its breach of the fundamental duty to fairly and fully report the evidence supporting a finding it is challenging.

arguments that it did not tender below. Respondent suggests that Petitioner did not get rid of the "murder weapon" because the gun (a Cold .38 Detective Special) "would not be distinctive for a police officer," or that he "might think disposing of the gun would be futile in light of the existence of a police report that could connect him to the disappearance of the gun." (ROB 85-86.) Neither point is responsive: The "fact" (for which Respondent cites no evidence) that the gun was a common make of firearm for a police officer would not alter the proven fact that it was a stolen gun used in multiple homicides, and thus would (and did) inculpate Petitioner in those crimes, and the police report in question – the one he filed to report that the gun was stolen from a convenience store – would prove nothing at all unless the gun was (a) recovered in his possession, and (b) tested and shown to be the one used in the killings. From there, Respondent descends even further into vacant speculation, suggesting that Petitioner "might have" chosen not to dispose of the gun out of concern for public safety (because someone else could retrieve it from the bottom of a lake and use it in a different crime), and finally that "it does not appear" that Petitioner "had a specific reason to believe he could be connected with the Clark murder . . . ."[15] (ROB 85-86.) Here, the fact conveniently omitted by Respondent – that Petitioner knew he had left tire tracks at the scene of Ms. Clark's killing, and (as an police officer) knew those could be matched with his truck – comes into play. And none of Respondent's points even begins to explain why Petitioner would be meticulous about covering up a sexual assault but do nothing at all to dispose of evidence tying him to two homicides.

Respondent next rehearses another brace of arguments it did not present to the Referee. First, it suggests that maybe Tambri Butler was mistaken about the mustache when she made it the first item of her description to the detectives a year after the assault. Putting aside what this says about the memory of its star witness – whose recollections 25 years later

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[15]In support of this point, Respondent observes that the Clark killing had only happened a few days before Petitioner's arrest and implies that he thus had insufficient time to dispose of the weapon. (ROB 86.) Respondent forgets the trial evidence showing that the same weapon was also used in the killing of Janine Benintende, a year earlier.

Respondent insists should be treated as gospel – the suggestion is untenable.[16] Ms. Butler stated at the outset of her interview in 1987 – and reiterated at Petitioner's trial and many times in the decade-and-a-half that followed – that her attacker had a "thick, brush mustache." (6 RHRT 1072; 4 RH Exhs. 889; RT 5798 [trial]; 1 RH Exhs. 218 [first declaration: "thick bushy mustache that hung over his upper lip]; 3 RH Exhs. 680, 698 [to Hodgson in 1998: "a very bushy mustache"]; 1 RH Exhs. 253-254 [second declaration: "thick bushy mustache that grew long over his upper lip . . . he wanted to kiss a lot and I found it disgusting"]; 3 Exhs. 723 [to Hogdson in 2001: "I remember a mustache [which] came down over his lip and that disgusts me"].) Dr. Pezdek put it modestly: if Ms. Butler noticed a mustache, "most likely it was there." (4 RHRT 737.)

Ms. Butler's very specific description of the nature of the mustache – "thick" and "brush" or "bushy" – also disposes of Respondent's "possibility . . . that she had an impression of a mustache" because perhaps Petitioner had just failed to shave. Even a few days growth doth not a "thick bushy mustache that grew over his upper lip" make. Nor, for that matter, is there even any evidence to support Respondent's predicate assumption that Petitioner "did not shave on his days off." (ROB 86.) Respondent relies on Petitioner's "booking photograph," which (Respondent says) "shows dark beard growth on his upper lip . . . ." (*Ibid*.) But, according to Investigator Hodgson, the post-arrest photographs of Petitioner in evidence – what Respondent apparently is referring to as "booking photographs"[17] – were *not* taken on the day of his arrest (February 13, 1987), but rather were

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[16]If, as Respondent insists, "it is quite possible that Butler simply made a reasonable good faith mistake about whether her attacker had a mustache" (ROB 86) one is left to wonder what part of her account, if any, was accurate.

[17]Respondent does not provide a record citation for the "booking photograph;" the only post-arrest photographs of Petitioner in evidence were those referred to in Investigator Hodgson's testimony. (See 11 RHRT 2124.)

probably taken some four days later. (11 RHRT 2123-2124; 2331.)[18]

In short, there is no way to contort the record to avoid the fact that the Referee was correct: The attacker had a mustache and Petitioner did not.

b. The Attacker's "Big, Rough Hands": Ms. Butler apparently described her assailant to the detectives at Lerdo before they turned on the tape recorder (4 RH Exhs. 892),[19] and something she said then led to the following, on-tape exchange: 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 hands were big. . . . His hands were rough, and big. I mean you notice these things.

(*Id* at 893.)[20]

This was another, very specific detail about the assailant – what Dr. Pezdek referred to as a "salient feature or essential characteristic" (4 RHRT 795) that was almost surely accurate. (See, 4 RHRT 655, 736.) As it turns out, David Rogers did not have "big hands" by any possible measure. In fact, according to unrebutted expert testimony,[21] Petitioner's hands are extremely small – falling somewhere between the smallest 1% and 5% of hand

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[18]It is undisputed that Petitioner stopped shaving after his arrest and "had a full beard during the trial." (ROB 87 fn. 52, citing 22 RT 5798.)

[19] That fact is itself significant in regard to the reliability of the identification process.

[20] As noted in the Opening Brief, 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."

[21] That testimony was from James Norris, who had a long and distinguished career as a criminalist in charge of police and district attorneys' crime scene investigations units. Mr. Norris has a particular expertise in the arcane area of palm prints and thus has extensive experience with hand measurements. Mr. Norris had been qualified and testified as an expert on over a thousand prior occasions, usually as a prosecution witness. (See 5 RHRT 815-821.)

sizes of American males.[22] (5 RHRT 828-829.) Ms. Butler's description again failed to match Petitioner – this time in regard to a characteristic that Petitioner could not conceivably have altered. Thus the Referee listed, among the traits that did not match Ms. Butler's description, the fact that "*Petitioner had . . . small hands . . . .*" (R&F 6.)

Respondent simply ignores the expert testimony regarding the size of Mr. Rogers' hands;[23] it instead insists that the Court should reject the Referee's finding and accept the Attorney General's own opinion that the hands pictured in the "booking photographs" were not small at all. (ROB 83.) For what it is worth, Petitioner's counsel disagrees: Examining the only one of those photos that picture Petitioner's hands in a context in which their relative size could possibly be judged (6 RH Exhs. 1580), the pictures in which they are measured (3 RH Exhs. 634-36) and, particularly, their outlines (3 RH Exhs. 638-39) they appear pretty small to us. And none of the pictures display hands that could conceivably be described – much less with great assurance – as being "big and rough."[24] (See, 6 RH Exhs. 1580, 1585, 1586.)

But the Court does not have to depend on the Attorney General's opinion, or ours. The undeniable, scientifically established fact, based on unrebutted expert testimony, is that David Rogers had, and has, very small hands. There is thus substantial, uncontradicted evidence in the record to support the Referee's finding in this regard: Petitioner does not match a very specific, immutable characteristic of the assailant described by Ms. Butler.

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[22]As will be discussed, Michael Ratzlaff's hands were enormous – larger than at least 95% of the adult male population. (5 RHRT 826-828)

[23]In fact, Respondent makes no mention at all of Mr. Norris's testimony regarding hand sizes – despite the fact that, below, Respondent went to considerable (though fruitless) efforts to try to have that evidence excluded. This is yet another example of Respondent's failure to perform its duty to the Court to fairly present the record evidence.

[24]The obvious point of comparison, which will certainly be discussed, is with the hands of the alternative perpetrator, Michael Ratzlaff, which both look very large in the extant photographs of him (6 RH Exhs. 1714-17), and were established by the same expert testimony as being at the very top end of the scale for American men. (5 RHRT 826-828.)

c. The Attacker's Big, "Hairy" Chest: Another quite distinctive – and thus persuasive – detail in Ms. Butler's description of her attacker was that he had a big chest with "hair on his chest" – "thick" but not "real thick . . . [b]ut it wasn't just a little bit. Across the front and down the belly." (4 RH Exhs. 889-90.) The Referee found that this descriptor did not "*fit the petitioner*," noting that "*[p]etitioner had a small chest . . . nor did he have hair on his chest across the front or down the belly."* (R&F 6.)

In attacking the Referee's finding as unsupported by substantial evidence, Respondent first argues, somewhat vaguely, that Ms. Butler's "description of the man's chest as big was likely influenced by the events of the assault, similar to the reported phenomenon of 'weapons focus,'" and that the lighting was poor. (ROB 84.) Respondent offers no record citation regarding the "phenomenon of 'weapons focus'" and the only record evidence was Dr. Pezdek's testimony that it likely had no play in this case, for it is generally only a factor in brief exposures (4 RHRT 634) – unlike the prolonged interaction described by Ms. Butler, most of which took place before a weapon was produced. (See 4 RHRT 639-640 [weapons were not present for a large enough portion of the time to compromise Butler's overall ability to describe attacker].) More generally, Respondent's efforts to impeach Ms. Butler's observational capabilities during the attack would not only apply to what she said about her attacker's chest, but to the entirety of her report, the accuracy of which is central to Respondent's case.

Respondent next contends that the "booking photographs" show that his chest was *not* small, "contrary to the referee's conclusion." (ROB 84.) Again, we disagree: The chest revealed in his photos would much more appropriately be described as "sunken" than as "big." (See, 6 RH Exhs. 1540, 1541; see also, photos attached to Exh. 3 in support of habeas petition.) More to the point, Ms. Butler herself disagreed: Even as she identified Petitioner's photograph, she told the detectives that the man who attacked her had a larger chest. (6 RHRT 1079; 4 RH Exhs. 889-90, 892.)

There is no room for honest disagreement about the more specific (and thus far more important) detail: Petitioner did *not* have anything like "thick" hair on his chest and belly.

Exactly the opposite is true – photographs demonstrate that he had virtually no hair at all on his chest and absolutely none on his abdomen. (6 RH Exhs. 1580, 1581; see also photographs attached to Pet. Exh. 3.) In fact, his wife testified that she and their friends used to make fun of Petitioner because of it. (JR RT 50-51.) This deviation regarding a particular detail provides another strong indication that Ms. Butler identified the wrong man.[25] (4 RHRT 655.)

In the years of hearings and argument and hundreds of pages of briefing before the Referee, Respondent never suggested that Ms. Butler's description of her attacker's hairy torso fit Petitioner – but, incredibly, it does so now. Seizing on the few errant hairs around Petitioner's nipples, visible in one of the photographs, Respondent asserts that Ms. Butler's description "is not a close fit for Rogers, but neither is it completely wrong." (ROB 85.)[26] Petitioner submits that there is no universe in which it could be anything but completely wrong to say that Petitioner had "thick hair . . . across his chest and down his belly." The fact, which Respondent cannot evade, is that the man who attacked Tambri Butler had a hairy chest and abdomen – and Petitioner does not.

d. Petitioner Has a Tattoo; The Attacker Did Not: As the Referee found, another of the salient features of Ms. Butler's description of her attacker was that, aside from

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[25]As capital defense expert David Coleman noted, it involves a characteristic that is "pretty much immutable . . . you don't change the nature of the chest hair that the good Lord gave us or didn't give us." (12 RHRT 2242.)

[26]Elsewhere in its brief, Respondent has the temerity to accuse Petitioner's wife, Joyce Rogers, of having perjured herself when she testified that Petitioner had no chest hair, and Respondent goes on to assert generally that "Jo's testimony is less credible than Butler's." (ROB 54 fn. 30.) It is, frankly, outrageous to suggest that Mrs. Rogers, who did not testify falsely about that or anything else, is less credible than Tambri Butler, who (regardless which of her accounts is believed) is a self-confessed and generally remorseless perjurer. (See *e.g.* 3 RHRT 321-22, 544-45, 6 RHRT 1023-24, 1231.) And it is a special insult to the long-suffering (and now deceased) Joyce Rogers that in making such unfounded accusations, and indeed throughout its brief, Respondent insists on referring to her simply by the affectionate name given her by her husband – "Jo."

a line of black moles across his lower back, "*he had no other markings [on his body]*." (R&F 7; see 4 RH Exhs. at 892 [Lerdo interview]) This again distinguished the assailant from Petitioner who "*had a visible tattoo on his right arm.*" (R&F 7; see, 6 RH Exhs. 1540, 1541; see also, photos attached to Exh. 3 in support of habeas petition.)

Respondent attacks this finding, asserting that "the evidence does not show that [Butler] had the opportunity to see [the tattoo]." (ROB 87.) According to Respondent, Butler told investigators her assailant . . . did not take off any of his clothing." (*Ibid*., citing 6 RH Exhs. 1644.) In a footnote, however, Respondent concedes that Ms. Butler *did* tell the investigators that, at one point, the attacker "had his shirt off" – but Respondent insists that she did not really mean that; rather she was just saying that the shirt was partially unbuttoned. (ROB 87 fn. 53, quoting 6 RH Exhs. 1661.)

We can put aside Respondent's unpersuasive effort to finesse the plain meaning of Ms. Butler's words as quoted, for there is ample other record evidence to support the Referee's finding. As Ms. Butler admitted at the reference hearing, she also voluntarily signed a declaration, under penalty of perjury, explicitly affirming that she had seen assailant's nude torso and arms, and that he had no tattoo – and that she "would have noticed" if he did. (1 RHRT 83; 1 RH Exhs. 267.) Asked to square that with her direct examination testimony at the hearing – in which she said she "believed" she had never seen the perpetrator with his shirt off – the best that Ms. Butler could offer was:

"I know I have said different stories." (6 RHRT 1232.)

The fact that Respondent chooses to accept only one of those stories would not be a problem but for its failure to include the others in its briefs before the Court. In fact, at no point in its briefing does Respondent even acknowledge the existence of the separate, "supplemental declaration" in which Ms. Butler swore that she had an opportunity to see the attacker's arms and torso and that he did not have a tattoo. This disservice to the Court and the truth-finding process cannot obscure the fact that there is substantial evidence to support the Referee's findings in this regard, and no new "story" can obscure the fact that Ms.

Butler's description of her assailant did not match the man she identified – David Rogers.

e. The Attacker's "Thicker" Hair: Even as she was identifying the photograph of Petitioner, Ms. Butler repeatedly noted that her assailant had "thicker hair" than David Rogers did. (4 RH Exhs. 889-90, 923.) Respondent contends that the only reason Ms. Butler thought there was a mismatch was because, in the particular photograph she was shown (*i.e.*, Petitioner's "Behind the Badge" picture used in the six-pack) Petitioner's hair was cut short on the sides. (ROB 83, 91 & fn. 55.) A problem with this argument is that there are many photographs of Petitioner in evidence, and there is not one in which Petitioner could fairly be described as having "thick" hair on any part of his head. But even that misses the point: As Dr. Pezdek testified, Ms. Butler's remarks, repeatedly drawing contrasts between the photograph that she was identifying and her own memory of her attacker, demonstrate that Ms. Butler herself felt that it was "a misfit, that her description doesn't map onto the person she is identifying . . . ." (4 RHRT 795.) In other words: Even as she was making the identification, Ms. Butler was herself questioning its reliability.

f. The Line of Moles Across the Assailant's Lower Back: A truly distinctive physical characteristic that Ms. Butler repeatedly described to the investigators at Lerdo was that "[a]cross the back of [the perpetrator's] rear he had moles . . . [r]ight above his . . . fanny." At one point the rapist 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." (4 RH Exhs. 892.) This was one of the few specifics that Ms. Butler provided to the detectives that she also reiterated on direct examination at the reference hearing; she testified that, 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." (3 RHRT 425-26; see also, 6 RHRT 1076.)

Shown a (relatively recent) 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. (6 RHRT 1076-77; see, 2 RH Exhs. 466.) And another photograph of Petitioner's back –

taken just after his arrest – makes it even clearer that he did not have anything resembling a line of "dark little moles" running across his lower back "right above his fanny." (5 RH Exhs. 1384.)

As Dr. Pezdek testified, certain of the perpetrator's features described by Ms. Butler, and particularly "the specific pattern of the moles across the back, those are quite specific descriptors. And if she looked at someone for a long period of time and that's how she described him, that's probably what he looked like. And the fact then that those descriptors don't match the defendant is telling information." (4 RHRT 657.) Dr. Pezdek went on to explain that some other sorts of details are fairly generic and it would mean little, for instance, if someone failed to notice a pair of glasses. "So people quite commonly miss this information. But if they include it in their description it is there. So the moles are quite unique and quite specific, the location of them, their size." (*Ibid*.)

The Referee included Ms. Butler's report about the moles – and Petitioner's lack of them – in the list of "*the descriptors given by Ms. Butler of her assailant [that do not] fit the petitioner.*" (R&F 6.) But there was another aspect of Ms. Butler's testimony regarding the moles that the Referee found equally or more significant.

After being forced to admit that Petitioner's back did not bear the line of moles she described, Ms. Butler abruptly shifted gears. Referring to what appear to be a few (rather small) blemishes on Petitioner's middle and upper back (see 5 RH Exhs. 1384), Ms. Butler referred to them as "disgusting pimples" that she remembered "feeling" during the attack. (6 RHRT 1227.) Suffice it to say that Ms. Butler had never before mentioned anything about feeling or seeing "disgusting pimples" in any of her many accounts, sworn and unsworn, during the 25 years since the attack.

Watching Ms. Butler suddenly alter her account – and observing her demeanor as she did so – the Referee saw this new testimony as exactly what it was: a transparent effort on her part to find another way to inculpate Petitioner. This led to the following specific finding:

> *The Court finds Ms. Butler not credible. The 'pimple scenario is but one example of her fudging or changing her testimony. Tambri Butler's trial testimony lacked credibility on many issues (seeing petitioner on TV, crime in custody for, and reference hearing issues [including] moles across petitioner's lower back characterized by Butler as dark splotches, then switched to 'ugly pimples,' jail molestations, inconsistent stories changed numerous times.) . . . 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.*

(R&F 7 [record citations omitted].)

According to Respondent, the Referee was just saying that Ms. Butler's testimony about the pimples was merely a failure of recollection – not that it was "willfully false." (ROB 67-68.) We submit that Respondent's interpretation is insupportable: the Referee quite clearly viewed this as one of many instances of Ms. Butler "fudging" important details which – in addition to many *other* times when she was sincere but confused – rendered her testimony as a whole "not credible." And however it was reached, this unambiguous credibility determination by a judicial officer who had the opportunity to watch Ms. Butler on the stand for some days, is a quintessential example of a finding to which this Court affords deference. (See, *e.g.*, *In re Boyette*, 56 Cal. 4th at 876-877.)

In the end, what is clear is that Petitioner did not have the line of black moles across his lower back that Ms. Butler explicitly and repeatedly ascribed to her assailant. The fact that Petitioner did not bear this very specific descriptor, that was explicitly and repeatedly recalled by Ms. Butler, is very strong evidence that he was not the perpetrator.

g. The Attacker's Children, Wife and Dog: When – before the attack commenced and their interaction was still congenial – Ms. Butler asked the perpetrator about his family, he replied that he had "two kids, a wife and a dog;" that one of the children was a boy, and the other a girl; "[a]nd he said, 'well, they're not babies.' And that's all." (4 Exhs. 908-09; see also *id*. at 886-87.)[27] (4 RH Exhs. 908-09; see also *id*. at 886-87.) Petitioner did

[27]Pressed by the detectives, Ms. Butler thought that the man said something about "school" – perhaps that one the kids was going to enter college – but she could not

not have a daughter or a dog; his two sons (from a prior marriage) were grown. (JR RT 25-27.) This is thus another, rather straightforward mismatch between the perpetrator described by Ms. Butler and Petitioner.

Respondent also chose not to mention anything about Ms. Butler's description of the perpetrator's family.[28] Respondent's reticence in this regard may be the result of an understandable reluctance to get into the thicket of Ms. Butler's subsequent, always different and increasingly ornate versions of the exchange about the perpetrator's family.[29] But it remains that this is one more area of description that differentiates Petitioner from Ms. Butler's assailant – and, as will be seen, that tends to confirm that the assailant was actually

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remember. (*Ibid.*) Significantly (in light of the many, conflicting additions she made to this account in the decades following) Ms. Butler did not mention anything about the perpetrator stopping to show her photographs of his family members; nor did she suggest that she had seen or known anything more about the man's wife.

[28]Respondent does not even include anything about it in its lengthy report of the Lerdo interview, where Ms. Butler reported to the detectives the details of what the perpetrator had said about his family. (See, ROB 31-38.)

[29]The evolution of Ms. Butler's stories in this regard is traced in Petitioner's Opening Brief, and is summarized in the Appendix to this brief, at page 6.

Respondent's only allusion to any of Ms. Butler's statements in regard to the perpetrator's family is found in Respondent's Opening Brief at page 54, fn. 30, where it is employed as part of a bizarre attack on Joyce Rogers' character. There, Respondent reports Ms. Butler's assertion – first made more than a decade after Petitioner's trial – that Petitioner had shown her a picture of Mrs. Rogers, whom Mr. Butler claimed to have known from a truck stop where Mrs. Rogers worked and Ms. Butler had been plying her trade. In this version, Mrs. Rogers had been kind enough to keep Ms. Butler off of a "hot list" of prostitutes whose presence would prompt a call to the police. After suggesting – quite reasonably – that there was no such photograph and that Ms. Butler was just conflating it with an image of Mrs. Rogers she later saw on television – Respondent cites the story as proof that "Jo at least tolerated prostitution at the truck stop," a (not otherwise proven) "fact" that somehow made her "testimony less credible than Butler's." (ROB at 54 fn. 30.) Petitioner will not pause to unpack that mass of supposition, innuendo and poor reasoning but will merely point to it as a prime example of the vice of a party selectively reporting only isolated snippets of record evidence.

Michael Ratzlaff. As such it is additional, substantial evidence in support of the Referee's finding that Ms. Butler was wrong when she testified that Petitioner attacked her.

h. The Assailant's Truck: When interviewed at Lerdo, Ms. Butler described, in some detail, the rapist's truck – including that it was a white pickup, not brand-new, but "newer"; that it had grey, weathered sideboards attached to the bed; that the cab was strewn with trash and contained a large thermos, a flashlight, and some sort of toolbox or case; that it had a large rear window and hook (or something like it) next to that window. She specifically remembered the word "Chevrolet" written in red letters across the tailgate. (4 RH Exhs. 894-99, 920.) She also said that she saw the perpetrator, with the same truck, on at least three occasions during the weeks after the attack. (*Id*. at 931-32.) Petitioner did not own a white pickup truck at the time Ms. Butler was attacked (he drove a Jeep and a small green Datsun pickup (12 RHRT 2390)), and there is no evidence whatever that he had access to such a vehicle.[30]

This distinction alone provides powerful evidence that Petitioner was in fact not the man who raped and tortured Tambri Butler. The Referee recognized as much, and also recognized the special significance of Ms. Butler's testimony in this regard:

> *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 7.)

In so finding, the Referee necessarily rejected Respondent's contention – argued strenuously below, and reiterated before this Court – that Petitioner must have been using

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[30]The fact that Petitioner did (later) own a light-colored pickup, and was driving it when he picked up Tracie Clarke, added undeserved weight to Ms. Butler's testimony: Trial counsel never pointed out that Petitioner did not own such a truck at the time of the Butler assault, and so the jury surely conflated the truck described by Ms. Butler with the one used by Petitioner in the Clarke killing.

the truck he later purchased from Toby Coffey for his nefarious uses.[31] The assertion is not just lacking in evidentiary support; it is directly contrary to the record evidence. The *prosecution's* evidence at trial was that Petitioner did not take possession of the truck until January of 1987 – a year after Ms. Butler was assaulted. (RT 4642; 4674; 4755; 4819.) And Mr. Coffey (who had testified for the prosecution at trial) was absolutely clear that he *never* loaned anyone – including Petitioner – his vehicles. (2 RHRT 330.)

Respondent suggests that Mr. Coffey's testimony was ambiguous on this point – that Mr. Coffey just could not remember whether or not he loaned Petitioner his truck – and that "it would not be surprising" if he made an exception to his policy and loaned his truck to a neighbor. That is simply not a fair reading of either the content or the implication of Mr. Coffey's testimony, which was as follows:

> Q: Mr. Coffey, do you have a policy about loaning your vehicles to other people?
>
> A: Yes, sir.
>
> Q: What is that policy?
>
> A: I don't loan my vehicles to nobody.
>
> Q: Okay, based on that policy, to the best of your recollection did you ever loan Mr. Rogers the truck before you sold it to him?
>
> A: *No, sir*. Not that I can remember.

(2 RHRT 329-30 [emphasis supplied].)

Respondent does not quote the last part of the colloquy, but paraphrases Mr. Coffey

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[31]Respondent insists that, because the Referee did not directly address Respondent's speculative thesis about Petitioner having borrowed the truck from Coffey (or someone else), the Referee's finding "does not appear to resolve the factual question of whether Rogers had access to this pickup truck at the time of the assault and definitely does not suggest that it was impossible for Rogers to have driven another truck in the assault on Butler." (ROB 94-95.) To describe it as a "factual question" is a misnomer, given that there are no facts to support Respondent's contention, and the notion that the Referee had to affirmatively find (or that Petitioner had to affirmatively prove) that something was "impossible" is itself absurd. More to the point: Given that Respondent's contentions in this regard were strongly urged to the Referee, the only reasonable interpretation of the Referee's finding is that he found them meritless.

as saying only that "he did not recall loaning his truck to Rogers" (ROB 95) – leaving out the forceful "No, sir" that preceded that statement. Whatever possible ambiguity can be read into Mr. Coffey's testimony on the cold page did not exist for the Referee, who heard him testify and surely took account of his intonation and demeanor. Contrary to Respondent's naked speculation, it would indeed have "been surprising" – to Mr. Coffey, at least – for him to have made an exception and loaned his truck (repeatedly) to Petitioner.[32] For Respondent to build an argument on the tiny rhetorical qualification at the end of the response is really grasping at straws.

Nor is that the only problem with Respondent's thesis: The truck that Coffey owned and later sold to Petitioner simply did not correspond to Ms. Butler's description: Unlike the "newer" white Chevrolet described by Ms. Butler, Mr. Coffey's truck was a beige 1966 Ford, and thus more than 20 years old at the time of the attack;[33] even if someone mistook it for a Chevrolet, no one could think it was "newer." The truck always had a camper shell on it. (2 RHRT 325-26.) Mr. Coffey did not have sideboards for it, and even after he sold it to Petitioner, he saw the truck every day parked in front of Petitioner's house, and never saw it with sideboards. (2 RHRT 326, 329.) The truck did not have anything like a hook or large window, and the interior was kept clean and neat.[34] (RT 4627-28; 12 RHRT 2390.)

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[32]The Court will recall that Ms. Butler saw the perpetrator with the white truck on at least two separate occasions after the assault took place. (4 RHRT 930-932.)

[33]In fact, Ms. Butler was quite specific that the truck was *not* that old: "it wasn't, you know, like a '60 or '70. It wasn't old." (4 RH Exhs. 897.)

[34]Respondent asserts that "the evidence was equivocal as to whether Rogers kept his truck completely free of clutter" (ROB 98 at 57) – and then (perplexingly) cites to the *only* evidence on the subject, which was Joyce Rogers' testimony as follows:

Q: How did he keep the inside of the truck? Did he keep –
A: Clean.
Q: Allow it – did he allow it to get. I'm sorry. I didn't hear the answer.
A: I said clean.
Q: Did he ever allow the truck to get dirty or cluttered with garbage?
A: No.
Q: And did he ever tease you or chide you if you let your car get dirty.
A: Oh, yeah. Uh-huh.

Respondent relies on the testimony of Katherine Hardie, a Union Avenue prostitute known as "Redbone." Ms. Hardie testified during the guilt phase of Petitioner's trial that sometime in the late Summer or Fall of 1986, she was picked up by someone driving a white truck with a camper shell. The driver of the truck would not go where she wanted, but instead tried to take her "out to the orchard" and Ms. Hardie jumped out of the vehicle. (RT 4914; 4916.) Shown a picture of the truck that Mr. Coffey sold Petitioner, she said that it was the same one that she had jumped out of, a year-and-a-half earlier. (RT 4914.)

From this testimony, Respondent insists that it must have been Petitioner driving the truck. (ROB 96-97; see also ROB 152 [referring to "Katherine Hardie . . . jumping out of Rogers' truck" as if it were a proven fact.]) Putting aside the fact that Petitioner did not own the truck then (and Tobey Coffey would not have loaned it to him) the fatal defect in that construction is that Katherine Hardie never said that the driver of the truck was David Rogers. In fact, when asked at trial, Ms. Hardie testified that she could not describe the driver. (RT 9414-16.) Thus she pointedly did *not* identify Mr. Rogers as the man driving the truck – even though he was sitting right in front of her at the defense table, having admitted killing another woman who worked on Union Avenue. That setting emphatically – indeed, unfairly – suggested to Ms. Hardie that Petitioner was the man she was talking about.[35] The fact that, even under those circumstances, Ms. Hardie did not identify Petitioner as the man driving the truck is itself powerful evidence that he was not.[36]

(JR RT 14-15.) This is an instance of Respondent not only failing to report evidence that supported the Referee's findings, but of actively misrepresenting what the evidence was.

[35]As Dr. Pezdek testified, regarding in-court identifications: "There is a presumption on the part of an eyewitness that it must be the guy, which then puts a heavier valence on the probability that that witness will just say yes, that's the person because he is there in court. . . . [Thus] an in-court identification is not a reliable source of information." (4 RHRT 704-05; *accord, People v. Fairley* 135 Cal.App.3d 182, 187 (1982).)

[36]Respondent relies upon fact that Ms. Hardie identified Mr. Coffey's truck as the same one in which she was picked up as proof positive that Petitioner must have been the driver, and simply assumes that it was not driven by Mr. Coffey himself – an odd assumption

Finally, Respondent reverts to sheer speculation: Noting the evidence that there were "'a lot of white trucks around town' in the 1980s" Respondent argues that Petitioner "has not proven that he did not, or could not, have borrowed or rented a truck described by Butler in early 1986." (ROB 98.) We note, and put aside, the absurdity of Respondent's premise: that Petitioner somehow bears the impossible burden of proving that he "could not have borrowed or rented a truck . . . ." Simply put: there is not a whit of evidence that he ever *did* borrow (or rent) a vehicle from anyone. Even when he picked up Tracie Clark, had sex with her, and ultimately shot her, he did so in his own truck. And Toby Coffey – who lived across a small street from Petitioner, and could recall Petitioner's vehicles even 25 years later – testified with some certainty that he never saw Petitioner drive a light-colored truck until he (Coffey) sold him one, a year after the Butler assault. (2 RHRT 330.) Yet, under Respondent's theory, Petitioner not only borrowed a white truck in order to have sex with – and assault – Tambri Butler, he *kept* borrowing that same truck during the weeks and months that followed, as he stalked Ms. Butler, attempted to pick up Ms. Hardie, and just generally drove it around Union Avenue.[37] This in turn conflicts with Respondent's basic premise, that Petitioner borrowed the truck for the same reason he purportedly disposed of a false mustache and a "stun gun" – so that he could quickly get rid of them in order to avoid

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given that Mr. Coffey was not only the truck's owner but (by his account) the *only* person to drive it during that period of time. But while we also doubt that Mr. Coffey picked up Ms. Hardie, we would point to a simpler explanation: Ms. Hardie was picked up in a light-colored truck with a camper shell and was shown a single picture of a light-colored truck with a camper shell. She was not asked what if anything – other than the camper shell – distinguished the truck in the picture (indeed, she was not asked *anything* about the truck on cross-examination). As Respondent argues, there were "a lot of white trucks around town" in Bakersfield, both then and now. (ROB 96, quoting 2 RHRT 332-33.) The most likely inference is that the truck which picked up Ms. Hardie just looked very similar to the one she "identified" in the one-truck photographic show-up in court. (Please see preceding footnote regarding the unreliability of such in-court show-ups.)

[37]Apparently – per that theory – whomever Petitioner was borrowing the truck from did not mind that Petitioner left the cab strewn with trash, and kept loaning it anyway.

detection.

Despite the ever-more tangled web of speculation and misstated evidence that Respondent attempts to weave, the facts are as simple as they appear on the record: Petitioner neither owned nor "borrowed" a truck that matched the description given by Tambri Butler of the vehicle used by her assailant; thus the assailant was someone else.

i. The Assailant's Stun Gun: Perhaps the most distinctive aspect of the horrible assault suffered by Ms. Butler was the rapist's use of a taser, or "stun gun" to torture her. But as the Referee noted, in support of his finding that "*none of the descriptors given by Ms. Butler fit the petitioner . . . , [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 stun gun.*" (R&F 6-7.) In fact, Detective (and prosecution witness) John Soliz confirmed at the reference hearing that, in all of the searches of Petitioner's home, vehicles, locker and other effects – which turned up a total of five guns (including the murder weapon), a cache of panties, pornography, the tires that left tracks at the scene of the homicide, and other evidence – no stun gun was found.[38] (6 RHRT 1780-81.)

Once again, Respondent answers this convincing item of proof with a flurry of speculation, asserting that "stun guns were available for purchase in 1983. [**Citation**s.] It would not be surprising if a police officer would be aware of such instruments." . . . "[Petitioner] could be expected to be interested in devices that would permit him to control a prostitute who did not want to cooperate with him." (R&F 157-158.) As Respondent readily points out elsewhere, Petitioner had a variety of contacts with other prostitutes, some lawful, some not. There was no testimony that any of those encounters ever involved a stun gun. Putting aside what would or would not be "surprising," and what could or could not be "expected," the actual evidence shows that Petitioner did not own or use a stun gun.

Notably, everything Respondent asserts in this regard undermines its theory that

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[38]Joyce Rogers testified that Petitioner had a number of guns, and did not hide them – but she had not seen a stun gun, "ever." (JR RT 15.)

Petitioner was the assailant, but disposed of the stun gun to avoid detection. If Petitioner did not bother to dispose of either a murder weapon (used to kill someone at around the same time as Ms. Butler was assaulted) or a "small gun" which Respondent asserts was used in the Butler assault, it does not follow that he would have gotten rid of the less incriminating stun gun – especially if (as Respondent's would have it) "he could find a stun gun useful . . . ." (ROB 158.)

The short version is this: Ms. Butler's rapist owned a stun gun. Petitioner did not.

j. The Many Very Specific Ways In Which Petitioner Did Not Match the Perpetrator Outweigh the Few, Generic Ways In Which He Did:

In addition to attempting (and failing) to vitiate the powerful evidence regarding the many specific mismatches between Ms. Butler's description and Petitioner's characteristics, Respondent places great emphasis on the few, very general things that Petitioner had in common with the perpetrator as described: Basically, his height and weight. Ms. Butler described her attacker as being between 5' 6" and 5' 9" tall and estimated his weight at around 160 to 175 pounds. (4 Exhs 891-92.) Petitioner was 5' 8" and weighed 160 pounds. (See, Exh 39 in support of Petition.)

Even if Ms. Butler's estimates of height and weight were accurate, they were not persuasive evidence that Petitioner was the perpetrator. As Dr. Pezdek explained, in testimony specifically credited by the Referee, descriptors like those are not significant indicia of reliability because they are "such generic information;" they merely suggest the man's height and weight were "within the normal range." (4 RHRT 659-60; see R&F 6.)

And while these descriptors would be of minimal value at best, they are especially questionable in this instance given the likelihood that they were simply inaccurate. As Dr. Pezdek testified, people are not particularly good at estimating height. (4 RHRT 659.) This is particularly true if they have not actually stood next to the person whose height they are guessing: "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." (4 RHRT 660-

61.) At the same time that Ms. Butler gave her estimate of her attacker's height, she stated – clearly, certainly and repeatedly – that she *never* stood next to her attacker and that she never got out of the truck "not once, not from the time I got into it until he pushed me out." (4 RH Exhs. 910; 6 RHRT 1073-74; see also 4 RH Exhs. 891 [Lage: "Did you ever stand up next to him?" Tambri: "Not once."].) Ms. Butler's estimate of her attacker's weight (that he was "160" or "175") was even less reliable: at the same time, she estimated Det. Lage's weight (which he said was "190") as being "165" or "170." (4 RH Exhs. 892.)

Thus the Referee concluded:

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

(R&F 6.)

Though Respondent insists that the Referee had "no reasonable basis to reject" Butler's height and weight estimates. (ROB 90.) However, Respondent has no answer for the weakness in Ms. Butler's weight estimate, and indeed concedes (as it must) that "Butler. . . underestimated Detective Lage's weight" (*ibid.*) – thought Respondent does not reveal that she underestimated it by as much as 30 pounds.

Regarding the height estimate, Respondent insists that the Referee should have credited Ms. Butler's estimate of her attacker's height, because she would have been able to compare it "with the top of the cab of the truck" when the perpetrator was standing outside of it. (ROB 89-90.) The problem with this argument is that it does not respond to the unrebutted testimony of the eyewitness identification expert, credited by the Referee, to the effect that a height estimate is simply unreliable if the witness has never actually stood next to the person whose height she is estimating.[39] (4 RHRT 660-61.)

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[39]Although Respondent's counsel vigorously – and unsuccessfully – cross-examined Dr. Pezdek on this point at the reference hearing, counsel did not even attempt to adduce evidence from Dr. Pezdek (or any other source) to support Respondent's contention that a reliable estimate could have been made by comparing the standing assailant to the doorframe

It was for this reason that Respondent concentrated its argument below on convincing the Referee of the accuracy of various of the (conflicting) accounts Ms. Butler provided to Investigator Hodgson more than a decade later, in which she insisted that she *had* stood next to the rapist, and thus knew for certain he was not taller than her. Those newer accounts were provided – with considerable coaching from Mr. Hodgson – for the undisguised purpose of undermining the new evidence that had come to light regarding the alternative perpetrator, Michael Ratzlaff, who was indeed several inches taller than Ms. Butler. We will accordingly review these contradictions in the record in the context of the discussion of the Ratzlaff evidence, where they are most pertinent.

It is sufficient for present purposes to observe that Ms. Butler's height and weight estimates were descriptors of such generality that they would have done little to corroborate her identification of Petitioner even if they were accurate – and there is excellent reason to conclude that they were not. They provide no effective counterweight to the mass of very specific evidence showing that Petitioner was not the person whom Tambri Butler described to the detectives as the man who raped and tortured her.[40]

We now turn to the equally persuasive mass of evidence demonstrating that someone else – a man named Michael Ratzlaff – was the person who committed those monstrous acts.

2. Unlike Petitioner, Michael Ratzlaff Matched Butler's Description of the Perpetrator

The gross mismatch between Petitioner and the perpetrator as Ms. Butler described him renders it more probable than not that Ms. Butler was mistaken when she identified Petitioner as her attacker. That probability becomes overwhelming when we add the facts about the alternative perpetrator, Michael Ratzlaff, who had nearly all of the specific characteristics Ms. Butler attributed to the perpetrator: the mustache; the hairy chest; the big

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of the truck. (See 4 RHRT 751-753.)

[40]Respondent also offers some argument to the effect that the perpetrator's *modus operandi* was more like Petitioner than like Ratzlaff. (See, RB 79-88.) We will respond to those assertions in the context in which Respondent made them – in regard to the newly discovered evidence about Mr. Ratzlaff.

hands; the blue plaid shirt; the gold watch with an expansion band; the white truck with weathered grey sideboards and littered cab, the flashlight, thermos and satchel, the big set of keys, the wife, two children (and boy and a girl) and dog; the small pistol and – last but far from least – the stun gun. That this man committed a remarkably similar – we would say nearly identical – attack on another prostitute, and had inflicted drunken, sadistic sexualized violence on several other women who worked on Union Avenue, points unavoidably to the conclusion that it was far more likely that Ratzlaff was the actual perpetrator of the attack on Ms. Butler.

While Respondent does its best to atomize the evidence and to pick apart each of the individual points of similarity – and suggest random dissimilarities – between Michael Ratzlaff and the perpetrator of the Butler assault, the law is quite clear that the evidence of "common marks" must be viewed in the aggregate. (*People v. Medina* (1995) 11 Cal. 4th 694, 748-749; *People v. Miller* (1990) 50 Cal.3d 954, 988–989; see also, *People v. (Glen) Rogers* (2013) 57 Cal. 4th 296, 328.) In this case, the points of commonality between Michael Ratzlaff and the rapist described by Tambri Butler, taken together, point overwhelmingly to the conclusion that they were one and the same.

a. Characteristics Shared By Ratzlaff and the Perpetrator

i. His Mustache

When she described her attacker to the detectives, the first thing Ms. Butler noted was a mustache – "a thick one. Thick brush one." (4 RH Exhs. 889.) She confirmed that description at the reference hearing. (7 RHRT 1293.)

It is beyond dispute that Michael Ratzlaff had such a mustache during the period when Ms. Butler was attacked – and indeed, for most all of his adult life. (6 RHRT 1261 [Helen Scoville Morgan (formerly Helen Ratzlaff)].) The other witnesses who knew Ratzlaff described it in virtually the same terms. (See, 5 RHRT 859 [Jeannie Shain: he had a "big mustache"]; 7 RHRT 1318 [Debbie Castaneda: Ratzlaff had a "thick mustache"]; DW 7.) And the extant photographs of Michael Ratzlaff from the 1980's all prominently feature a thick, bushy mustache. (5 RH Exhs 1344-46.)

Thus the Referee put at the head of his list of "*physical characteristics of [Butler's] assailant that differed from those of the petitioner and that could be attributed to a third party [i.e., Ratzlaff]: Long thick mustache curling over lip . . . .*"[41] (R&F 11.)

Yet, incredibly, Respondent seems to argue that this was *not* a trait that Ratzlaff and the perpetrator described by Ms. Butler had in common. (ROB 93.) Conceding (as it must) that Ratzlaff's mustache "would usually be described as bushy," Respondent points out that, in the mentioned photos, the mustache "curved inward" and argues that it thus could not possibly be the "brush mustache" described by Ms. Butler at Lerdo because paint brushes and workplace "brushes . . . generally have straight bristles . . . ." (*Ibid*.) This unsupported assumption that Ms. Butler intended a strict analogy to an industrial brush is defeated by Ms. Butler's other, clarifying remarks. The same photographs on which Respondent relies led Ms. Butler to remark to Investigator Hodgson: "The pictures that [Ms. Ermachild] 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." (6 RHRT 1155; 1163-64; 3 RH Exhs. 700.) And Ms. Butler's other descriptions of the perpetrator's mustache in her declarations (a "thick bushy mustache that grew long over his upper lip" ([1 RH Exhs. 253]) and to District Attorney's Investigator Hodgson ("I remember a mustache ... this one came down over his lip" [3 RH Exhs. 723]) echo rather precisely the description given by Ratzlaff's ex-wife, of a "bushy brown moustache, which he wore rather long, over his upper lip." (1 RH Exhs. 280, 284; see also 7 RH RT 1293-1294.)[42]

On its own terms, Respondent's attempt to distinguish Ratzlaff's mustache from the

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[41]The Referee's reference to "*a third party*" in the context of his findings can only reasonably be understood as intended to indicate Michael Ratzlaff, and both Petitioner and Respondent treat it as such. (See ROB 83-88.)

[42]Yet again, Respondent does not acknowledge any of the mentioned evidence that tends to support the Referee's finding, except to note darkly that Ms. Butler first used the specific adjective "bushy" after she met defense investigator Melody Ermachild. (ROB 93.) As such Respondent seems to be insinuating that Ms. Ermachild somehow used her dark magic to completely alter Ms. Butler's memory in regard to the mustache.

one described by Mr. Butler can charitably be described as feeble. As an effort to suggest that the Referee's finding in this regard was unsupported by substantial evidence, it is an embarrassing failure.

ii. The Layer of Hair On His Chest and Abdomen

The next characteristic noted by the Referee as being inconsistent with Petitioner but that could be attributed to Ratzlaff was the "*[l]ayer of hair covering but not obscuring his chest and abdomen* . . . ." (R&F 11.)

Ms. Butler specified that her attacker 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,"[43] which completely obscured her view of the "husband's" abdominal area – but the attacker nonetheless "was covered with hair. . . . It was brown." (4 RH Exhs. 889-90.)

The testimony of the witnesses who knew Mr. Ratzlaff intimately, as well as the contemporaneous photograph of his unclothed torso, demonstrates that (unlike the virtually hairless David Rogers) Ratzlaff had brown hair covering his chest and abdomen – but not so thick as to obscure the flesh underneath. (5 RHRT 857-58 [Jeannie Shain];[44] 7 RHRT 1263

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[43]When Ms. Butler referred to her "husband" in the Lerdo interview she was actually alluding to her then-boyfriend, William "Pegleg" Wiese. (See 6 RH Exhs. 1642.)

[44]Ms. Shain who knew Ratzlaff very well, both as a friend and (paid) lover, testified at the reference hearing as follows:

> Q: Mike Ratzlaff. Had some hair on his chest. Is that correct?
> A: Yes.
> Q: Okay. And you described it as not too thick.
> A: It was kind of, but it wasn't like gross, you know, where you couldn't see his chest.
> Q: So you could see some skin?
> A: Yeah.
> Q: Okay.
> A: But it was there.

(5 RHRT 875.)

[Helen Scoville]; 5 RH Exhs. 1347; 6 RH Exhs. 1714.)

In short, this characteristic was a precise, and telling, match between Ratzlaff and the perpetrator. In marked contrast to its efforts to convince the Court that this descriptor fit the (essentially hairless) Petitioner, Respondent makes no mention of it at all in regard to Michael Ratzlaff.

iii. His Big Hands

One thing that Tambri Butler found particularly remarkable about the man who attacked her: "His hands were big. . . . His hands were rough, and big. *I mean you notice these things.*" (4 RH Exhs. 893 [emphasis supplied].) One thing that was extraordinary about Michael Ratzlaff is that he had enormous hands: Estimating conservatively, they fell within the 95th to 98th percentile for the adult male population. (5 RHRT 826-828.) Thus, again, one of the attributes of Ms. Butler's assailant that the Referee found to fit Ratzlaff (and *not* fit Petitioner) was his "*[e]xtremely big hands*." (R&F 11.)

Respondent asserts that Ms. Butler's description of the man's hands was "vague and subjective, and thus insufficient" to support the Referee's finding, and suggests that it "appeared to be connected to her impression that the man was 'strong' when he was controlling and physically abusing her." (ROB 84.) Petitioner has no quarrel with the latter notion; Ms. Butler's perception of her attacker's hands was indeed formed during a prolonged ordeal during which she had very good reason to pay attention to those hands and extensive opportunities to do so – including as they held weapons used to threaten and hurt her, and as they were laid directly upon her.[45] As to the Respondent's principal assertion,

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[45]In this regard, Respondent's otherwise inapt invocation of the phenomenon of "weapons focus" (ROB 84) is pertinent. It describes the tendency of a victim during a brief encounter to train all his or her attention on the weapon being used to threaten them, and thus can interfere with the victim's ability to record memories of the attacker's face. (4 RHRT 635.) Ms. Butler's lengthy encounter with her assailant meant that, weapons aside, she had ample opportunity to record his characteristics, and it was only for "a minority of that time [that] either of those weapons [were] present as a source of distraction." (See 4 RHRT 638-640.) But to the extent that her attention was drawn very specifically to watching his weapons for certain periods of time, Ms. Butler was perforce looking closely at her attacker's hands.

Petitioner can only respond that – like the Referee – he finds nothing particularly vague about the statement "[h]is hands were rough, and big. I mean you notice these things." Nor is that statement particularly more "subjective" than other eyewitness descriptions.[46]

If Ms. Butler's description of the attacker's hands was subjective, it was a subjective impression shared by others who had far more extensive contact with Ratzlaff. Jeannie Shain – who knew Ratzlaff quite well over a course of years, and had no memory of the occasion when he laid violent hands on her – also recalled that he had "big hands." (5 RHRT 860.) And Delia Winebrenner – echoing Ms. Butler's description of her attacker – emphasized that Ratzlaff was "strong." (DW RT 31.) In short, the evidence is far more than sufficient to support the Referee's finding that (unlike Petitioner) Michael Ratzlaff and the man who attacked Tambri Butler had "*extremely big hands*."

iv. His Thick Hair

Even as she was identifying Petitioner's photograph to the detectives, Ms. Butler expressed some uncertainty because "it just seemed like he had more hair. . . . It seemed thicker." She added that it seemed "thin on top" but, on the sides and in the back, "seemed to be thicker, longer or something what I seen." (4 RH Exhs. 889-90.) The contemporaneous photographs of Michael Ratzlaff show a man with thick hair, especially on the sides of his head, while – particularly in the one dated "1984-85," the date closest to the attack on Ms. Butler – his hair seems somewhat thinner on top and in front, as if his hairline were receding. (5 RH Exhs. 1344.) Thus the Referee included in his list of characteristics that "*differed from those of the petitioner and that could be attributed to a third party: . . . Thick hair.*" (R&F 11.)

Respondent implies that Ms. Butler's description was inconsistent with Ratzlaff because "the hair on on Ratzlaff's head was quite thick" – at least in the extant photographs.

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[46]Notably, Respondent finds nothing vague or subjective about other descriptors given by Ms. Butler – such as that the perpetrator appeared to be "older" – when it believes they support its argument. (See ROB 94.)

(ROB 93.) This is something of a *non sequitur*; all agree that his hair generally appears "thick," and Respondent does not deny that it was thinner on top. Whatever else is true, Mr. Ratzlaff certainly "had more hair," and his hair was "thicker" (particularly on the sides and in back) than what Ms. Butler saw in the photograph of Petitioner that was shown her.

v. His Big Chest

Even as Ms. Butler was picking Petitioner's photo from the lineup, another way in which she thought that Petitioner, as pictured, was *different* than her memory of her attacker was that the perpetrator was 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.)

Like Ms. Butler's attacker (and unlike Petitioner) Ratzlaff had a "big chest" – certainly one that was bigger than his belly. (See, 5 Exhs 1345-47; 6 RH Exhs. 1716.) Thus the Referee included the perpetrator's "*[b]ig chest*" as yet another characteristic that "*differed from those of the petitioner and that could be attributed to [Ratzlaff]*."

Respondent again attacks the sufficiency of the evidence in support of the Referee's finding by calling into question its star witness's ability to perceive and remember the characteristics of her attacker. (ROB 84-85.) Respondent's failed assertions in this regard – such as that Ms. Butler's "description of the man's chest as big was likely influenced by the events of the assault, similar to the reported phenomenon of 'weapons focus,'" and that they were "in a remote area with very little light" (ROB 84) – have already been addressed. (See also 4 RHRT 638-640 [testimony of identification expert Dr. Kathy Pezdek that, based on Ms. Butler's description of the events and conditions, "she had a good opportunity to acquire a memory of the individual who assaulted her."].)

A few pages later in its brief, Respondent offers a different argument, which utterly contradicts its first one. (ROB 92-93.) There, Respondent asserts that the attacker *did* have a big chest which thus distinguished him from Ratzlaff who (Respondent says) "did not have a notably large chest," but "had a distinct 'pot belly' (DW RT 60; cf. 1 RH Exhs. 284), which was inconsistent with Butler's description." (*Ibid*.) Again, whether Ratzlaff had a "large

chest" or not is a matter of opinion; the Referee viewed the photographs in evidence and concluded that he did. The supposed evidence on which Respondent relies certainly does not require a contrary conclusion. In the photograph cited as a "cf.," Razlaff is bending forward from the waist – the posture most likely to create an impression of a "bulge in his abdominal area" – while every other photograph of him, both earlier and later, clearly displays a relatively trim man with a bigger chest than stomach. As for the purported quote from Delia Winebrenner regarding Ratzlaff's "pot belly": there is no such testimony from Ms. Winebrenner on the page cited (DW RT 60) – nor, so far as we can find, anywhere else.[47] Putting aside Respondent's own selective perceptions and invented record citations, what is left is that Michael Ratzlaff (unlike Petitioner) shared yet another trait with the man described by Ms. Butler: A "big chest."

vi. His Big, Crowded Keychain

Yet another very specific descriptor that Ms. Butler recalled about the man who attacked her was that he "had a big set of keys." (4 RH Exhs 895; accord, 6 RHRT 1077-78, 1265; 1 RH Exhs. 254.) In its briefing before the Referee, Respondent acknowledged that the evidence shows Michael Ratzlaff had "a metal key chain with 'a lot of keys on it . . . like issued by the railroad.'" (RBFRH 72, quoting 7 RHRT 1265.)

In its briefing before this Court, Respondent simply ignores the whole thing. It is to Respondent's credit that it does not attempt to rehearse again its attempts to explain away this point of commonality between Ratzlaff and Ms. Butler's attacker – explanations that clearly failed to impress the Referee. But ignoring the matter does not erase the Referee's explicit finding that, just like the assailant (and unlike Petitioner) Ratzlaff had a "*[b]ig, crowded keychain*." (R&F 11.)

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[47]It is particularly disturbing that Respondent depends on this invented quotation, given that, when it offered the same false citation in its brief to the Referee (RBFRH 68), the error was pointed out in Petitioner's Reply Brief below. (PRBFRH 75.)

vii. His Truck and Its Contents

The next items on the Referee's list of characteristics of Ms. Butler's assailant that differed from Petitioner but matched Ratzlaff related to the perpetrator's truck: It was a "*[w]hite pickup with weathered sideboards"* containing a "*[t]ool chest and large silver thermos*," and the *[i]nterior of [the] cab [was] strewn with litter . . . .*" (R&F 11.)

It is undisputed that, in the Lerdo interview, Ms. Butler described her assailant's vehicle as a white pickup truck – nice and "newer," but not brand-new. (4 RH Exhs. 896-97, 920.) Ms. Butler told the detectives that the truck had bench seats covered in grey material. (*Id*. at 895-96.)[48] Ms. Butler also had some specific recollections regarding what was in the truck: A large silver thermos, a flashlight, what looked like a toolbox on the floor, and – most significantly – both a small pistol, which he kept in the glove compartment, and a "stinger" or stun gun. (4 RH Exhs. 887, 894-96, 904.) She also recalled that the interior of the truck was strewn with "trash." (*Id* at 984.) A particularly distinctive feature of the truck, as she described it to the detectives, was that it had sideboards on the bed, made of grey, weathered wood. (*Id*. at 898-99 ["That just sticks in my head. Those boards on the truck."].)

In 1986, Michael Ratzlaff owned – and employed in his attacks on other prostitutes – a white Ford pickup truck, with a black top, which he had purchased in the late 1970's. It had a bench seat, covered in dark fabric. (7 RHRT 1270.) Mr. Ratzlaff had outfitted sideboards for the truck bed, out of what his wife described as "junky" pieces of weathered grey wood. (7 RHRT 1290, 5 RH Exhs. 1348. He always had a large silver thermos, a flashlight and a suitcase (or something of that sort) on the floor. (5 RHRT 860; 4 RH Exhs. 1104.) The other women he "dated" during that period recalled that the inside of his truck was always messy, strewn with trash. (5 RHRT 860 [Shain]; DW RT 24 [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. (8 RHRT 1462; 4 RH

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[48]As noted, she told the detectives she saw the word "Chevrolet" written in red letters across the tailgate, but at trial she identified the truck as a Ford. (2 RH Exhs. 377.)

Exhs. 1116.) Mr. Ratzlaff regularly carried a handgun small enough to fit in his pants pocket. (5 RHRT 862, 7 RHRT 1275.) He was carrying such a weapon – a .25 automatic – when Det. Fidler confronted him at his place of work to ask him about the Imperatrice assault. (9 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. Both Jeannie Shain and Deborah Castaneda had seen the stun gun that Mr. Ratzlaff kept in his glove box (5 RHRT 862, 7 RHRT 1323) – which is where Det. Fidler found it when he confronted Ratzlaff. (9 RHRT 1645, 1646-48; 4 RH Exhs. 1118.)

Although Mr. Ratzlaff's truck and its contents matched the description that Ms. Butler gave in almost every significant respect, Respondent asserts that "Butler's description of her assailant's truck . . . was absolutely inconsistent with Ratzlaff's truck, principally due to color scheme, make, age, and lack of air conditioning." (ROB 98-99.)

Respondent first insists that Ratzlaff's truck was not *really* a white pickup – it was "obviously a two-tone truck with a black cab from the windows up." (ROB 74.) While it is true that the roof over the cab of the truck was painted black, in photographs the truck appears predominately white. (5 RH Exhs. 1348-50.) More to the point, the other people who came in contact with Ratzlaff – including the other women he "dated" and assaulted, and Sgt. Fidler, who arrested Ratzlaff for the attack on Ms. Imperatrice – routinely described his vehicle as being a "**white Ford pickup**" 5 RHRT 867 [Jeannie Shain] *accord,* 7 RHRT 1318 [Deborah Castaneda: Ratzlaff always drove a "**white pickup truck**"]; 9 RHRT 1642 [Det. Fidler: Imperatrice described truck as "**white Ford pickup**"]; 9 RHRT 1645 [Fidler: other informant described "Mike Ratcliff" [*sic*] as driving a **"white Ford pickup"**]; DW RT 24 [Winebrenner: Ratzlaff always drove **"a white truck**"; she recalled that he "didn't keep it clean"]; 4 RH Exhs. 1098 [Fidler report, describing Ratzlaff's **"white Ford pickup**, license #1G04774"]; Exh. 3 in support of habeas petition at p. 4 [testimony of Lavonda Imperatrice in *People v. Ratzlaff*: He drove "**a Ford pickup truck . . . [i]t was a white one.**"]. And while Respondent attempted to press this same distinction on the Referee, in an unguarded moment elsewhere in its briefing below, Respondent itself described the evidence

as showing that Ratzlaff "**drove a white pickup truck** and had a reputation for being violent when drunk." (RBFRH 63.)

While it is true that Ratzlaff's truck had a black roof, the fact is that most everyone – like Ms. Butler – simply perceived it as a "white pickup."

Consistent with its unfortunate practice of disregarding evidence that supports the Referee's findings, Respondent makes no mention at all of either the thermos, the toolbox/case, or the flashlight – even though the Referee specifically cited the first two of those items. And Respondent simply shrugs off the very specific details that the attacker's truck – like Ratzlaff's – had weathered grey sideboards and a cluttered interior, suggesting that they were merely the product of a defect in Ms. Butler's recollection due to "the circumstances of the assault and the passage of a year until the [Lerdo] interview . . . ."[49] (ROB 98.) Indeed, Respondent attacks the Referee's findings for crediting those details while discounting Ms. Butler's statement that the truck was a Chevrolet, rather that a Ford, and that it had air conditioning. (*Ibid*.)

As such Respondent ignores some important distinctions, such as that Ms. Butler had a view of the interior of the truck for as much as two hours – certainly far more than was needed to form a reliable memory of its cluttered state. She also would have had repeated opportunities to see the sideboards on the bed of the truck – but more important, her specific description of the sideboards was, as Dr. Pezdek put it, "sufficiently nuanced in detail that it more likely reflects a true memory for something she actually saw." (4 RHRT 706-707; see also 4 RH Exhs. at 898-99 [Ms. Butler to the detectives: "That just sticks in my head.

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[49]Elsewhere in its brief, Respondent relies on the testimony of Ratzlaff's ex-wife, to the effect that he only put the sideboards on the truck when he was using it to haul wood. (ROB 134.) Respondent omits to mention, however, that the photographs of the truck with sideboards, placed in evidence, were taken at night, and that his ex-wife agreed that Ratzlaff would not have been involved in getting wood then. (7 RHRT 1302.) Nor does Respondent acknowledge that Jeannie Shain independently recalled Ratzlaff as sometimes having sideboards on his truck when he was spending time with her – times when he was presumably not occupied in cutting or gathering wood. (5 RHRT 860-61.)

Those boards on the truck."].)

In contrast, her recollection about the truck having air conditioning was apparently based on a single memory that the air conditioning was on and that the driver turned it down and then turned it off.[50] (4 RH Exhs. 1648.) Given that the attack on Ms. Butler occurred in the middle of the winter it seems unlikely that what she experienced was actually "air conditioning," as opposed to simply air coming out of vents in the dashboard – something that would not require an air conditioner.[51]

To be sure, Ms. Butler's recollection that the truck was a Chevrolet was more the sort of specific detail that warrants crediting. But it was a detail she abandoned at Petitioner's trial, where she testified that the attacker's vehicle was a Ford (RT 5794), and one she explicitly repudiated in her testimony at the reference hearing. (3 RHRT 519.) And it bears recalling that this descriptor was equally inapplicable to Toby Coffey's Ford truck, which Respondent elsewhere insists was used by Petitioner in the attack on Ms. Butler. Similarly, Ratzlaff's truck, while a few years older than Ms. Butler's recollection of a nearly-new vehicle, was considerably newer than Mr. Coffey's 1966 pickup.

In arguing to the Referee that Petitioner was the assailant, Respondent insisted that Ms. Butler's mention of a late-model Chevrolet should be disregarded and that "the evidence fails to affirmatively show the make or year of the assailant's truck." (RBFRH 39 & n. 47.) It is ironic, to say the least, that Respondent now premises its attack on the Referee's findings on the fact that they do not exclude Ratzlaff as the perpetrator based on the age and make of his truck – a truck that in every other notable detail precisely matched Ms. Butler's description.

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[50]An illustration of the fact that the existence of air conditioning, *vel non*, is not a terribly distinctive point is found in the fact that Ratzlaff's ex-wife – who was very well acquainted with the truck – testified at the hearing that it *did* have air conditioning, until she was shown her declaration, stating that it did not; she finally said she could not remember. (7 RHRT 1269.)

[51]The detectives never raised this possibility with Ms. Butler. (See 4 RH Exhs. 1648-1649.)

viii. The Stun Gun

The last – and most freighted – item on the Referee's list of things about the attacker that fit Ratzlaff (and did *not* fit Petitioner) was: "*Stun gun*." (R&F11.) It is beyond dispute that Ratzlaff had a stun gun in his truck, that he had owned it for quite some time, that it was always on hand and that he had put it to horrible use in torturing other young women. (See, 5 RHRT 860-62 (Jeannie Shain); 6 RHT 899, 904 (Rhonda Brown [describing Ratzlaff as "obsessed" with stun guns]); 7 RHRT 1322 (Debbie Castaneda); *see also*, 6 RHRT 1221-30 [police told Ms. Castaneda that Ratzlaff carried stun gun]; 9 RHRT 1644-1648; 9 RHRT 1651 [Det. Fidler: prostitute Misty Gatewood reported Ratzlaff bragging about using stun gun on "another gal" who had given him trouble]; 9 RHRT 1653 (Delia Winebrenner); 9 RHRT 1656 (attack on Lavonda Imperatrice); 4 RH Exhs. 1118 [stun gun found in Ratzlaff's truck when he was arrested; he admitted it was his].)

Respondent asserts that there was nothing particularly distinctive about Ratzlaff owning – and using – a stun gun, and quotes Det. Fidler (who investigated the Imperatrice assault) as testifying that he had "come across" other cases in which one had been used. (ROB 158.) Respondent does not mention that Det. Fidler also testified that the presence of a stun gun was "an unusual fact in a case" (9 RHRT 1665), or that Det. Soliz (the lead detective in the Butler assault) opined that the use of a stun gun was "kind of a rare thing," and that he had no recollection of another case in which one was used.[52] (9 RHRT 1773.)

Finally, in a burst of unbridled speculation, Respondent argues that since it is conceivable that Ms. Butler was attacked before Ratzlaff assaulted Delia Winebrenner,[53] "it

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[52]At one point the prosecutor Sara Ryals – in support of her assertion that she saw no real similarity between the Butler and Imperatrice attacks – testified that the only connection between them was the use of a stun gun, and there was nothing unusual about stun guns in Kern County. (10 RHRT 1972.) At another point, however, Ms. Ryals "testified . . . that she had never heard of another stun gun case . . . ." (RBFRH 99, citing 10 RHRT 1968-69.)

[53]Ms. Butler did not remember exactly when she was assaulted, but put the date generally as sometime in January or February, 1986. Ratzlaff attacked Ms. Winebrenner on January 28, 1986. (DW RT 6.)

would be entirely possible that Ratzlaff had heard that a customer (Rogers) had used a stun gun on a Union Avenue prostitute and decided to buy one himself." (ROB 157.) A small problem with this fantasia is that the tenuous time line does not hold: although Ratzlaff did not use the stun gun on Ms. Winebrenner in January, 1986, she had "dated" him many times *before* that encounter and he had told her about owning a stun gun then – *i.e.*, prior to the Butler attack. (9 RHRT 1652-1653.) A slightly larger problem is that Respondent does not even bother to suggest who would have told Ratzlaff about the "customer" who had used a stun gun, much less how that mystery informant would have known. But the truly fatal flaw in Respondent's scenario is that (aside from Ms. Butler's impeached testimony) there is simply no evidence whatever that Petitioner *ever* owned a stun gun, much less that he "used [it] on a Union Avenue prostitute." Indeed, as traced above, all of the evidence is to the contrary.

ix. Other Respects in Which Ratzlaff Matched Ms. Butler's Description

In addition to the ten points of correspondence between Ratzlaff and the perpetrator set out specifically in the Referee's findings, there are several other items that confirm that match and that thus support the Referee's conclusion that Ratzlaff *was* that perpetrator. Although all of these additional points were proved up and argued below, Respondent does not acknowledge them, much less try to rebut them.

His family configuration: Ms. Butler reported that in the early part of the encounter, when their interaction was still congenial, she asked the man who attacked her about his family. He replied that he lived in a residential area and had "two kids, a wife and a dog." (4 RH Exhs. at 908-09; see also *id*. at 886-87.) He specified that one of the children was a boy, and the other a girl. "And he said, 'well, they're not babies.' And that's all." (*Id*. at 908.)

Michael Ratzlaff lived in a residential area with two kids, a wife and a dog. (7 RHRT 1256-58.) One of the children was a boy, and the other a girl. (The dog was a German Shepherd.) At the time of the attack, his children were no longer babies – the girl was seven, the boy four. (*Id. at* 1258.) In short, his family situation perfectly matched what the perpetrator described to Ms. Butler.

His clothing and accessories: Another noticeably specific recollection that Ms. Butler had of her attacker was that he wore a *gold-colored metal watch* with an expansion band. (5 RH Exhs. 893.) This, again, was something that Dr. Pezdek categorized as the sort of detailed, "nuanced" memory that was likely to be accurate. (4 RHRT 706.) Ms. Butler similarly recalled the perpetrator wearing **dark brown boots – "the short kind,"** not cowboy boots, and a **blue plaid shirt**, and carrying an **old brown "fold over" wallet**, which he kept in his back pocket, and later placed on the dash. (4 RH Exhs. 893-904.)

Mr. Ratzlaff's ex-wife testified that he regularly wore brown workboots (7 RHRT 1265); Ms. Imperatrice described the same sort of boots (9 RHRT 1642) and Det. Fidler found multiple pairs of them when he searched Mr. Ratzlaff's residences. (9 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 his wife threw him out. (9 RHRT 1658, 1660.) Finally, by coincidence or otherwise, in the largest and most contemporaneous of the pictures provided by his ex-wife Mr. Ratzlaff is wearing a blue plaid shirt. (5 RH Exhs. 1346.)

While it may be that no one of these items of personal apparel are sufficiently distinctive to establish that Mr. Ratzlaff was the perpetrator, when combined with the mass of other, similar evidence they compel that conclusion. As this Court has pointed out, when it comes to assessing whether "common marks" are sufficient to establish the identity of a perpetrator, it is not essential that every point of commonality "standing alone, is particularly distinctive. [Rather], in the aggregate, the similarities become more meaningful, leading to the reasonable inference that [the subject] was the person who committed [the] crimes." *People v. Medina* (1995) 11 Cal. 4th 694, 748-749.

x. The Purported Differences On Which Respondent Relies Are Based On Either Non-Existent Evidence or Ambiguous Evidence, And Are Too Generalized To Be Meaningful

Despite the close physical fit between Ms. Butler's description and Ratzlaff in regard to his bushy mustache, extraordinarily large hands, hairy chest and abdomen, build, hair,

personal effects (including the watch, shirt and unusually large key ring), and the exact same family configuration – and despite the fact that Ms. Butler herself thought that the pictures of Ratzlaff looked exactly like her attacker – Respondent insists that "the descriptors which are the most objective and least subject to an alternative explanation fit Rogers and are absolutely inconsistent with Ratzlaff." (ROB 91.) He bases these assertions principally on purported differences between Ratzlaff and the attacker in regard to "height, body build, age, and skin color." (ROB 94.)

We have already addressed Respondent's failed efforts to distinguish Ratzlaff from the attacker on the basis of "body build" (*i.e.*, the size of his chest and non-existent "pot belly"). The other three characteristics function at a level of generality, and are so dependent on subjective perception, that they would provide little persuasive information even if they were as Respondent represents them to be. As Dr. Pezdek explained, Ms. Butler's description of her attacker's height was "pretty generic information," and estimates of both height and weight are frequently mistaken. (4 RHRT 658-59.) Although she was not asked about age (for reasons that will be obvious in a moment) or relative skin color,[54] common experience advises that the same can be said – likely with greater force – in regard to those characteristics as well.

But the more immediate problem with Respondent's argument with regard to "age" is that it is based on a flat misstatement of the evidence in the record. Respondent asserts "Ratzlaff 's age of 31 in 1986 was also inconsistent with Butler's estimate of her assailant's age of 'forty-five, forty-eight, close to fifty,'" and that "Rogers was only 40," but "could" have looked older as a result of being a police officer. (ROB 93-94.)[55] Respondent is wrong about both men's ages. According to the police reports in evidence, Ratzlaff was born on

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[54]It is undisputed that the assailant was white, as was Ratzlaff and as is Petitioner.

[55]Respondent provides no citation regarding Ratzlaff's age, and the citation it provides regarding Petitioner ("4 CT 877") does not exist. The last document in the "Clerk's Transcript on Appeal" – cited as "CT" by the Referee and the parties (see R&F 5-6 n.1) – is the Abstract of Judgment; it ends at page 740.

March 9, 1949 (4 RH Exhs. 957) while Petitioner was born on November 23, 1946. (6 RH Exhs. 1505.) That would have made Ratzlaff just weeks shy of 37 years old at the time Ms. Butler was attacked (in February, 1986), while Petitioner would have recently turned 39. The fact that there was less than two-and-one-half years difference in their ages undercuts Respondent's assertion that Ms. Butler's estimate of her attacker's age pointed decisively toward Petitioner and away from Ratzlaff.[56]

We have already addressed Respondent's arguments about the assailant's height, and shown that they cannot overcome the fact that Ms. Butler repeatedly told the detectives that she had never stood next to the assailant "not once," combined with the unrebutted expert testimony (credited by the Referee) 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." (4 RHRT 660-61; see R&F 6.)

In its arguments before the Referee, Respondent attempted to surmount this problem by arguing that Ms. Butler's very definitive statements to the detectives in 1987 were unreliable in this regard, and that the Referee should instead credit what she told Investigator Hodgson, more than twenty years later. In that 2008 conversation, Ms. Butler asserted that she was standing up, outside the truck when the attacker sodomized her. (3 RH Exhs 774.) In this version (which she reiterated with some deviations at the reference hearing), he bent her over the seat and clamped his chin on her shoulder to keep her from moving. *Ibid*. Because of that, she could tell that he was shorter than her. (*Id.* at 792-94.)

Respondent reiterates Ms. Butler's revisionist account in its brief before this Court, but now stops short of actually endorsing it. (ROB 92.) Nonetheless, since Respondent

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[56]Even more disturbing than Respondent's misstatements in this regard is that Respondent was on notice that they were not true. Respondent made the same false statements in its brief to the Referee (RBFRH 70), and Petitioner pointed them out it his reply brief below (PRBFRH 79) exactly as he does here. While the first time may be ascribed to sloppiness, the reiteration of the same misrepresentations is inexcusable.

chose (however ambivalently) to advance the argument again, it behooves us to explain, again, why it is untenable.

There are a number of reasons to credit Ms. Butler's 1987 statements over what she told Mr. Hodgson in 2008 – beginning, most obviously, with the indisputable reality that one's memory tends to be far better one year after the fact than it is 22 years after the fact.[57] It was in that same 2008 conversation that Ms. Butler very firmly insisted (for the very first time) that her attacker did *not* have a mustache (3 RH Exhs. 791-92); that the photograph the attacker showed her was of two *boys* – not a boy and a girl (*id*. at 792-94); that the attacker had tried to take her pearls, as opposed to the gold watch she mentioned to the detectives (*id*. at 775, 789; compare, 4 RH Exhs. 888), and various other things that conflict not only with her initial statements at Lerdo, but also with things she said every other time she was interviewed. In short, not even Respondent is willing to stand by everything that Ms. Butler said to Mr. Hodgson in that 2008 conversation.[58]

The most basic problem with the version Ms. Butler came up with in 2008 – 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.

And even if Ms. Butler had stood next to her attacker, Respondent's argument would

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[57]Even though that fact is beyond reasonable dispute Ms. Butler actually disputed it, insisting at the reference hearing that her memory in 2011 of events that took place in 1986 and early 1987 was much better than it had been later in 1987. (6 RHRT 1178.)

[58]Among other things, Ms. Butler said then that she first learned that Petitioner was a police officer when she saw him on television in Lerdo, just before she talked to the detectives. (3 RH Exhs. 786.) This conflicts with the other statements she has given on the subject, and certainly undermines Respondent's insistence that Petitioner had previously molested her in the jail. (See generally Appendix pp. 9-10.)

be undercut by the fact that, as Dr. Pezdek testified, eyewitnesses are generally not very good at estimating height (see 4 RHRT 659) – a point well-illustrated in the instant case by the testimony of Jeannie Shain, who knew (the 6' 3") Ratzlaff quite well, but estimated his height as being between 5' 10" and 6 feet.[59] (5 RHRT 859.) The additional fact that – unlike those women – Ms. Butler did not even stand next to her attacker renders her estimate of her attacker's height neither reliable nor significant. (See, 4 RHRT 660-61.)

Weaker yet is the argument that Ms. Butler described her attacker as having "light skin," which sounded like Petitioner but excluded Ratzlaff, who (Respondent asserts) had "dark skin."[60] (ROB 88, 94.) Respondent does not cite any evidence demonstrating that Ratzlaff had "dark skin," but elsewhere in its brief it recounts Ms. Butler's testimony at the hearing, to the effect that she told Melody Ermachild that the pictures of Ratzlaff did not look like her attacker because (*inter alia*) the man in the picture was "darker skinned." (3 RHRT 521.) Like many of the things that Ms. Butler said for the first time in 2011, her assertion that she told Ms. Ermachild that the man in the photographs (*i.e.*, Ratzlaff) did *not* resemble her attacker was directly contrary to everything she said around the time she actually saw the photographs. Not only did she repeatedly swear in her declarations – without qualification – that the photographs of Ratzlaff "resemble my attacker" and "looked like the man who attacked and raped me" (1 RH Exhs. 250, 258), but, in between signing those declarations she reiterated the same thing to Tam Hodgson, regarding the photographs:

> And the pictures, and the pictures that she showed me. 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 . . . .

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[59]The other women who "dated" Ratzlaff generally described him as being six feet tall – three inches shorter than he actually was. (DW RT 31-32 [Winebrenner]; 7 RHRT 1318 [Castaneda]; 9 RHRT 1641 [Imperatrice, describing Ratzlaff to Det. Fidler].)

[60]Respondent is again not quite faithful to the record: what Ms. Butler actually said, when the detectives asked about her attacker's race, was that he was a "white guy . . . . He was fair [skinned] . . . Skin tone. *Not dark. Not light*." (6 RH Exhs. 1641 [emphasis added].)

(3 RH Exhs. 696.) She notably did *not* add anything like: "but his skin is darker . . . ."[61]

In short, what Respondent asserts are unmistakable differences between Michael Ratzlaff and the man described by Tambri Butler are largely unsupported by the evidence and unpersuasive at best.

b. The Evidence Regarding Ratzlaff's Other Crimes Against Women Points Unerringly To The Conclusion That He Assaulted Ms. Butler

Michael Ratzlaff closely resembles Tambri Butler's description of her assailant in almost every significant way – from his bushy mustache and big hands, to his hairy chest and abdomen; from his clothing and effects to his identical family configuration – just as his truck matches the white, full-size pickup with gray sideboards and cluttered interior that was used in her assault. All of that is persuasive evidence that it was Ratzlaff, and not Petitioner, who attacked Ms. Butler. But what makes the conclusion truly compelling is the evidence of the violent crimes Ratzlaff committed against other women who, like Ms. Butler, were working as Union Avenue prostitutes. (See R&F 10-11 [discussing the "*[s]triking parallel[s] between the Butler assault and Mr. Ratzlaff's documented attacks on Lavonda Imperatrice"* and observing that "*Ratzlaff's assaults on other women including Jeannie Shain, Deborah Castaneda, and Delia Winebrenner depicted a similar pattern*"].)

Respondent asserts that "there are no distinctive similarities between the confirmed Ratzlaff assaults and the assault on Butler, but there are distinct differences," and then recites the standard governing admission of "other crimes" evidence under Evidence Code, § 1101. (ROB 149, discussing *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) As Respondent is aware

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[61]In its argument to the Referee, Respondent also sought to rely on a photograph of Ratzlaff from the 1980's, in which he appears swarthy. (RB 70, citing 5 RH Exhs. 1344.) In adjacent photographs, however, Ratzlaff looks fair, even pink-cheeked. (See, 5 RH Exhs. 1345-46.) Similarly, in some of the older photographs Petitioner appears more swarthy, while in others he seems more fair-skinned. (See, 5 RH Exh. 1199; 6 RH Exh. 1580; photos attached to Petition Exh. 3.) If (as we've seen) estimates of height are generally not reliable, surely observations about the relative skin tone of someone viewed in a truck on a dark night are less reliable yet. But to compare those observations to color xeroxes of color xeroxes of 30-year-old color photographs results in an argument that is effectively meaningless.

(because again, this was all briefed below), there is no particular need for the application of the section 1101 standard, as explicated in *Ewoldt*, because all of the evidence regarding Ratzlaff's other crimes against women was admitted by the Referee for all purposes, without any objection whatever by Respondent. The limitations on the admission and use of evidence set forth in Evidence Code, section 1101 applies only when they have been invoked through timely objection or motion. (*People v. Alexander* (2010) 49 Cal. 4th 846, 912; *People v. Bunyard* (1988) 45 Cal. 3d 1189, 1207.) Because Respondent did not offer any such objection or motion in this case – either before the Referee or in this Court – any limitation on the use of the evidence regarding Ratzlaff's other crimes has been waived, and the evidence is before the Court for all purposes. (*Ibid.*)

But even if Respondent had tendered a timely objection it would fail in its entirety in regard to the evidence regarding Ratzlaff's attack on Lavonda Imperatrice, which was so nearly identical to what he inflicted on Tambri Butler as to eliminate any reasonable possibility that it was the work of someone else.

i. The Common Features of the Attacks On Butler and Imperatrice Demonstrate That the Same Person Committed Both Crimes

In February, 1986, **Tambri Butler's assailant** – a man with a bushy mustache, exceptionally big hands and a hairy abdomen, driving a white full-size pickup truck with a cluttered interior and gray, weathered wooden sideboards on the bed – picked her up on the street on Union Avenue.[62] They agreed that she would give him a "blow job" for $20.00; he later gave her another $20.00 for vaginal sex.

Over her initial objections, he drove Ms. Butler to an isolated spot near White Lane and Cottonwood, south of Highway 58 and to the east of Union Avenue. (4 RH Exhs. 887; 6 RH Exhs. 1720.) On the way there they chatted amiably. The man smelled of alcohol and

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[62]The noted descriptors are just a representative sampling of those detailed in the text, *ante*, of those attributed to both Ms. Butler's attacker and Ratzlaff; in the interests of concision we will not always reiterate all of the other common features like the "thick hair," big set of keys, the gold-colored watch, boots and plaid shirt, the thermos and large flashlight, the suitcase or tool case on the floor of the cab, *etc*.

was unable to climax.

After what seemed to her an unreasonable amount of time, Ms. Butler asked him to take her back. The man insisted that she continue; when she refused, he grew violent and slapped her across the face. When she continued to resist, he took a stun gun off of the dash board of his car, put it to her neck and stung her "until I couldn't scream anymore." After more unsuccessful attempts to culminate the sex act, he demanded that she turn over so he could penetrate her anus. When she refused, he pulled out a small gun and held it to her head. She responded that the gun was not loaded; he demonstrated that it was by firing it in front of her face. After she submitted to anal sex, he robbed her and then pushed her from the truck and apparently attempted to run her over.

In May, 1988, **Michael Ratzlaff** – a man with a bushy mustache, exceptionally large hands and a hairy abdomen, driving a white full-size pickup truck (sometimes outfitted with gray, weathered wooden sideboards) and a cluttered interior and wearing a "plaid, checkered shirt" – picked up **Lavonda Imperatrice** on the street on Union Avenue. (RTR 3-5, 8.) They agreed that she would give him a "blow job" for $20.00; he later gave her another $20.00 for vaginal sex. (RTR 5-6, 8.)

Over her initial objections, Ratzlaff drove her to an isolated spot near Oswell St., south of Highway 58 and to the east of Union Avenue. (RTR 6, 99; 4 RH Exhs. 1116; 6 RH Exhs. 1720.) On the way there they chatted amiably. Ratzlaff smelled of alcohol and was unable to achieve an erection. (RTR 6-8.)

After what seemed to her an unreasonable amount of time, Ms. Imperatrice asked him to take her back. Ratzlaff insisted that she continue; when she refused, he pulled out a small gun and pointed it at her head. (RTR 10-11.) She responded that the gun was not real; he demonstrated that it was by firing it into a cup on the floor between her feet. (RTR 10-12.) After committing various other acts on her – including penetrating her anus with his fingers – Ratzlaff took a stun gun from the dash board of his truck and stung her several times, on

her abdomen and the outside of her vaginal area.[63] (RTR 17-18, 20, 22-24, 30.) When she struggled, her punched her in the face. (RTR 27, 29-30.) At the end of their encounter, Ratzlaff gave Ms. Imperatrice her clothes and told her to run; as she did, he fired his gun at her. (RTR 33, RCT 30.)

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The parallels between the attacks on Ms. Butler and Ms. Imperatrice – and between Ms. Butler's assailant and Michael Ratzlaff – are so numerous, and many are so specific, that any reasonable observer would conclude that the crimes were committed by the same person, namely: Ratzlaff. (See, R&F 10-11.) Indeed, even if Respondent had interposed a pertinent objection, and Petitioner was thus required to meet the "common features" standard for proving the identity of the perpetrator, as reiterated in *Ewoldt*, the standard would be easily satisfied in this case. The list of "marks" common to the two crimes is lengthier and more compelling than what this Court has held sufficient to establish proof of identity in many of its precedential cases in this area. (*People v. Jones* (2013) 57 Cal. 4th 899, 926; *People v. Sully* (1991) 53 Cal. 3d 1195, 1226 ["defendant's pattern of luring prostitutes to his warehouse and physically abusing them . . . shows both intent and modus operandi."]; *People v. Miller* (1990) 50 Cal. 3d 954, 988-989 (1990) see also, *People v. Wright* (1998) 62 Cal. App. 4th 31, 45.)

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[63]Unable to sustain an erection long enough to achieve orgasm through anal sex (as occurred with Ms. Butler), Ratzlaff instead inflicted other humiliations on Ms. Imperatrice, including putting his fist in her vagina and her rectum, trying to force her to urinate, and forcing her to pose, naked, for photographs. As will be discussed, the fact that Ratzlaff inflicted these cruelties on Ms. Imperatrice, that were additional to those suffered by Ms. Butler, is explicable both by his inability to reach sexual climax with Ms. Imperatrice and by the fact – stressed in the literature cited below by Respondent – that a serial rapist's *modus operandi* is "dynamic and malleable. Developed over time, the M.O. continuously evolves . . . ." (Douglas and Munn, *Violent Crime Scene Analysis: Modus Operandi, Signature and Staging,* FBI Law Enforcement Bulletin, at p. 2 (February 1992) [discussed at RBFRH 80 n. 88].)

ii. Respondent's Attempts to Distinguish the Butler and Imperatrice Attacks Fail

Respondent nonetheless insists that "there are no distinctive similarities between the confirmed Ratzlaff assault[] and the assault on Butler, but there are distinctive differences." (ROB 149.) Neither part of Respondent's formulation is supportable.

Regarding the supposed lack of similarities, Respondent finds nothing distinctive about any of the points of commonality – not even specifics such as the sideboards on his truck, his firing a shot inside the truck to intimidate his victim, or his use of a stun gun. As discussed, Respondent asserts – based on nothing more than *ipse dixit* – that the gray, weathered wood sideboards "could not be much less common than white pickup trucks were." (R0B 98 n. 57.) Similarly, as discussed above, Respondent points to evidence that stun guns *existed* in 1986, and cites Det. Fidler's statement that he had "come across" other cases in which a criminal had used a stun gun, as well as Ms. Imperatrice's testimony that she had heard of them, and "seen them with the police" and on television. (ROB 158.) Respondent does not mention that Det. Fidler also testified that the presence of a stun gun was "an unusual fact in a case" (9 RHRT 1665), or that Det. Soliz opined that the use of a stun gun was "kind of a rare thing," and that he had no recollection of another case in which one was used. (9 RHRT 1773.)

Quarreling with another of the Referee's findings, Respondent insists "nothing in the evidence proves that Ratzlaff was 'obsessed with anal sex' or that the assailant was similarly obsessed with anal sex." (ROB 150-151.) *Nothing* in the evidence? Respondent appears to have forgotten that Ratzlaff choked Deborah Castaneda (whom Respondent refers to as "Deborah Lilly") to unconsciousness, nearly killing her, because she refused his demand for anal penetration (7 RHRT 1321-22),[64] just as the assailant in Ms. Butler's case put a gun across the bridge of her nose and fired it in order to compel her to submit to anal sex. (4 RH Exhs. 918-919, 928.) And while Respondent implicitly acknowledges Jeannie Shain's

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[64]Indeed, Respondent explicitly (mis)represents to the Court that "Lilly refused his requests to have anal sex and he did not react with force or violence." (ROB 151.) The record is precisely to the contrary.

testimony that Ratzlaff repeatedly asked her for anal sex (which she declined), Respondent draws the unsupported conclusion that Ratzlaff never employed violence to force her to yield to those demands. (ROB 151.) The evidence is that *something* caused Ratzlaff, who had been "friends" with Ms. Shain for years, to turn on her with such violence that she was hospitalized in a coma for more than a week afterwards. (5 RHRT 863-864, 878-79.) Ms. Shain had no memory of what led to her beating at Ratzlaff's hands, but the inference is obvious. And while Respondent is correct that "Ratzlaff did not attempt to have anal intercourse with Imperatrice" (ROB 151), it omits to mention her testimony that Ratzlaff did shove his fist up her rectum. (RTR 30; RCT 15.)

But we need not quibble about *how* "distinctive" were Ratzlaff's sideboards, or his extraordinarily large hands, or the fact that he discharged his gun inside the cab of his truck, or his seeming obsession with anal penetration, or his use of a stun gun, or any of the many other details common to both crimes. As this Court has repeatedly taught: "The inference of identity . . . 'need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.'" (*People v. Edwards* (2013) 57 Cal. 4th 658, 711; quoting *People v. Lynch* (2010) 50 Cal.4th 693, 736.) The long list of such features in this case – from the big, bushy mustache and exceptionally large hands to the attacker's sudden shift from amiability to violence when unable to perform sexually; from his cluttered pickup truck with rough wooden sideboards to firing "warning shots" inside his truck and torturing his victims with a stun gun; from his family (comprised specifically of a wife, son, daughter and dog) to his sexual fixation on women's anuses; from the light coating of hair on his chest and abdomen to his parting efforts to menace the victim's life as she finally broke free of him – taken together "yield a distinctive combination" pointing directly to Michael Ratzlaff as the perpetrator of both crimes.

Respondent attempts to undercut a few of these similarities by attacking the victim Lavonda Imperatrice for "embellish[ing] several parts of her story;" he asserts that "[d]ue to the many inconsistencies in [her] stories – and the jury's evident disbelief of much of it – it

is uncertain what happened." (ROB 154; see also ROB 106 n. 63; 156.) This is a gross mischaracterization of the record in the Imperatrice case. In truth – unlike Tambri Butler – Lavonda Imperatrice remained quite consistent regarding virtually every significant aspect of the attack she suffered, and what Respondent refers to as "many inconsistencies" are either illusory or come down to inessential details. The facts upon which Respondent bases its attack on Ms. Imperatrice consist of the following: (a) the police reported Ms. Imperatrice saying that Ratzlaff had stung her with the stun gun twice, but at trial she testified he stung her five times; (b) the responding officer reported that she said Ratzlaff fired two shots at her as she ran, but at trial she said there were four; (c) Ms. Imperatrice said that Ratzlaff fired a bullet into a styrofoam cup between her feet, but Det. Fidler did not find a hole in the floor of the truck; and (d) although she told the officers and detective – and testified at trial – that Ratzlaff had put his fist in her vagina, the jury acquitted Ratzlaff of "rape with a foreign object." (ROB 154.)

Respondent's accusation, that these were instances of Ms. Imperatrice "embellishing . . . her story," depends on a series of questionable assumptions, half-truths, and legally insupportable conclusions. The first two examples depend entirely on the assumptions that the extremely distraught victim clearly conveyed the exact correct details to the reporting officers in the first instance; that they in turn correctly understood her; and that they then were 100% accurate in transcribing those facts in their reports. Put in plain terms: maybe Ms. Imperatrice did not express herself clearly, or maybe the police officer did not correctly understand her; or maybe he wrote it down wrong. Anyone who has played the children's game of "telephone" knows how unlikely it is that there will be no variations at all in such a chain – and that is without even factoring in that the first reporter, the victim, was in almost unfathomable emotional distress when she spoke to both the responding officer and to Det. Fidler.

The third example on which Respondent relies – the fact that Det. Fidler did not find a bullet hole in the floor of the truck – proves nothing. As (then former) Det. Fidler affirmed at the reference hearing, he did indeed find a bullet hole – in the dashboard – that appeared

to come from a gun fired inside the truck. (RHRT 1649.) Without some evidence (and Respondent presented none) that the bullet from a small, low-caliber gun could not have ricocheted off of the sheet metal floor, and lodged in the soft dashboard, there is no basis for Respondent's bizarre implication that Ms. Imperatrice had simply made the whole thing up. (Besides which: Why would she?)[65]

But even taking these points touted by Respondent at face value, they are inadequate to carry his argument. At worst, these examples – and not the myriad gross inconsistencies in Tambri Butler's many accounts of *her* experience – fairly constitute what Respondent elsewhere refers to as "the normal variations in descriptions given by victims of violent crimes" for which "allowances must be made." Respondent's suggestion – that these things prove Lavonda Imperatrice was a fantasist and a liar whose account of Ratzlaff's assault on her was in some measure a fabrication – is a heedless attack against a truly blameless victim of an unspeakable crime. It is particularly dismaying, given Respondent's insistence on Tambri Butler's "credibility," despite the fact that Ms. Butler (unlike Ms. Imperatrice) has undeniably perjured herself on several occasions.

This brings us to the final aspect of Respondent's attack on Lavonda Imperatrice: the repeated insistence that the jurors disbelieved much of what she was saying, because they acquitted Ratzlaff of a few of the charges against him, including the "rape with a foreign object" count. Based entirely on *believing* Ms. Imperatrice's testimony the jury convicted Ratzlaff of the bulk of the charges, including false imprisonment, assault with a deadly weapon, two counts of assault with a stun gun, sexual battery, and assault by means of force likely to produce great bodily injury while armed with a handgun. (RCT 199-215.) The fact that the jurors acquitted him on a few lesser counts literally proves nothing: As the courts

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[65]It is beyond the bounds of reason to suggest that Ms. Imperatrice invented the incident about Ratzlaff firing his gun in order to match Tambri Butler's account, which included a nearly identical incident. There is no evidence that Ms. Imperatrice ever heard of either Ms. Butler or Petitioner, and she would have had no motivation to lie about it even if she had.

have recognized for centuries, a jury may convict on some counts and acquit on others because they are not convinced "to a moral certainty" as to whether the very high, "beyond a reasonable doubt" standard has been satisfied as to the latter. (*E.g., Helvering v. Mitchell* (1938) 303 U.S. 391, 397; *In re Dunham* (1976) 16 Cal. 3d 63, 67.) Or they may do so simply because the verdicts were the result of a compromise or a misplaced sense of compassion or lenity, "no matter how clear the evidence of guilt . . . ."[66] (*People v. Superior Court (Sparks)* (2010) 48 Cal. 4th 1, 11; citing, *Standefer v. United States* (1980) 447 U.S. 10, 22-23.) The one thing that is clear about such acquittals is that they are not "proof of anything . . . ." (*People v. One 1950 Pontiac 2-Door Coupe* (1961)193 Cal. App. 2d 216, 218; quoting, *In re Anderson* (1951) 107 Cal. App. 2d 670, 672; cited with approval in, *In re Dunham*, *supra*, 16 Cal. 3d at p. 67; see *People v. Palmer* (2001) 24 Cal. 4th 856, 865.)

Having failed to dispel the force of the many, obvious similarities between the two attacks, Respondent turns to what it asserts are key *dis*similarities between Ratzlaff and Ms. Butler's attacker. Some of the "facts" he cites in this regard are simply false – such as the assertion that "Ratzlaff only assaulted prostitutes he had 'dated' previously." (ROB 155.) In fact, it is clear from the police reports and the record of his trial that Ratzlaff had never "dated" Lavonda Imperatrice before – he was a stranger to her when he brutally raped, sodomized and tortured her. (4 RH Exhs. 1119; RTR 6-7.) Similarly, the suggestion that Ratzlaff chose locations for his attacks that were very different than the place where Ms. Butler was attacked does not bear scrutiny: All occurred in remote areas South of Highway 58 and to the East of Union Avenue; the assault on Ms. Imperatrice took place roughly two miles from where Ms. Butler was attacked. (12 RHRT 2387.)

But the heart of Respondent's presentation is an elaborate argument to the effect that each event displayed a different behavioral "pattern" that corresponded to what Respondent

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[66]Another factor which may have been at play in Ratzlaff's case is that he – unlike Petitioner – was represented by an extremely able defense attorney, who rigorously cross-examined the victim regarding every inconsistency, and effectively argued reasonable doubt.

deduces about the psychological differences between Ratzlaff and Petitioner.[67] According to Respondent, Ratzlaff was just an unstable person who "would become frustrated, fly into an uncontrollable rage, and, due to his size and strength, overwhelmed [*sic*] his victim with an explosion of violence." (ROB 153.) In his crimes against women, Ratzlaff "show[ed] regret as well as a lack of criminal (or any) sophistication." (*Ibid.*) By contrast – Respondent asserts – the "actions of Butler's assailant reflected a skilled and confident use of measured techniques to control and ultimately dominate and humiliate her." (ROB 155.) This description, Respondent contends, closely fits Petitioner – whom Respondent flatly asserts *was* "Butler's assailant." (ROB 153-159.)

We will put aside the lack of any precedent for such armchair psychologizing in the extensive case law discussing "common marks" and *modus operandi*.[68] Respondent's argument fails badly on its own premise.

It is certainly true that Ratzlaff was unstable, strong, prone to violent rages and the infliction of bodily injury. But it is strange to suggest that the man who bound Lavonda Imperatrice's wrists with plastic ties (which he clearly kept on hand for such purposes) and ordered her to perform a series of weird and degrading acts was not obsessed with "control" and "control techniques." And it is simply bizarre to contend that Ratzlaff was acting out of anything apart from a desire to "dominate and humiliate" Ms. Imperatrice when he forced her to urinate in front of him, or when he shoved his fist up her vagina and rectum, or when he applied a stun gun to her genitals, or when – at the end – he made her run away, naked,

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[67]In its briefing below, Respondent framed this argument as demonstrating that the each man employed a distinct "*modus operandi*." Respondent has abandoned that approach in its brief to this Court – a wise choice, given that neither the facts nor the law support it.

[68]The discussions in the pertinent precedent are a good deal more straightforward, based on the premise that "to demonstrate a distinctive *modus operandi*, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed the crimes." (*People v. Jones* (2013) 57 Cal. 4th 899, 926 [citations omitted].) As set forth in the text, *ante*, the marks and identifiers that are common to the Imperatrice and Butler assaults are more than ample to meet this test.

as he fired his gun at her.

To say that Ratzlaff was different than Ms. Butler's attacker because the latter displayed no regret or sympathy for his victim[69] is to disregard the fact that Ratzlaff was similarly remorseless in his treatment of Ms. Imperatrice during the event, afterward, and even at trial (where he tried to blame her for the whole event). Nor did Ratzlaff ever show any remorse after beating his longtime "friend" Jeannie Shain into a coma – in fact, she never saw him again. (5 RHRT 865). And the notion that Ms. Butler's attacker was more "sophisticated" about avoiding detection or identification is risible, given that he repeatedly reappeared, driving the same truck, during the weeks after the attack.[70]

In short, even if we accept Respondent's amateur psychological profile of Ms. Butler's attacker as being a man obsessed with "control" who acted in a "commanding" way to "dominate and humiliate" his victim, and who was remorseless about the suffering he inflicted, the description fits Michael Ratzlaff to a "t".

Virtually all of the record evidence – including and perhaps especially those facts summoned by Respondent – points directly to the ineluctable conclusion that the man who assaulted Lavonda Imperatrice was the same man who committed a nearly identical crime against Tambri Butler. It was Michael Ratzlaff.[71]

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[69]This characterization of the attacker's conduct toward Ms. Butler is not entirely accurate either: it will be recalled that he gave her back her heroin and some of her money – gestures that call to mind Ratlzaff's pitiful attempt to make it up to Delia Winebrenner by buying her a beer after nearly choking her to death.

[70]By the same token, the implication that Ms. Butler's attacker must have been Petitioner because *he* was so skillful at covering his tracks makes no sense at all. We are talking about a trained police officer who made no attempt to dispose of the (apparently stolen) weapon used in not one, but two homicides – nor even to change the tires on the truck that left the telltale tracks at the scene of the second killing, despite having returned to the scene to see what it looked like there. (RT 5371, 5383-85.)

[71]Thus the Referee, having reviewed the evidence and the same arguments tendered to this Court by Respondent, found that "*the similar patterns of the above mentioned assaults [on Butler and Imperatrice], combined with the differing characteristics of the*

3. The Identification of Petitioner As the Perpetrator Was Suggested to Ms. Butler Before She Made It

a. The Identification Conducted At Lerdo Was Extraordinarily Suggestive

As shown above, Ms. Butler's description of her assailant really did not fit Petitioner at all; indeed, Ms. Butler herself repeatedly implied as much even as she was discussing her identification of his photograph with the detectives at Lerdo. The question then arises: Why did she pick out his photograph as the image of the man who attacked her? A substantial part of the answer to that question lies in the grossly suggestive nature of the identification process.

We cannot know the full extent to which Ms. Butler's identification of David Rogers as her assailant was the product of suggestions made by others. Her identification of him – or rather, of his photograph – to the detectives at Lerdo took place before they turned on the tape recorder (9 RHRT 1747, 10 RHRT 2159; ROB 33), and it is undisputed that there was substantive conversation between the detectives and Ms. Butler, regarding the identity and characteristics of the perpetrator, that took place *before* the tape was turned on. (ROB 33; 12 RHRT 2344-45; see, *e.g.*, 4 RH Exhs. 892 [Det. Soliz: "Before you came on the tape you said that he was strong."]; *Id.* at 931 [questions about the perpetrator stalking her, asked before she mentioned it on tape].) As Dr. Pezdek pointed out, given the procedure that was used there were myriad ways in which the detectives – wittingly or unwittingly – could have suggested to Ms. Butler which photograph to choose. (4 RHRT 703.)

But it is quite clear that the suggestion that David Rogers was the perpetrator – and that she should pick his photograph – was made in the most emphatic way before she even entered the interrogation room. As the Referee found, "*Ms. Butler saw petitioner on TV before she identified him.*" (R&F 8.) Specifically, just the day before, Ms. Butler had seen Mr. Rogers on television in news coverage regarding his arrest for the murder of another

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assailant and petitioner, support the fact that another assailant other than the petitioner committed the assault on Ms. Butler." (R&F 11.) In context, it is absolutely clear that the "other assailant" to whom the Referee is referring is Michael Ratzlaff.

Union Avenue prostitute. (1 RH Exhs. 220, 222; 2 RH Exhs. 255-56; 3 RHExhs. 679-79; 3 RH Exhs. 714-15; 3 RH Exhs. 786, 790, 806-07; 3 RH Exhs. 838-39, 841; 4 RH Exhs. 943; 6 RHRT 1224.)[72] She was then presented with an array of six photographs that were *not* selected because of their resemblance to her description of the attacker – although that was the standard protocol for such identifications.[73] (4 RHRT 686.) Rather the photos were assembled for the purpose of identifying the man who killed Tracie Clark – that is, they were chosen for their resemblance to David Rogers. (9 RHRT 1660-61, 1726, 1743-45.)

Under these circumstances, it would have been astonishing had Ms. Butler *not* picked out Petitioner's photograph as the person who attacked her. As Dr. Pezdek noted: "media exposure to someone between when a witness observes a perpetrator to begin with and when she identifies him later . . . is very likely to suggestively influence memory for the perpetrator and taint the subsequent identification." (4 RHRT 710.) In this case, the confluence of Ms. Butler's exposure to the media coverage of Petitioner, the specific content of that coverage, and the inappropriate manner in which the procedure was conducted made her identification of Petitioner all but inevitable.

b. Ms. Butler Had Not Previously Identified Petitioner

Respondent asserts that all of the evidence – showing that Ms. Butler's "identification" of Petitioner at Lerdo was the product of prior suggestions – was irrelevant

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[72]Ms. Butler's trial testimony, denying that she had seen Petitioner on television, the eight separate occasions on which she later acknowledged that she had (in her words) "lied" about that, and her – ultimately unsuccessful – attempts at the reference hearing to disavow those admissions, will all be discussed in the next section of this brief, regarding why and how her testimony was biased in favor of the prosecution.

[73]As Dr. Pezdek explained, the manner in which the photo lineup was assembled and shown to Ms. Butler was itself utterly improper and highly suggestive. The appropriate procedure is to first obtain a description of the perpetrator, then assemble a lineup of persons who match that description, and *then* ask the eyewitness if she can identify any of them. (4 RHRT 686-687, 690-691.) By doing it in the reverse order in this case the authorities essentially ensured that Ms. Butler would pick out Petitioner's photo.

because that was not the first time Ms. Butler had identified Petitioner as the person who assaulted her. According to Respondent "[i]t has not been disputed that Butler actually identified Rogers when she recognized him in jail when he was in uniform with a name tag." (ROB 112.) This assertion is audacious – and it is false on every level. Petitioner has consistently disputed the contention that Ms. Butler *ever* "identified" David Rogers before she was shown his photograph by the detectives at Lerdo. (*E.g.*, PRBFRH 35-38.) Substantively, Respondent's contention is betrayed both by the evidence on which it purports to rely, and by the very concept of what it means to "identify" someone.

Respondent's assertions regarding Ms. Butler previously "identifying" Petitioner rely on a variety of Ms. Butler's recollections – all first articulated long after the fact – to the effect that she recognized Petitioner as her assailant when she saw him working in the jail, and on her contention that she confirmed that recognition during her conversation with Deputy Jeannine Lockhart. One of the claimed encounters with Petitioner (the one she described to the detectives at Lerdo) may well have occurred, while others (the alleged jailhouse molestations that she first reported 25 years later) are surely fantasies – but none of them constituted "identifications." And what she actually told Deputy Lockhart is that she did not recognize anyone in the book of photographs that included Petitioner. (RT 5806.)

Put simply, an "identification" occurs when a witness both recognizes the subject *and* reports that fact to someone else. As Dr. Pezdek explained – when Respondent's counsel forcefully tried, and failed, to get her to agree that Ms. Butler had identified Petitioner "to herself" prior to the Lerdo interview – whatever happened on those occasions (or more to the point, whatever Ms. Butler thought had happened) was not an "identification" in any meaningful sense. (4 RHRT 765-66.) Without some documentation or a corroborating witness, all that remains is the witness's memory, months or years after the fact, regarding what she thought she saw at the time. (*Ibid.*) As Dr. Pezdek put it: "it is subject to so many possible memory and memory distortion errors that I would not consider it a reliable source of information about who her attacker was." (*Id*. at 767.)

The instant case illustrates the point well. The record is full of instances – many of them traced in the charts attached as an appendix – in which Ms. Butler's ever-changing memories of a given fact or event turned out to be less than credible, or just demonstrably wrong. But there is no better example of the degradation of Ms. Butler's memory, and the accompanying interpolation of invented elements, than the metamorphosis of her accounts about encountering Petitioner in the jail, and her conversation with Deputy Lockhart.

i. The Encounter on "A" Deck

Ms. Butler reported to the detectives at Lerdo that she had seen Petitioner a few times when he was working at the jail and she went to visit her "husband" (actually her boyfriend), who was in custody. On about the third such visit she realized she knew him – she thought his name was "Burch" – and that she had said so, adding that he drove a white truck. He responded (she said) that he had arrested her in Arvin for being under the influence, in a white squad car. She had never been arrested in Arvin, and "snapped" – she realized that he was the man who assaulted her and "got real smart with him." (At trial, she specified that she called him a "son of a bitch." (2 RH Exhs. 375.).) She kept staring at him, hard, and he said: "I suggest if you want that visit you turn your ass around and keep your mouth shut," or (in a later version) "[t]ape your fucking mouth shut." She did as told, and did not mention it to anyone. (4 RH Exhs. 920-21.)

Of course, there is nothing to corroborate Ms. Butler's memory that the deputy whom she thought she recognized, and confronted, was even David Rogers. But assuming that the account was more or less accurate, it proves little in itself. There would have been nothing particularly incriminating – or even unusual – about any on-duty officer, having been addressed by a visitor (much less a drug-addicted prostitute) as a "son of a bitch," to have responded by telling her to turn around and shut up. And the fact that Ms. Butler felt she knew Petitioner – and even that he apparently had some recognition of her – is unsurprising, given that, when she had been arrested (for being under the influence) in April, 1985, he was the deputy who upon her release signed the citation and summons ordering her to appear in

court. (2 RHRT 278-79, 6 RHRT 1045-47; 1 RH Exhs. 59; see R&F 16 [finding that "*the credible evidence indicates there was some contact between them at that time*"].) 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. (4 RHRT 665-66.) For the same reasons, it would explain Ms. Butler's "recognition" of him – and he of her – when they encountered each other again in the jail, some 2 ½ years (and many arrests) after that first interaction.[74]

After that initial telling, Ms. Butler's account of her jailhouse encounters with Petitioner began to change – at first slightly, and then radically – until (as Investigator Hodgson put it, describing another aspect of her story) "it kind of [took on] a life of its own." (3 RH Exhs. 800.) In the version she told at trial, *she* was the one in jail, and it was her "husband" who was visiting when she saw Petitioner "when passing through the booking room." (2 RH Exhs. 363, 374, 385.) She was clear, however, that the only times she had seen him in uniform were "on the A Deck" of the jail. (*Ibid*.) In her subsequent declarations, she averred that she was being booked at Lerdo when she saw him, but he was just drinking a cup of coffee, not booking her or anyone else.[75] (1 RH Exhs. 218, 254.) In between

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[74]Respondent asserts that the "mere fact" that both Petitioner and Ms. Butler signed the Notice to Appear "does not show that petitioner was present when Butler signed [the document]." (RB 128) Respondent provides no explanation (much less any proof) as to how that could be true. On the form, Petitioner's signature is followed immediately by Ms. Butler's, which is in turn followed immediately by the notation "Div 6" (Petitioner's patrol) and the date, both written in Petitioner's distinctive hand. Both the document itself and common experience require the inference that they both signed it at the same time; Respondent's contrary assertion is not just unsupported but bizarre.

[75]Apparently, in those versions, no one was visiting anyone. The part about visits made a reappearance in Ms. Butler's testimony at the reference hearing; when confronted on cross-examination with her earlier versions, she asserted that she and her "husband" were *both* in jail, but were permitted to visit each other – and that's when she saw Petitioner. (6 RHRT 1100-01.) Former Deputies Simon and Lockhart, who worked at the jail during that time period, testified that there was never any visiting allowed between male and female inmates. (5 RHRT 914, 11 RHRT 2087.)

signing the two declarations she told Investigator Hodgson (in October, 1998) that when she saw Petitioner in the booking area, "he was booking someone else entirely." She was apparently already booked, and she added a new and decidedly more ominous line to what Petitioner supposedly said when she recognized him: "Yeah, and you got five months to do and I'm still here." (3 RH Exhs. 675-77.) Another inculpatory quote was added when she spoke to Mr. Hodgson again in April 2001 – Petitioner not only told her to turn around but also to "not be talking to everybody." (3 RH Exhs 719.) More dramatic details were added in her conversations with Mr. Hodgson in 2008. In August of that year, she said (at one point) that Petitioner had booked her, and (at another) that she recognized him when he made "a derogatory remark about other girls" to another deputy. When she confronted him, in this version what he said was: "you've got at least five months to do in this jail. You can do it the easy way or you can do it the hard way." (3 RH Exhs. 786-87, 798, 804-05.) Two months later, the setting shifted back from Lerdo to the Main Jail (where Petitioner was booking other people), and the version she gave Mr. Hodgson was more threatening still: "you know and I know we need to keep our mouth shut 'cause we got five months to do here." (3 RH Exhs. 824-26.)

ii. The Recently Fabricated Jailhouse Molestations

The evolution of Ms. Butler's story took a quantum leap in her next recorded conversation with Mr. Hodgson, in October, 2011, a month before the reference hearing. The initial encounter grew more baroque: Petitioner was not booking anyone but "cutting up and laughing with his friends" in a characteristic manner that led Ms. Butler to recognize him.[76] When Petitioner mentioned Arvin, Ms. Butler realized "that he thought I was one of the girls

[76]We pointed out in the opening brief, and below, that the notion that Petitioner's distinctive demeanor was of someone "laughing and cutting up" at work is completely contrary to the testimony of Deputy Lockhart, that on the job Petitioner "was like wound tight and he hardly ever smiled." (5 RHRT 943.) Without acknowledging Deputy Lockhart's testimony, Respondent responds on this point that there is (other) testimony, and photographic evidence, that Petitioner sometimes laughed and had fun with his friends *off*-duty. (ROB 31 n.5.) The response is a *non-sequitur*.

that he messed up in Arvin."[77] This time, Ms. Butler claimed, she told him "I know exactly where I know you from," and he replied: "We can do this my way, we can do this your way, or we can do this the hard way, which is my way."[78] (3 RH Exhs 861, 937-42, 947.)

At that point in her retelling, Ms. Butler – absolutely infuriated at the fact that Petitioner was still alive, and thus that she would have to come back to testify against him – introduced for the first time (25 years after the fact) her story about having been molested by Petitioner on three later occasions while she was in custody.[79] She told a version of that story again at the reference hearing – although in the intervening month, virtually every detail of the story had changed radically, and much of it changed again on cross-examination.[80]

The Referee explicitly found Ms. Butler's story about the "jail molestations" to be "*not credible,*" and *"thoroughly impeached by Ms. Lockhart's . . . and [Deputy Norm] Simon's testimony."* (R&F 7.) Although Respondent takes exception to that finding, it generally refrains from attempting to use the alleged incidents to support its substantive arguments –even though they would have provided Respondent important support if they

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[77]There is no evidence that Petitioner ever "messed up" any "girls" in Arvin – unless the reference was supposed to be to the homicides of Ms. Benintende and Ms. Clark, neither of which anyone had connected to Petitioner at that point in time, and neither of which occurred in Arvin.

[78]The sinister but not-quite-coherent quality of this bit of dialogue makes it sound like a parody of a sneering movie villain.

[79]Respondent relies on Ms. Butler's anger in that conversation as the reason to reject her statements at the time affirming the fact that she knew she would be released early if she testified against Petitioner (see ROB 44-45) – but sees no connection between her rage (and expressed indignation about the fact that Petitioner had not been executed) and her brand-new recollection of other occasions on which Petitioner had supposedly attacked her.

[80]These deviations and internal inconsistencies in Ms. Butler's story about the jailhouse molestations are detailed in Petitioner's Opening Brief, at pp. 89-92, and are summarized in the appendix to this brief, at p. 10.

were true.[81]

The obvious implication of Ms. Butler's molestation account is that, if she really knew Petitioner that well, then surely she could not have made a mistake in identifying him. But that same logic provides the *first* and most powerful of several persuasive reasons why her story (or stories, really) about the jail molestations cannot be credited. If Ms. Butler really had suffered that series of three (or, in her final testimony four) hideous, intimate encounters with Petitioner in the jail so close to the time that she identified him, it would defy reason for her thereafter to harbor any doubts about that identification. And it is established beyond dispute that she did indeed have serious doubts about whether she had picked the right man (which is to say, the actual rapist). She said so, emphatically and repeatedly, in her sworn declarations.[82] At the hearing, Ms. Butler admitted that she – not Ms. Ermachild – had written those words, and she affirmed that all of it was true when she signed the declarations. (6 RHRT 1181.)

Even when she attempted to repudiate those parts of her declarations, Ms. Butler repeatedly confirmed that she did indeed harbor such doubts, at least from the time she met

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[81]A telling indication of Respondent's lack of confidence in Ms. Butler's jailhouse molestation stories is in its assertion that, prior to the Lerdo interview, "the most important" of her "observations of Rogers [were] made while on the A Deck [*i.e.*, the booking area] of the jail." (ROB 82.) Of course, if Petitioner had subsequently molested her three times (or four, depending on which version of her story is discussed), surely *those* would have been the "most important" occasions on which she observed him between the time of the assault and when she picked out his picture.

[82]Ms. Butler represented, under penalty of perjury, 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." (See, 1 RH Exhs. 258-59, ¶¶ 21-23.)

with Ms. Ermachild until she spoke with Mr. Hodgson. (*E.g.*, 3 RH Exhs. at 815, 817-18 [Ms. Butler tells Mr. Hodgson that she was "questioning my identification," but only because Ms. Ermachild "had me doubting myself."]; *id*. at 845 [she had doubts about the identification until Mr. Hodgson "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."]; 2 RH Exhs. at 511 [she had harbored some doubt when Ms. Ermachild came and showed her pictures of Mr. Ratzlaff, and "made me question myself to the point of near – near insanity"]; *id*. at 559 ["She made me doubt"].) As Ms. Butler put it in one particularly dramatic locution: "she [Ms. Ermachild] had me second guessing and wondering what the hell I was thinking or not thinking, because by this point, *I am very upset because now not only I have testified against the wrong guy, he has been in jail for long and this other guy is out on the street* . . ." (3 RH Exhs. 797-98 [emphasis supplied].)

While she blamed Ms. Ermachild for instilling those doubts, what Ms. Butler consistently said about *how* that happened is extremely significant: The doubts arose because Ms. Ermachild told her that Petitioner never had a mustache, did not own a white pickup truck at the time of the attack, and did not have a stun gun – and because Ms. Ermachild showed pictures of Michael Ratzlaff. (*E.g.*, *id.* at 687.) She admitted at the reference hearing that, when she saw the Ratzlaff pictures, she thought: "Oh, my God, that's the man." (6 RHRT 1164.)

Even after proclaiming her certainty regarding the identification to Investigator Hodgson, Ms. Butler said: "I still am kind of messed up in my head, you know, to where I am questioning my judgment . . . ." (3 RH Exhs. 687; see also, *id.* at 749 ["I'm still having a real problem with this mustache thing."].) As she put it most explicitly:

> I am still kind of – you know, I know Mr. Rogers is the cop that I was supposed to testify against . . . but he doesn't match the description that I remember in my head.

(*Id*. at 697; 6 RHRT 1162-63.) This last statement echoes what Ms. Butler said at the

beginning of the process, in the course of the Lerdo identification interview itself, to the effect that the picture she had picked out – Petitioner's picture – looked different than her memory of her attacker.

Whatever magical persuasive powers Ms. Ermachild may have possessed (and so far as the record shows, all she did was tell Ms. Butler the truth) the fact remains that Ms. Butler could not possibly have maintained doubts about Petitioner being the man who raped her if he had then gone on to repeat his crimes against her again and again and again while working as a deputy in the jail. The things to which Ms. Butler ascribed her "confusion" – whether the attacker had a mustache, or a white truck, or a stun gun – did not enter into the jail scenario at all. Petitioner certainly did not have a mustache then, did not even purportedly use a stun gun, and whatever vehicle he was driving was parked elsewhere. If Ms. Butler had that much contact – and that sort of contact – with Petitioner, much less if he had actually said anything like "yes, I know you and you know me," there is simply no way that Ms. Butler would have been confused or doubtful or uncertain about whether he was the man who attacked her. The fact that she continued to doubt her identification demonstrates that there were no such encounters.

A *second* and even more obvious reason why Ms. Butler's accounts of the jail molestations should not be credited is because she did not mention a word about any of it for 25 years. In fact, everything she said in the interim (including at trial) was to the contrary – that her only contact with Petitioner in the jail was their encounter in the booking area on "A" Deck. (RT 5780 [asked where she had seen Petitioner before, Ms. Butler testified: "On Union Avenue and on A Deck."]; 3 RH Exhs. 732 [her certainty that Petitioner was the rapist "was from seeing him in the holding tank 18 months prior."].) And when the detectives at Lerdo concluded their interview with Ms. Butler, Det. Soliz asked her whether there was "anything else that you want to tell us? In regards to this case or something similar to it?" (4 RH Exhs. 934.) Ms. Butler then told them about how the man had stalked her in the days after the attack (*id*. at 935); when asked again if there was anything more, she seemed to

search her memory and said: "No. I don't think I have anything." (*Ibid*.)

Ms. Butler has been very clear that her avowed purpose in testifying at Petitioner's trial was to put him on death row. (4 RH Exhs. 855-56, 861, 869.) It beggars common sense to suggest that she would have withheld such damning evidence, from the jury and from law enforcement. Pressed on this point, Ms. Butler repeatedly said that, when she talked to the investigators – and in her later conversations with Mr. Hodgson – she did not go into "the details" of what had happened to her, but only gave a "general" account of things, leaving out the molestations in the interview room. (3 RHRT498-99, 538, 6 RHRT 1059, 1210, 1228.)

Her characterization of the Lerdo interview is insupportable: That interview was lengthy and during the course of it Ms. Butler provided a wealth of detail about everything she discussed – the attacker, his truck, what was said, what happened. Throughout the tape of the interview, the listener can hear Ms. Butler working to make sure that she was forthcoming on every detail. As veteran criminal defense lawyer David Coleman put it: "she gave a very detailed statement. 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."[83] (12 RHRT 2226.) None of those details included anything about molestations in the jail.

In the 25 years that followed, Ms. Butler had hours and hours of conversations with Tam Hodgson, covering, over and over again, every aspect of the case. But she never mentioned anything about being raped in an interview room until October, 2011 – a month before she was set to testify and when she was in a rage about the fact that Petitioner David Rogers had not yet been executed, and that she had to testify again. (See 3 RH Exhs. 877.)

During that same period, Ms. Butler repeatedly met with Melody Ermachild and

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[83] As noted in Petitioner's Opening Brief, Mr. Coleman testified extensively – and was extensively cross-examined – at the reference hearing, and the Referee explicitly "*found Mr. Coleman to be a very credible witness.*" (R&F 17.) In a sort of back-handed acknowledgment of the persuasiveness of Mr. Coleman's testimony, Respondent does not mention him once in its Opening Brief.

provided declarations which, she acknowledges, were expressly designed to help Petitioner. If she was actually certain that Petitioner not only raped her in his pickup truck, but also repeatedly abused, degraded and molested her in the jail, it would have been an act of forgiveness, compassion and generosity almost beyond human comprehension for her to have purposefully intervened on his behalf while remaining silent about the full measure of harm he had inflicted upon her. Whatever impression the Court may draw from Ms. Butler's testimony, it would be extremely difficult to picture her as being that selfless.[84]

Ms. Butler's explanation for why she hid such a bombshell for two-and-one-half decades was that she too "ashamed and humiliated" to tell anyone (or at least anyone on a jury or in law enforcement) that part of the story. (See ROB 68-69 & n. 38, citing 3 RHRT 498, 6 RHRT 1203.) The explanation, frankly, makes no sense. Ms. Butler had already told of being raped and tortured in a manner that was, if anything, more humiliating than her account of the jailhouse incidents. She told everyone, including the jury, about being a prostitute and a drug addict, about soliciting sex for money, about the sex acts – consensual and otherwise – that she engaged in with the man who attacked her; about the forced anal penetration; about how the rapist had made her put his penis in her mouth after it had been in her anus; about how he had made her beg for her drugs; about how he had degraded and hurt her. What she claims happened in the interview rooms was horrible – but certainly no more horrible than what she had extensively discussed with the detectives and on the witness stand. It certainly did not cast Ms. Butler herself in nearly as unflattering a light as what she had already, freely admitted about her own conduct before and after the attack that occurred in a pickup truck parked in a field in the winter of 1986. The far more sound inference is that if she did not tell anyone about the jail molestations it was not because they were too embarrassing – it was because they never happened.

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[84]This is, after all, the same person who complained to Tam Hodgson that she had not received anything from Kern County for her trouble, when she "knew for a fact that these women he killed sued the state. They made out." (3 RH Exhs. 867.)

The *third* reason that compels that conclusion is that the specifics of Ms. Butler's stor(ies) about the jail molestations were contradicted by the evidence presented at the hearing by the State's own witnesses. She testified that, on each occasion, she was escorted by another deputy to a small interview room with either no window, or a window that was papered over, where Petitioner was waiting for her. (3 RHRT 485.) After each molestation (she said) Petitioner would open the door and tell her to find her own way back to her cell. (3 RHRT 488-89, 492, 495.)

As the Referee found, this testimony "*was thoroughly impeached by Ms. Lockhart's . . . and Ms. Simon's testimony.*" (R&F 7.) The testimony of former Deputies Lockhart and Simon was that there were no interview rooms without windows, and their testimony makes it difficult to believe that another deputy would have deposited a female inmate into a room where the window was "papered over." But what appears flatly impossible is the part about Ms. Butler returning, unescorted, to matron's desk on "C" Deck. As Deputy Simon testified, there was a heavy locked door separating the women's wing from the rest of the facility, and the desk was behind it. (11 RHRT 2068.) Clearly, Ms. Butler could not have gotten through it unescorted. Moreover, it was undisputed that there were no interview rooms that met Ms. Butler's description on that floor of the jail. (12 RHRT 2438.) At the hearing, the State offered a response to this problem: Ms. Butler said, in one of her accounts, that the process involved walking up and down stairs, and Mr. Hodgson claimed that there were interrogation rooms on "B" Deck, one floor below that met the general description. (12 RHRT 2437.) But this version would have required Ms. Butler to get through a heavy, locked door to the staircase (which was only used in cases of emergency) and then through another such door at the top of the staircase, before even getting to the heavy, locked door to the women's wing. (13 RHRT 2472, 2476.) The undisputed evidence was that no inmates – not even trustees – were permitted to travel between floors of the jail unescorted by a deputy. (5 RHRT 916-17, 11 RHRT 2082-83.) Thus it would have been impossible for Ms. Butler, as she insisted, to have simply left the interview room(s) and return by herself to her cell – she never would

have gotten up the stairs, much less to have passed, unnoticed, by the women deputies at the desk on her deck who surely would have demanded an explanation as to how she got there.[85]

In addition, part and parcel of the jail molestation story was that Ms. Butler told Deputy Lockhart about it – or at least told her about "a deputy who liked to take women into interrogation rooms without anybody else knowing about it," or that "there was a deputy that messed with women in the jail." Deputy Lockhart was quite clear in her testimony that Ms. Butler had never said anything of the sort. (12 RHRT 2376-77.)

Fourth, even the accounts of the purported jail molestations that Ms. Butler gave – 25 years after the fact, but only one month apart – were utterly inconsistent with each other. As detailed in Petitioner's Opening Brief (at pp. 87-93), between October, 2011 and November 2011, Ms. Butler changed the entire framework of events: the order of the molestations; whether or not she was a trustee when various of them happened; when in the sequence she spoke to Ms. Lockhart; what Petitioner allegedly said to her during them; and even how many of them there were. In October she told Mr. Hodgson that the **first** molestation consisted of Petitioner "feeling her up" on her breasts and crotch – but in November she did not describe that happening during any of the encounters. Her account, in October, of the **second** molestation was that Petitioner just had her remove her clothes and stand there, nothing more – but in November, she testified the **first** incident consisted of something like that, except that she added that she had "felt something brush up the crack of [her] fanny"

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[85]Respondent contends that the Referee got it wrong, and that the testimony of former Deputies Simon and Lockhart "left open the possibility" that the molestations could have occurred as described by Ms. Butler. (ROB 69.) "In fact" (Respondent asserts) "Simon described how it could be done." (*Ibid*.) That is a gross mischaracterization of the former deputies' testimony, which made clear, *inter alia*, that an unescorted male deputy would not have had that sort of access to a woman inmate (and even an escorted male deputy would not have had access unless he had specific authority to do so); that there were no windowless interview rooms, and that the windows were never "papered over"; and that Ms. Butler could not – as she testified – have gotten from one floor of the jail to another, through locked doors at each floor of the stairwell, and through the locked door to the women's deck, all on her own. (See 5 RHRT 915-917, 938; 11 RHRT 2072-2074, 2076, 2081-2083.)

– which was contrary to what she said in October.

When she spoke to Mr. Hodgson in October, she said that, during the **third** molestation Petitioner "took me" – putting his penis in her vagina and anus. Mr. Hodgson suggested (for whatever reason) that maybe it was not his penis, and Ms. Butler immediately agreed that maybe it was a flashlight. And she said that it happened in a room in which she had just been interrogated about "slandering" a deputy – the other officer left and Petitioner came in and raped her. In November, that had become the content of the **second** molestation, but now she was sure that it was an foreign object of some sort that entered her and that it was unconnected to her interrogation for slander. Rather, she had some other, **fourth** encounter with Petitioner after that interrogation – as to which no details were given.

The fact that Ms. Butler quite literally could not keep this new story straight from one month to the next leads inescapably to the inference that she was just making it up as she went along. That does not mean that she did not believe it – the record demonstrates that, over the years, she came to believe many things that were demonstrably untrue. But it does mean that it would be unreasonable to credit it. That in turn suggests that, rather than supporting the reliability of her initial identification of Petitioner, the jail molestation story demonstrates only that Ms. Butler is an unreliable witness.

The fact that the jailhouse molestation stories cannot be credited is not just important because it neutralizes their viability as inculpatory evidence. It also demonstrates quite vividly how unreliable Ms. Butler's uncorroborated "memories" are – particularly in regard to the contacts (if any) that she had with Petitioner before seeing him on television one day, and picking his photograph from the detectives' lineup the next. In the final analysis, all of the evidence regarding jailhouse contacts between Ms. Butler and Petitioner, and whether she "identified him to herself," just confirms Dr. Pezdek's point. The only "identification" event that the Court can depend upon as having occurred was the one that took place during the interview at Lerdo, and the evidence demonstrates that Ms. Butler's identification of Petitioner then was corrupted by, *inter alia*, her having seen him on television the day before.

iii. The Conversation With Deputy Lockhart

Respondent contends that well before she picked out his picture from the lineup, Ms. Butler knew Petitioner's name and had "identified" his picture from the "Behind the Badge" book that Deputy Lockhart had shown her. (ROB 112.) Neither part of that formulation is true. That Ms. Butler in fact did *not* know the name of the man she subsequently identified (at least until she saw Petitioner on television) is easily established by her own statements to that effect to the detectives at Lerdo (4 RH Exhs. 920-923), at trial (RT 5782, 5792), in her first post-trial conversation with Investigator Hodgson (3 RH Exhs. 677-688 ["quite honestly, I don't know the name . . . but I do know the face"]), as well as her sworn declarations.

More important: Even Ms. Butler has admitted that she never told Deputy Lockhart (or anyone else in law enforcement) that Petitioner was the perpetrator. Ms. Butler instead claimed that she said that she saw his photograph in "Behind the Badge" but did not want to be too specific, and so informed the deputy that "the man's" picture was in the book. (*E.g.,* 2 RH Exhs. 376; but see, 4 RH Exhs. 924 [Lerdo interview: Ms. Butler told detectives that, after looking in "Behind the Badge," she pointed out a picture (apparently of someone else) to Dep. Lockhart and said "he looked like this guy but it wasn't him . . . ."] .)

But even these more diluted accounts cannot be credited. Ms. Butler has gone on to give numerous, conflicting versions regarding what she told Deputy Lockhart – and one thing they have in common is that they are all demonstrably false.[86]

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[86]Like much that she had to say, Ms. Butler's version of her interchange with Deputy Lockhart evolved over the years. (See, 1 RH Exhs. 219, 256 [she told the deputy that the man's face was on "one of the pages" in the book]; 3 RH Exhs. 679, 790 [she told the deputy that "he was on one of these two pages"]; 4 RH Exhs. 940 [same, but had added that "I still got 5 months to do and I ain't saying nothing else"]; 3 RH Exhs. 927 [had said that the picture was on page 12]; 3 RHRT 483 [found picture on page with 12 pictures, facing another page with 12 pictures and told the deputy that, but would not specify the picture because "I've got to do a lot of time here"].)

Asked to reconcile her various statements in this regard at the reference hearing, Ms. Butler tried a new tack: She testified that she told Deputy Lockhart that the man's

Although Respondent does not deign to mention it, Deputy Lockhart, both at the trial and the reference hearing, contradicted Ms. Butler's narrative. According to the deputy, after looking through the "Behind the Badge" book for about an hour, Ms. Butler said that she did *not* see her assailant in the book. (RT 5806, 5 RHRT 919-21.).[87] Deputy Lockhart is utterly unbiased: she was a prosecution witness at trial and made it clear at the reference hearing that she had no particular affection for Petitioner (see, 5 RHRT 944) and her testimony – unlike Ms. Butler's – has remained completely consistent through the years.

* * *

In short: The record is clear (notwithstanding Ms. Butler's efforts to revise reality over the years) that she saw Petitioner on television, arrested as the murderer of one of the other

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photograph was on one of two pages of 12 pictures (24 in all), and assumed the deputy would know which one it was because Petitioner's face had already "been on the news." (6 RHRT 1186-88.) ["So all Ms. Lockhart had to do was turn to the page that I showed her and go uh-huh, that's the guy she must be talking about. Because that's the one who is in the news, obviously."] Suffice it to say that, by everyone's account, the conversation between Ms. Butler and Deputy Lockhart occurred several months *before* Tracie Clark was killed and Petitioner arrested – so he could not possibly have been "on the news" at that point.

[87]Respondent does, however, include a citation to Deputy Lockhart's hearing testimony to support the assertion that "Butler recognized Rogers as her assailant by his photograph in the 'Behind the Badge' annual . . . ." (ROB 108, citing, *inter alia*, 5 RHRT 919-23.) The cited testimony is not as Respondent represents it to be. The pertinent exchange is as follows:

> Lockhart: I remember I asked [Ms. Butler] if she . . . would look at a book that was like a year book of deputies and if she could see if she could pick out the deputy that raped her.
>
> Q: What did she do?
>
> A: She looked at the book. *And then she told me that she did not see him.*

(5 RHRT 920; *see also, id.* at 921 [Q: "Did she say that he looks like a particular person in the book?" A: "No." Q: "Did she identify anyone in the book?" A: "No, she didn't."].)

women working on Union Avenue, before the first time she ever identified him to anyone in authority as her assailant. Indeed, other than Ms. Butler's various, confused and contradictory accounts, there is no evidence at all that she ever identified Petitioner to *anyone* until she picked out his photograph at Lerdo, after seeing him on television. Thus, once again, both science and common sense confirm that the identification followed from the most emphatic of suggestions, that all but dictated its result.

4. Ms. Butler Was Biased In Favor Of The Prosecution

In responding to the Referee's finding that "*Ms. Butler [is] not credible*" (R&F 7), Respondent devotes considerable energy to arguing that Ms. Butler's testimony was "sincere" – by which it apparently means "not wilfully false." (ROB 64-78.) The simplest reply is that – as this Court's reference questions make clear – the determinative question is not whether she lied, but rather whether she "'*testif[ied] falsely (either inadvertently or otherwise at the penalty phase of petitioner's trial . . . .*'" (R&F 1, quoting Reference Question #1; see, *Richards I*, *supra*, 55 Cal.4th at pp. 961-62 [in claim based on "false evidence" there is no "'obligation to show that the testimony was perjured'"]; quoting *In re Hall*, *supra*, 30 Cal.3d at p. 424 [granting relief where "the trial testimony of two key witnesses identifying petitioner as the killer apparently was false, albeit unintentionally so"].)

It is nonetheless helpful in making that determination to observe that Ms. Butler had – and has – reason to seek the favor of the prosecuting authorities and that she shaped her testimony accordingly.

a. Ms. Butler's Bias

It has long been recognized that the testimony of a witness who is in custody or on probation is likely to be "affected by fear or favor growing out of his detention . . . ." (*Alford v. United States* (1931) 282 U.S. 687, 693; *citing*, *People v. Dillwood* (1895) 39 P. 438, 439 (Cal. Sup. Ct.).) [holding fact that charges are pending against a witness is a "circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant"]; *accord*, *Davis v. Alaska* (1974) 415 U.S. 308, 317-18 (1974) ["The claim of

bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of [the witness's] vulnerable status as a probationer."]; *Amado v. Gonzalez* (9th Cir. 2013) 734 F.3d 936, 952; *United States v. Lankford* (11th Cir. 1992) 955 F.2d 1545, 1548; *Carrillo v. Perkins* (5th Cir. 1984) 723 F.2d 1165, 1169-1170; *Baldwin v. Adams* (N.D. Cal. 2012) 899 F. Supp. 2d 889, 916-17.)

In this case, Ms. Butler was in custody when she picked Petitioner's photograph from the detectives' array at Lerdo. When she later testified against Petitioner, Ms. Butler was again in custody, 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. (10 RHRT 1994; 1 RH Exhs. 165.) 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 threatened to amend the charges against her to include that offense.[88] At that time, she was on probation for two misdemeanors and a felony. (6 RHRT 1111.) She "knew I was about to go to prison and this was my last shot" and expected to receive an 18 month prison term. (6 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 felony charge and the probation violations were taken "off calendar."[89] (6 RHRT 1112.)

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

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[88]Respondent inaccurately asserts that Ms. Butler was only arrested for simple possession of heroin on that occasion. (ROB 39.) The police report is to the contrary. (1 RH Exhs. 128.)

[89]Ms. Butler 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. (6 RHRT 1113.) The very unusual fact that she received such an indeterminate sentence – rather than for a specific period of time – strongly suggests that the prosecutor and the sentencing court anticipated that she would return to court for further consideration of that sentence following some future event, such as her successfully testifying against Petitioner.

and end up in state prison. (6 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. (3 RHRT 535-36; 554-55.) She testified that they did not promise her anything, and even told her that she would not get anything in return for testifying. (3 RHRT 555.)

Ms. Butler also testified that she neither wanted nor expected any reduction in her sentence. (See 3 RHRT 508, 6 RHRT 1027.) But in a telephone conversation with Investigator Hodgson, a month before the hearing, Ms. Butler said 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. (6 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. (6 RHRT 1031-33.) And Ms. Butler 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." (6 RHRT 1033.) At the reference hearing, Ms. Butler attempted to recant those statements, saying that they were just her anger talking and that she did not even want an early release; what she really wanted was not to be out on felony probation, for she feared that would inevitably lead to a prison term. (6 RHRT 1030-31.)

The Referee, having reviewed the evidence and having heard Ms. Butler's testimony, credited her statements to Mr. Hodgson and found, simply: "*it is clear she knew she would get out if she testified . . . .*" (R&F 9.)

But regardless which of Ms. Butler's stories one credits, the facts demonstrate that Ms. Butler was in precisely the "vulnerable" position described by the United States Supreme Court, and that she had substantial motivation to curry favor with the authorities. That would be true either if (as common sense dictates) she wanted to be released from jail early, or if (as she at times insisted) she was only concerned about having her felony probation

"violated" at some point in the future. It would also be true just because she was powerless while in custody *and* just because she was certain of running into legal trouble down the road. Regardless how one looks at Ms. Butler's situation, she had every reason to want to be in good favor with law enforcement.

Nor does this analysis depend on whether any promises had been made to Ms. Butler. "Whether or not such a deal existed is not crucial. What counts is whether the witness may be shading his testimony in an effort to please the prosecution." (*Greene v. Wainwright* (5th Cir. 1981) 634 F.2d 272; *accord*, *United States v. Lankford*, *supra*, 955 F.2d at p, 1548.) Indeed, as Justice (then Judge) Anthony Kennedy observed: "A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception."[90] (*Burr v. Sullivan* (9th Cir. 1980) 618 F.2d 583, 586-587; *accord*, *United States v. Lankford*, *supra*; *Carrillo v. Perkins*, *supra*, 723 F.2d at pp. 1169-1170.)

It is important to note that Ms. Butler received *both* of the mentioned benefits after she testified. She was indeed released from jail several months early, and she was spared the prospect of being prosecuted for violating her felony probation – and receiving a consequent prison term – when she (unlawfully) left California at the urging of the District Attorney's office. But the more fundamental point is that her extraordinary vulnerability to the inclinations of local law enforcement authorities, and her grave need to gain their favor,

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[90]This point was more fully elucidated in a seminal opinion, published some 90 years ago: "[P]romises of immunity are admissible; they are, however, rarely made. Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper, either by crossexamination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope." (*Farkas v. United States* (6th Cir. 1924) 2 F.2d 644, 647; *cited with approval in*, *Alford v. United States*, *supra*, 282 U.S. at p. 693.)

surely resulted in a "desire to assist the state." Whether that desire was conscious or unconscious, its inarguable tendency to "cloud [her] perception" provides the best explanation as to why she was willing to identify Petitioner and testify against him at trial – even though he shared none of the specific characteristics of the man who attacked her.

Her bias in favor of the State was even more evident by the time she testified at the reference hearing. As Respondent accurately reports, when Ms. Butler was contacted as part of the post-trial investigation – after she had fled the state and established a new identity in Oregon – she was very concerned about being returned to Kern County, where she would be facing felony charges and prison time. (ROB 50 & n. 23, quoting 3 RH Exhs. 703-704 ["Do you know what I'm really scared about? I left the state on felony probation."].) That anxiety about being sent to prison for absconding while on probation continued up until the time she testified at the reference hearing in 2011. (6 RHRT 1230.)

After her initial meeting with Melody Ermachild in 1998, Ms. Butler (on the advice of a nephew in law enforcement) contacted the Kern County District Attorney, and sought reassurance from Investigator Hodgson. (3 RHRT 703-704.) In the course of that conversation, Ms. Butler surfaced another concern: Whether she would be prosecuted for perjury if she now contradicted her trial testimony. (3 RH Exhs. 698-699.) Mr. Hodgson assured her she would not – unless she was "lying through her teeth" when she said that Petitioner was the perpetrator. (RH Exhs. 699-700.)

It could not have been lost on Ms. Butler that the only way she would be prosecuted for any of those offenses – absconding, or the underlying felony, or her perjury – would be if the Kern County District Attorney elected to do so. She thus had ample reason to shape her testimony at the reference hearing to suit what the Kern County District Attorney (who served as lead counsel for Respondent) sought to accomplish – namely to defeat the instant petition. And it bears note that Ms. Butler's efforts were successful, at least in that regard: She was not and has not been prosecuted for any of the crimes of which she is undeniably guilty. In particular – and regardless which of her versions of the truth one accepts – there

is no question that Ms. Butler has committed perjury, either when (as the Referee found) she testified falsely at trial or (as the State and Ms. Butler both insist) by knowingly and intentionally signing a series of declarations, under penalty of perjury, that she knew at the time to be false.

Under the circumstances, it is not surprising that Ms. Butler gave false testimony in an effort to inculpate Petitioner at trial, and even less surprising that she worked so hard at the reference hearing to ensure that his death sentence remains intact.

b. Ms. Butler's False Testimony At Trial, Which Reflected Her Bias

The proof of Ms. Butler's bias in favor of the State is in the proverbial pudding – the several demonstrably, knowingly false statements she made while testifying at trial in her efforts to assist the prosecution.

In response to specific questions referred by this Court, the Referee found that – in addition to (and in support of) her assertion that Petitioner was her assailant – Ms. Butler testified falsely to a number of things:

i. Her Discussions With Other Inmates

According to the Referee:

> *Ms. Butler talked with other inmates extensively about the case and she testified falsely when she denied talking to other inmates about the case. She talked with her friend and cellmate, Kay Davis, about the TV news broadcast when her friend and cellmate alerted her to the news by saying 'O my god there he is!'* [¶] *And she repeatedly assured both Mr. Hodgson and this Court that the only reason she agreed to talk with the detectives was because she received (depending on the version) either '150' or '175 kites' from the men in the jail, urging her to do so."*

(R&F 7 [record citations omitted].)

In disputing this finding, Respondent quotes a snippet of Ms. Butler's pertinent trial testimony, but leaves out the more significant parts. Lest we fall into a similar error, here it is in its entirety:

> Q: And it's true, is it 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.

Q: Well isn't it true, though that 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?

A: Some of the girls knew that I was raped, yeah, but as far as the details, no, I didn't go into details. It's something that I haven't really wanted to think about.

Q: But isn't it true, it was a matter of jail gossip before you talked to Mr. Hodgson, was it not?

A: No.

Q: It wasn't discussed at all, no interest on your deck at all?

A: In my part, I kept it to myself.

(RT 5803.)

Quoting only the second part of that exchange ("Some of the girls . . . .") Respondent insists that Ms. Butler was only saying "that she had not discussed the *details* her [*sic*] *own assault* with a *number* of other inmates." (ROB 71 [emphasis in original].) Even if one accepts Respondent's initial premise – that Ms. Butler was referring exclusively to her own rape, and not at all to "this case" (*i.e.*, Petitioner's prosecution, regarding which she was testifying) – Respondent's interpretation is simply untenable in light of the entirety of the pertinent testimony as well Ms. Butler's subsequent statements. By her own admissions – including under oath – Ms. Butler did *not* "keep it to herself." Clearly she had gone "into details," at least in regard to her belief that her attacker was a sheriff's deputy – not only with her friend Kay Davis but with enough other people that hundreds of inmates were privy to the information; hence the "kites." And, for the same reasons, her flat "no" regarding whether "it was a matter of jail gossip" was simply a lie.

Indeed, Ms. Butler herself characterized that testimony in precisely those terms, in her

subsequent declarations under penalty of perjury: "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."[91] (1 RH Exhs. 222.) Respondent insists that the Court should simply ignore that sworn admission and instead rely on Ms. Butler's later recantation of it at the reference hearing.[92] (ROB 71.) But in addition to the other defects in Respondent's benign interpretation of Ms. Butler's testimony (including the plain language of what she said, and her subsequent admissions regarding its falsity) Respondent faces the insurmountable problem that it just does not make sense. Indeed, it beggars common sense to suggest that the jail was not abuzz with the news of Petitioner's arrest, and that Ms. Butler – who claimed to have significant evidence in that regard – just "kept it to [her]self."

ii. Whether She Saw Petitioner On Television

In response to the Court's reference question asking "[d]id Tambri Butler testify falsely at the penalty phase of petitioner's trial [regarding] whether she had seen petitioner on television before she identified him," the Referee answered: "*Yes. The Court finds Ms. Butler saw petitioner on TV before she identified him*." (R&F 8.)

The Referee's finding in this regard is not subject to reasonable dispute. As reviewed in an earlier section of this brief, Ms. Butler has admitted on at least eight occasions that she did indeed see Petitioner on television before she identified him. (1 RH Exhs. 220, 222; 2 RH Exhs. 255-56; 3 RH Exhs. 679-79; 3 RH Exhs. 714-15; 3 RH Exhs. 786, 790, 806-07; 3 RH Exhs. 838-39, 841; 4 RH Exhs. 943; 6 RHRT 1224.) That now indisputable fact puts the lie to the following testimony she gave at trial:

> 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.

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[91]Ms. Butler's lies about not having seen Petitioner on television will be discussed presently.

[92]The Referee considered, and rejected, Respondent's repeated contention "that the declarations are meaningless . . . ." (R&F 6.)

A: No sir, none whatsoever.

(RT 5795.)

Respondent nonetheless contends that "[i]n light of the question, Butler's other testimony, and in the context of the case, Butler's testimony was not false . . . ." (ROB 117.) To support this (frankly astonishing) contention, cherry-picks Ms. Butler's later statements on the subject in order to quote those that minimize the length of the time that his image was visible to her, which Respondent characterizes as merely a "flashing glimpse." (ROB 116-118.)

The first and most obvious point is that, regardless of whether she saw Petitioner's face for a second or an hour, the indisputable fact is that she did see photographs of him on television and she lied when she said: "No sir, none whatsoever."[93]

In a reversal of its position before the Referee, Respondent concedes in its brief that "[t]he People agree that Butler saw an image of Rogers on a television screen in jail, but

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[93]In its brief before this Court, Respondent implies there is some issue as to "whether the use of the plural term, 'photographs,' in the question should be taken literally . . . ." (ROB 120.) It would be difficult to understand what Respondent was driving at without knowing that its argument to the Referee was that Ms. Butler was only denying that she saw a "*still photograph*" on television, and thus may well have been telling the truth. (RBFRH 37.) Petitioner answered this argument by pointing out that: (a) in her many responses, Ms. Butler herself never suggested that *she* interpreted the question that way; (b) no reasonable person would understand the question ("it's true that you saw photographs of Mr. Rogers on television . . . before you talked to the police, did you not?") as being limited to "still" as opposed to moving images; (c) the standard dictionary definition of "photograph" is "[a]n image . . . recorded by a camera and reproduced on a photosensitive surface." (*American Heritage Dictionary of the English Language* at 1323 (4th ed. 2006)), and nothing in that definition limits its scope to a "still photograph" rather than a film clip (which is, after all, merely a series of individual images displayed so quickly as to appear that they are moving); and (d) even if one were to accept Respondent's cramped definition, there is no reason to accept his unstated, predicate assumption that the images of Petitioner seen by Ms. Butler on television were moving as opposed to still images – mug shots, Sheriff's Department photos, or the like. Thus the Referee found that "*the argument set forth in respondent's brief as to Ms. Butler seeing a still photo is not supported by the evidence.*" (R&F 9.)

contends that her testimony on the subject had little or no significance . . . ." (ROB 116.) We have already discussed why Ms. Butler having seen Petitioner on television was enormously significant to weighing the reliability of her identification of him when shown a photo lineup the next day. Nor was that significance lost on Ms. Butler, who acknowledges in her declaration that:

> 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. . . . I picked out David Rogers, who I had just seen on television the day before . . . . I testified, and I lied when I said I hadn't seen Rogers on TV . . . . I knew there were some things it wouldn't be good to say if I was going to help put Rogers on death row.

(1 RH Exhs. 222.)

Respondent nonetheless persists in asserting that Ms. Butler's testimony was not really false because, crediting (only) her statements that she only caught a "fleeting glimpse" of Petitioner on television, the Court should conclude that she did not see enough to have recognized him. (ROB at 119.) Respondent yet again does the Court a disservice by discussing only the fragments of the evidence that serve its argument, and failing to mention the several other statements Ms. Butler made that support the Referee's findings. But a review of Ms. Butler's averments on this subject reveals the other regard in which they are very significant to this case: Both her initial perjury and her later attempts to either deny or downplay it clearly demonstrate her bias in favor of the prosecution.

Respondent ignores not only Ms. Butler's sworn statement that she had indeed seen Petitioner on television (and "lied" about it on the stand) but also the fact that Ms. Butler reaffirmed the quoted statement in conversations with Investigator Hodgson on several occasions over the following years – even as she was attempting to retreat from the other contents of her declaration. Thus in her telephone call with Mr. Hodgson in October, 1998 – after she had signed the handwritten declaration but before she reiterated her admission in the typed declaration – Ms. Butler said: " . . . it was at Lerdo. It was like ten o'clock at night and the news came on and they flashed his face . . . . 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. . . . then the next morning . . . [the detectives] were there." (3 RH Exhs. 702.) She said much the same thing to Mr. Hodgson in April, 2001:

> Q: . . . [Y]ou testif[ied] at trial that you did not see him on TV. That's not true then. Is that right?
>
> A: Yes.
>
> Q: Yes, it's not true, or . . . .
>
> A: Not true.
>
> Q: Okay. So you had seen him on TV?
>
> A: That very night, I seen it on the news. . . . [W]hen it showed up on the news everything [*claps hands*] clicked into place that my memory served me right.

(3 RH Exhs. 714-15.) She said it again, in August, 2008: "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."[94] (3 RH Exhs. 786.) A bit later, Ms. Butler was commenting that she had been "very aggressive when you guys came in [to show her the photo lineup] because as far as I was concerned, I was going to be a rat fink and . . . ." Investigator Hodgson broke in: "But this was after you saw him on TV." To which Ms. Butler answered: "Uh-huh." (3 RH Exhs. 806-07.)

Ms. Butler went even further in another conversation with Mr. Hodgson, some two months later. In October, 2008, she asserted that she had told the detectives at Lerdo about seeing Petitioner on television: "I pretty much remember telling you guys I had just seen it

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[94]We note that once again Ms. Butler's prior statements render her later stories about being molested by Petitioner in jail impossible to believe. If she did not know he was a police officer until she saw him on television while she was in Lerdo, then he could not possibly have sexually assaulted her on several occasions in the Main Jail – while he was in uniform – during the weeks that preceded her transfer to Lerdo. And there is no reason on Earth for Ms. Butler, in her 2001 conversation with Investigator Hodgson, to have admitted seeing Petitioner on television (see 3 RH Exhs. 714-15) – unless that was true.

last night on TV and I didn't know he killed a bunch of people." (3 RH Exhs. 839.) She repeated the assertion a few minutes later: "In fact, like I said, I believe I even told you guys wh[ile] you were there that day, that *I'd seen him just last night*." (3 RH Exhs. 841 [emphasis supplied].)

Ms. Butler made the same admission in October, 2011 during her last conversation with Mr. Hodgson before the reference hearing. She said she was in Lerdo, sitting in her cell when "*his face came up and I went, 'Oh my God. That's him*. That's the cop that did me.' And that's when it said he was being arrested." According to Ms. Butler, she was cellmates with her friend, Kay Davis, and "when he came and [*sic*] I go: '*There he is, right there, that's him.*" (4 RH Exhs. 940.)

Yet at the reference hearing, scarcely a month later, Ms. Butler denied having seen Petitioner on television *at all.* Directly contrary to what she had said the month before (and on at least a half-dozen other occasions), Ms. Butler claimed that she had not seen Petitioner's face; rather, it was Kay Davis who alerted *her* "to the news. She goes oh, my God, there he is," at which point Ms. Butler supposedly just saw a Kern County Sheriff's badge being flashed on the screen. (3 RHRT 497.) She never saw his picture. (*Id*. at 500, 552, 556.)

On cross-examination, confronted with her many contrary statements, Ms. Butler retreated – she testified she was "pretty sure I didn't see his face. If I did it was so fast." (6 RHRT 1018.) Her testimony shifted once again on redirect: She really wasn't paying attention to the television news stories about a Sheriff's deputy who had murdered a fellow Union Avenue prostitute – "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 . . . ." (6 RHRT 1224.)

Respondent insists on ignoring all of the many times that Ms. Butler freely admitted seeing Petitioner's face on television before she identified him, and focuses solely on her more grudging assertion at the reference hearing that (as Respondent puts it) "Butler only had

a fleeting glimpse of Rogers on television."[95] (ROB 117.) But the truth lay in what Ms. Butler reiterated so many times, including just a month before the reference hearing – that she saw Petitioner's face on television, and "recognized" him, the night before she picked out his photograph. (4 RH Exhs. 940 [". . . his face came up and I went, 'Oh my God. That's him. That's the cop that did me.' And that's when it said he was being arrested. . . . I go: 'There he is, right there, that's him."].)

There are several good reasons to credit Ms. Butler's many, many statements affirming that she saw Petitioner on television – and recognized him – over her (frankly pathetic) attempts to deny it at the reference hearing. Perhaps most important, for purposes of the current discussion, is her reluctance to admit, under oath, that she had lied under oath – that she had perjured herself at Petitioner's trial. Whether she was going to face any consequences for doing so was of course up to the District Attorney, so it can hardly be surprising that she gave the answer that was most helpful to the District Attorney who was examining her. In short: she was demonstrably biased.

The record evidence compels the conclusion that – just as Ms. Butler said on so many separate occasions over the years – she saw Petitioner on television the night before she identified his picture at Lerdo, and (as she put it) she "lied" when she testified otherwise. Just as that demonstrates that her trial testimony was biased in favor of the prosecution, her efforts at the reference hearing first to deny the truth, and then to trivialize it, demonstrates that her testimony in 2011 was as biased and unreliable as was her testimony in 1988 – if not more so.

iii. Whether Ms. Butler Knew She Would Be Released Early If She Testified

On cross-examination at Petitioner's trial, Ms. Butler was asked whether, "although perhaps no formal promises have been made to you . . . you hoped to get out of jail as soon

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[95]We note again that even that minimal concession establishes that Ms. Butler perjured herself: What she testified to was that she had not seen any image of him at all – "No sir, none whatsoever."

as possible?" Ms. Butler replied that, no, she was not going to get out until August 9, 1988, and that she did not "expect any help."[96] (RT 5801.) The Referee found that this testimony, too, was false: "*it is clear she knew she would get out if she testified ....*" (R&F 9.)

In explaining that finding, the Referee quoted Ms. Butler's taped conversation with Investigator Hodgson in October, 2011, in which Ms. Butler said that she had to testify "just to save my freedom." (4 RH Exhs. 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 allowed that no one from law enforcement had made her 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 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." [97] (*Ibid*.)

This evidence in support of the Referee's conclusion is clear, emphatic – and certainly substantial. Yet Respondent contends that it "does not support the referee's finding." (ROB 122.) Respondent urges this Court to disregard it, and instead credit Ms. Butler's testimony at the hearing to the effect that she actually "had no expectation of leniency, and did not believe or assume she would be released from jail early." (ROB 125, citing 6 RHRT 1026-

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[96]In fact, Ms. Butler was released from jail on May 2, 1988 – the same day that Petitioner was sentenced to death. (11 RHRT 2171; 2173.)

[97]Although Respondent makes a brief reference to the quoted colloquy – which it describes as "a single statement made in a telephone conversation in 2011 expressing frustration over being required to return to California to testify" (ROB 122) – Respondent neither quotes what was actually said nor even provides a record reference to it. Instead, following its unfortunate but standard practice, Respondent spends several pages detailing only the evidence that supports its contrary position. (ROB 122-125.)

1027, 1030.) Respondent insists that the Court should accept Ms. Butler's explanation that the statements she made to Mr. Hodgson the month before were merely "anger talking here. I was very angry." (6 RHRT 1030; see ROB 125.) In fact, according to Ms. Butler (and Respondent) she did not even *want* to get out of jail. (ROB 122-124.)[98]

We pause to note the irony in Respondent's argument that statements made by Ms. Butler in October, 2011, should be disregarded because she was so angry that she would say things she clearly did not mean, and that were not true. It is, after all, only moments later in that same conversation that Ms. Butler surfaced, for the first time, her tale about Petitioner molesting her in jail – yet Respondent has no difficulty placing fulsome reliance on *those* statements, and anything else Ms. Butler said at that time that it might find helpful.

An obvious problem with Respondent's position – and the testimony on which it is predicated – is that it defies common sense and experience. The Referee's finding asks only for the Court to accept that someone serving an extended and unpleasant sentence in jail wanted to get out sooner, rather than later, and that she thought it likely that she would get out early if she provided valuable assistance to the prosecution in a very important case. That is simply more persuasive than the contrary story on which Respondent insists: that Ms. Butler, who by then had extensive experience with all aspects of the criminal justice system, was (in her words) so "stupid" that she had no expectation of receiving any consideration for helping the District Attorney, and that she preferred to just sit in jail anyway.

But the final and insuperable problem with Respondent's argument is that it challenges a factual finding made by a referee who heard the witness's testimony on the subject, listened as she was impeached with her prior, inconsistent statements, reviewed the evidence and made a credibility determination as to which of her stories he thought was truthful. As such it is, once again, the quintessential function of the referee to which this

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[98]Bizarrely, Respondent asserts that "Rogers has not argued that these statements, or Butler's similar testimony at trial, were false." (ROB 123.) Respondent has apparently forgotten that, *inter alia*, Petitioner devoted several pages of his final brief to the Referee arguing precisely that. (See, PRBFRH 64-68.)

Court affords deference. (See, *e.g.*, *In re Price, supra,* 51 Cal. 4th at p. 559.)

In short, the fact that Ms. Butler was clearly motivated to assist the prosecution in order to obtain favorable treatment and an early release demonstrates that she had a reason to be biased, and the fact that she lied about those things on the stand – both at trial and at the reference hearing – demonstrates that she was in fact a biased and unreliable witness.

iv. The Crime For Which Ms. Butler Was In Custody

In response to the Court's reference question regarding whether Ms. Butler "testif[ied] falsely at the penalty phase of petitioner's trial regarding any other matter," the Referee found as follows:

> *[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 ...; that is a completely different – and far more serious – offense than simply possessing heroin . . . . [which is] a crime of moral turpitude. [¶] . . . . The Court finds she testified falsely, either inadvertently or otherwise, about an issue material to her credibility as a witness."*

(R&F 9-10.)

Respondent disagrees, contending that Ms. Butler responded accurately to a "question that called for, and received, a generic answer which described the cause of Butler's incarceration more accurately than relying on the offense of which she had been convicted." (ROB 129.) That question, Respondent asserts, "sought a description in common terms of the *conduct* which led to her conviction." (ROB 130.)

But the "conduct" for which Ms. Butler was arrested, charged and convicted did not simply involve possessing heroin – it involved furnishing it to someone else, which both the law and society as a whole understand as a whole different matter. Respondent's argument appears to be predicated on a factual error recited earlier in its brief – namely that when Ms. Butler was arrested she was initially charged only with simple possession. (ROB 39.) As noted previously, however, the charge made at the time of Ms. Butler's arrest in fact included possession of heroin for sale (1 RH Exhs. 128.)

The difference is not one of degree, but of kind. Simple possession does not carry the extraordinary negative societal connotations regarding the character of the accused that makes possessing narcotics for sale a "crime of moral turpitude." (*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; *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 p. 435, quoting, *U.S. ex rel. De Luca v. O'Rourke* (8th Cir. 1954) 213 F.2d 759, 762].)

In short, the crime described in the answer Ms. Butler gave was *not* the crime for which she was in custody, and the truth could be expected to have made a difference in how the jury viewed her and assessed her credibility. Respondent argues that it could not have made any significant difference, given that the jurors already knew that she was an habitual heroin user and career prostitute. (ROB 131.) But those are offenses that are generally understood to be harmful primarily to the offender. As the cited and quoted authorities demonstrate, trafficking in hard narcotics is widely (and appropriately) condemned for the evil it does in destroying the lives of others.[99]

Respondent contends that, at worst, Ms. Butler made an innocent and understandable mistake in giving a real-world answer to a technical legal question. That contention is untenable. As Respondent emphasizes, Ms. Butler was not a neophyte; she "admitted to 'about eight, nine' heroin arrests." (ROB 131.) She certainly knew the difference between simple possession and drug trafficking. She answered falsely, and like her other false testimony at trial, her answer betrayed her determination to bolster her own credibility and

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[99]Capital defense expert David Coleman offered that, in his experience, juries also make that distinction: "I think jurors find people who are engaged in the sale and possession of drugs to be very different in their character from [those] who, unfortunately, are addicted to the use of drugs." (12 RHRT 2308.)

thus to aid the prosecution's cause. In other words: It betrayed her bias.

v. "I Think He Told Me His Name Was David"

Ms. Butler told the detectives at Lerdo that she did not know the name of her attacker, but for some reason thought it was "Birch," and had said that to Deputy Lockhart, who in turn had suggested that perhaps it was "Lenski" or "Laski." (2 RHRT 529.) (For her part, Deputy Lockhart testified that Ms. Butler had never said anything about the name of her attacker, nor had the Deputy suggested any such thing to her. (9 RHRT 1701).) At trial, Ms. Butler asserted for the first time:

"I think he told me his name was David . . . ."

(RT 5782.) When cross-examined about the fact that she had not said that to Deputy Lockhart, Ms. Butler retreated: "I didn't know the man's name at the time." (RT 5797.) Then she added: "Birch . . . is what I thought his name was." (*Ibid.*)

Questioned about this anomaly at the reference hearing, Ms. Butler's explanations went from implausible to simply embarrassing. She first testified that she had gotten the name "David" from seeing Petitioner's name tag when he was working as a deputy in the jail. (6 RHRT 1140.) While this version, even if believed, would have contradicted her trial testimony (that he told her his name on the night of the assault), it quickly fell apart. Pressed, Ms. Butler agreed that the name tag would only have had Petitioner's last name. (6RHRT 1140-1141.) At that point, she returned to her story that she had learned his name on the night she was attacked, but she said she had not shared it with either Deputy Lockhart or the detectives at Lerdo because she was afraid to do so – even though, at Lerdo, she was not afraid to describe him and pick out his picture from the photo array. (6 RHRT 1141-1142.) This led to the following colloquy on cross-examination:

> Q: 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?
>
> A: Yes.

(6 RHRT 1142.)

Ms. Butler's testimony in this regard at Petitioner's trial was so obviously fabricated that criminal defense expert David Coleman opined that a competent trial attorney would have used it as the starting point of cross-examination – asking her why she had never given that name to the police but was suddenly using it now – or as the platform from which to attack her other inconsistent statements, perhaps putting up a display that included her various conflicting statements ("I don't know his name"; "I thought his name was Birch"; "I think he told me his name was David"; *etc.*).[100] (12 RHRT 2324-2325.)

Ms. Butler's sudden use of the name "David" at trial and her frantic efforts to explain it later was far from the most egregious of her falsehoods. But as Mr. Coleman's analysis suggests, it is a concise but particularly telling example of how she sought to shade her testimony in favor of the prosecution, and thus is a clear demonstration of her bias.

* * *

In summary, Tambri Butler had powerful reasons for favoring the prosecution when she testified, both at Petitioner's trial and at the reference hearing on the instant petition. The testimony she gave on both occasions demonstrates that her biases were not merely theoretical. Rather, it is clear beyond reasonable dispute that, without regard for the truth, Ms. Butler did her best to shape her testimony to ensure that the prosecution would prevail and that Petitioner would be executed.

5. Ms. Butler Repeatedly And Persuasively Recanted Her Trial Testimony

As shown above, there is a mountain of evidence to support the Referee's finding that Tambri Butler testified falsely when she told Petitioner's jury that he was the man who raped and tortured her. But the most obvious reason for questioning the accuracy of Ms. Butler's identification of Petitioner as her attacker is that Ms. Butler herself has done so, volunteering

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[100]Interestingly, Petitioner's actual trial counsel, Eugene Lorenz, essentially agreed. He testified that, if Ms. Butler had said the man's name was "Birch" but then said, for the first time when she testified at trial, that the man's name was "David," he would have wanted to point that out for the jury. (8 RHRT 1509-1510.) Of course, that is exactly what happened – but Mr. Lorenz did not point it out at all.

strong reasons to conclude that the identification was indeed inaccurate. She has done so repeatedly, without coercion or other incentive to do so, in statements sworn under penalty of perjury. And even after attempting to repudiate her declarations, Ms. Butler has reaffirmed key portions of their contents at various times, in her conversations with Investigator Hodgson and at the reference hearing. Thus, in finding that "*Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial*" (R&F 5), the Referee set out as the first item of proof: "*This is supported by the sworn recantations contained in her declarations.*" (R&F 6.)

The declarations,[101] while powerful evidence in themselves, take on their full significance in the context of the other factors, discussed in this brief, bearing on the inaccuracy of her identification testimony. Thus, the principal declarations reiterate the details of the description she gave to the detectives at Lerdo, and explicitly reaffirm the very specific descriptors of her attacker – descriptors which we have shown do not match Petitioner. And she gave full voice to the uncertainties about her identification, which she had repeatedly implied while talking with the detectives:

> I 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.

(1 RH Exhs. 224 [handwritten version; strikeout and interlineation in original].)

Ms. Butler also expressed concern that the actual perpetrator was Michael Ratzlaff. Noting the similarities between the attack she suffered and what happened to Lavonda Imperatrice, Ms. Butler added: "I have viewed photos of Ratzlaff and he does resemble my

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[101]Ms. Butler's three declarations – a hand-drafted document, signed on May 31, 1998; a largely identical typewritten draft (with interlineations), executed on November 14, 1999; and a brief typewritten supplement, bearing that same date but actually executed nine days later – are in the record (1 RH Exhs. 219-25, 253-59, 267), and their contents are summarized in Petitioner's Opening Brief (at pp. 34-39 and 44-46.)

attacker. I cannot be certain he was not the man who raped me." (1 RH Exhs. 224.)

Regarding another factor discussed above – that the identification was suggested to her before she made it – Ms. Butler could not have been more clear:

> 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. . . . 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.

(1 RH Exhs. 220-21 [strikeout and interlineation in original].) She also described being coached, prior to testifying, by men from the District Attorney's office who supplied horrible (and false) details regarding the killing of Tracie Clark, and who convinced her "to testify to put Rogers on death row to protect other women prostitutes."[102] (1 RH Exhs. 222.) Accordingly, she averred:

> 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.

(1 RH Exhs. 222.)

Yet another factor discussed above, regarding bias, is particularly pertinent when weighing the significance of Ms. Butler's sworn declarations. Her vulnerabilities – as an inmate, a felony probationer, and a chronic offender – provided strong motivation for her to shade (or even invent) testimony that would favor the prosecution. In contrast, she had absolutely no reason to favor Petitioner – much less to be so biased that she was willing to sign declarations under penalty of perjury, recanting her identification testimony and even

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[102]Investigator Hodgson strongly disputed that any such meeting could have taken place. (12 RHRT 2400-01). But although Ms. Butler later softened her account (suggesting that the disgusting, false information had been implied by the "men" rather than supplied expressly), she remained consistent in asserting that the meeting occurred. (3 Exhs. 834-35, 837-38, 842; 3 RHRT 554-55; 6 RHRT 1119-20).

admitting to have perjured herself at trial. Precisely the opposite is true: If one credits Ms. Butler's identification of Petitioner as being the man who savagely raped, sodomized, tortured and even tried to kill her, it would require a level of compassion nearly beyond human contemplation for her to do anything to help him – much less to expose herself to criminal liability in order to do so. Just as this Court observed in *Hall*, if Ms. Butler "remained as certain as [she] originally [was] that . . . petitioner [was the perpetrator, she] would have no reason now to come to petitioner's defense." (*In re Hall*, *supra*, 30 Cal. 3d at p. 418.)

Given that Ms. Butler's declarations are really sufficient in themselves to completely undermine Respondent's case, it is unsurprising that Respondent not only refuses to credit them but attacks them with real ferocity. (See ROB 49-64.) What is surprising – and disappointing – is that, in service of that attack, Respondent constructs a false narrative regarding the circumstances in which the declarations were written and signed.

In that narrative – reviewed earlier in this brief – defense investigator Melody Ermachild "ambushed" Ms. Butler by coming to her house unannounced, on (only) one occasion, and manipulated the unsuspecting Ms. Butler into signing a handwritten declaration that Ms. Butler did not meaningfully review. (ROB 52-53.) Sometime later (Respondent says) Ms. Ermachild mailed Ms. Butler a typed version of the declaration; even though Ms. Butler was "disgusted" with how Ms. Ermachild had modified her words she just signed and mailed it back in order to be done with the whole thing. (ROB 53.)

As discussed earlier, this version of events is belied by the testimony of *both* Ms. Ermachild *and* Ms. Butler as well other evidence, including the documents themselves. The established facts are that Ms. Butler and Ms. Ermachild spent several hours together on May 31, 1998, at the end of which Ms. Ermachild wrote out the declaration by hand and read it, *verbatim* and in its entirety, to Ms. Butler. Ms. Butler insisted on corrections and interlineations which appear on every page of that initial declaration – some in her own handwriting and with her initials nearby. She signed it – knowing that she was doing so

under penalty of perjury, and what that meant – and then invited Ms. Ermachild to have some wine and stay for dinner with Ms. Butler's husband and another couple. (1 RHRT 136-40; 6 RHRT 988-1000, 1160, 1172-85, 1197).

Contrary to Respondent's assertion that Ms. Butler received the second, typed declaration in the mail, the undisputed facts show that Ms. Ermachild brought it to Ms. Butler's house on November 11, 1999, after first calling and getting permission to do so. (1 RHRT 132-133, 6 RHRT 1173). The two of them sat down together, and Ms. Ermachild once again read the declaration to Ms. Butler – *verbatim* and in its entirety. Ms. Butler again made numerous, substantive changes to the declaration, and this time she initialed each one, as well as initialing the bottom of each page. (1 RHRT 135-140, 6 RHRT 995-1000, 1174-1184).

Any possible doubt about whether Ms. Butler knew what she was saying, and doing, in signing the latter declaration is banished by a significant historical fact that Respondent does not deign to mention. In between the two visits from Ms. Ermachild – and the completion of the respective declarations – Ms. Butler (unbeknownst to Ms. Ermachild) called the Kern County District Attorney and spoke to Investigator Hodgson at length about the case and about Ms. Ermachild's visit. (3 RH Exhs. 672, *et seq.*) Although Ms. Butler did her best to reassure Mr. Hodgson that she was still in the prosecution's corner, she reiterated many of her uncertainties about her testimony, saying that she was "still sure but I'm not sure;" that she was "questioning my judgment," and asking Mr. Hodgson whether she could be prosecuted for perjury if, at trial, she "made a mistake, a completely left-handed mistake?" (*Ibid.*)

The fact that, even after that conversation with Mr. Hodgson, Ms. Butler voluntarily met with Ms. Ermachild and carefully reviewed and signed the typed version of her declaration makes nonsense of the Respondent's narrative. Given what actually transpired, it is extraordinarily disingenuous to suggest that Ms. Butler was not fully aware of the contents of the declarations she signed, and the implications of signing them under penalty

of perjury.

It is equally indefensible for Respondent to suggest that Ms. Ermachild obtained Ms. Butler's signatures by hoodwinking her about the facts. Relying solely on one of Ms. Butler's (many) descriptions of their initial visit, Respondent asserts that Ms. Ermachild effected this ruse by telling Ms. Butler that "Rogers had never had a mustache, a white pickup, or a stun gun," and by describing a "remarkably similar" attack that a similar-looking man, Michael Ratzlaff, had carried out against another woman, Lavonda Imperatrice. (ROB 51-52.) Ms. Ermachild "told Butler that Ratzlaff liked to degrade and humiliate women – a characteristic of the assault on Butler," purportedly told Ms. Butler that Petitioner's family had fallen on hard times, and she showed Ms. Butler pictures of Michael Ratzlaff, taken in the 1980's.[103] (*Ibid*.) Respondent goes on to relate that Ms. "Butler started 'second-guessing' her identification of petitioner" but later decided that the identification was correct.[104] (ROB 53.) Nonetheless, when she "received" the second, typed version of the

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[103]Respondent places great emphasis on Ms. Butler's later assertion that, while Ratzlaff looked young and vital in the pictures, Ms. Ermachild also showed her family pictures of Petitioner who appeared to be "'older, feebler' [and] looked more stable." (ROB 52, citing 6 RHRT 1162-63; see also 3 RH Exhs. 685, 889, 700 ["family pictures" – *not* mug shots – of an "older, feebler man."]). Respondent adds, ominously, that those "photographs were never presented in evidence." (ROB 53).

The reason *why* those family photographs of an "older, feebler" Petitioner were not presented is because they do not exist. Ms. Ermachild testified that she did not show Ms. Butler *any* pictures of Petitioner. (2 RHRT 233-34). And – as we pointed out in the briefs below, and Respondent has not attempted to dispute – 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 would have been taken in 1986 or early 1987 at the latest – *i.e.*, less than a year after Ms. Butler was attacked.

[104]The reader will note that if there was even a scintilla of truth to the jailhouse molestation accounts that Ms. Butler came up with much later, it would have been unimaginable for her to have subsequently "second-guessed" her identification of Petitioner, even for a moment. The fact that she did is fairly conclusive evidence that the jailhouse molestation story (or stories, actually) were sheer fabrication.

declaration from Ms. Ermachild, Ms. Butler "just sign[ed] it and sen[t] it back" because she "just wanted the issue to be out of her life." (*Ibid.*)[105]

What Respondent does not pause to acknowledge is that – even in its very tendentious rendering – *everything that Melody Ermachild told Tambri Butler was true.* In fact, Ms. Ermachild's presentation of the facts to Ms. Butler was honest – in marked contrast to the unabashed lies that Investigator Hodgson later told Ms. Butler in order to bring her back around.[106] Petitioner did not have a white truck at the time of the attack, and he never wore a mustache or owned a stun gun. Michael Ratzlaff *did* own a white truck (containing the things that Ms. Butler had described) and a stun gun and had a "thick, bushy mustache," as well as most of the other characteristics detailed by Ms. Butler. And he most certainly did carry out a "remarkably similar" attack on Lavonda Imperatrice – including (*inter alia*) the drive to a remote location southeast of Bakersfield, the drunken inability to perform sexually, the enforced demand for anal sex, the use of a stun gun and the firing of a pistol to intimidate her, and even the apparent attempt on her life as they parted. As for whether Ratzlaff looked "similar" to the man who attacked Ms. Butler: Although Respondent does not report it, Ms. Butler told Investigator Hodgson a few months later that her reaction to Ratzlaff's pictures was: "she's pulled him out of the past and that's him." (3 RH Exhs. 696.)

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[105]Respondent also asserts that Ms. Ermachild told Ms. Butler "that she had identified the wrong person as her attacker" (ROB 49), and that "Rogers could not possibly have been the man who attacked [her]." (ROB 61-62.) Respondent does not include record citations for those assertions, for the simple reason that *there is no evidence that Ms. Ermachild ever said either of those things.* While Ms. Ermachild did raise legitimate doubts about the accuracy of Ms. Butler's identification in light of the newly discovered evidence, her statements to Ms. Butler in that regard were different in kind from the categorical contentions fabricated by Respondent.

[106]When they met in 2001, Investigator Hodgson falsely told Ms. Butler that the police had a picture of Petitioner with a white pickup truck taken "*at that time*" of the attack on her. He went on to suggest that Petitioner also had a false mustache and a stun gun – even though he knew full well that neither of those items had been found in the extensive searches of Petitioner's home, vehicles, locker and effects. (Please see, POB 46-47).

This points up another unfortunate tactic Respondent employs in its attack on the integrity of Ms. Butler's sworn declarations – namely, the by-now familiar selective discussion of only those morsels of evidence that support Respondent's position. Thus Respondent would have the Court believe that, commencing right after her (supposedly sole) encounter with Ms. Ermachild, Ms. Butler began repudiating those declarations and has consistently repudiated them since. (ROB 54-58.) The truth, however, is that – while Ms. Butler has indeed attempted to disown her sworn statements, and has said any number of things repudiating one or another of them – she has also frequently (and often in the very same breath!) reaffirmed the significant content of those declarations. Thus Respondent reports that, in her initial conversation with Mr. Hodgson in 1998, Ms. Butler "questioned – but did not disavow – her previous identification of Rogers . . . ." (ROB 54.) What Respondent does *not* report is her statement in the same conversation that the pictures of Michael Ratzlaff brought by Ms. Ermachild so precisely matched Ms. Butler's memory of her attacker that Ms. Butler thought "oh my God she's pulled him out of the past and that's him . . . ." (3 RH Exhs. 700.) Nor does Respondent mention Ms. Butler's lament that "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 . . . but *he doesn't match the description that I remember in my head."* (*Id*. at 697 [emphasis supplied].) And Respondent omits the fact that Ms. Butler then confirmed her sworn statement that she had indeed seen Petitioner on television the night before she identified him. (*Id*. at 702 ["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 saw his face that night for the first time . . . ."].)

Respondent places great reliance in this regard on repudiating statements Ms. Butler made in her face-to-face meeting with Mr. Hodgson in Texas in 2001 – but never acknowledges the fact (litigated and established in the proceedings below) that the investigator ensured her cooperation by telling her several outright lies, including about Petitioner owning a white truck at the time of the attack, and possibly having a fake mustache. (See POB 49-52; 3 RH Exhs. 718, 723-724.) Nor does Respondent – who

elsewhere emphasizes the lack of resemblance between Ratzlaff and Petitioner – mention that, in the 2001 meeting, Ms. Butler said that Ratzlaff "was close enough in appearance just by the face, that with or without a mustache there could have been that much confusion ..." (3 RH Exhs. 717), or that on that occasion Ms. Butler yet again reaffirmed that she had seen Petitioner on television – and lied about that fact at trial. (*Id*. at 714.)

Similarly cherry-picking parts of Ms. Butler's August, 2008 interview with Mr. Hodgson (see ROB 55), Respondent fails to report her statements that, when she signed the declarations and for some time afterwards she was concerned that she had falsely identified Petitioner: "by this point, I am very upset because now not only have 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?" (3 RH Exhs. 797-798.) The significance of that omission is underscored by the fact that Respondent repeatedly and exclusively reports other of Ms. Butler's statements claiming that she had no doubts at all, and "was completely certain that Rogers is the person who attacked her." (ROB 57, citing 3 RHRT 558-560; see also ROB 55-56.)

Also telling is the short work Respondent makes of the conversation between Ms. Butler and Mr. Hodgson in October, 2008, during which they went over her declaration, line by line. Respondent makes no mention of the fact that Ms. Butler then emphatically reiterated that she had, indeed, seen Petitioner on television the night before she picked out his picture – and that she additionally insisted that she had told the detectives about it. (3 RH Exhs. 88-829, 838, 840-841.) Nor does Respondent report that Ms. Butler reaffirmed a portion of her declaration that Mr. Hodgson found particularly troubling – namely, that he had come to see her on Union Avenue and advised her to flee the state, promising her that her "'file would drop behind a counter and my name would never be mentioned in California again.' That's all true."[107] (*Id*. at 843-844.) And Respondent's brief synopsis of the

[107]Respondent also leaves out Ms. Butler's statements that she could no longer remember for sure whether her attacker had a mustache, and that in fact her entire memory

Butler/Hodgson conversation of October, 2011 (see ROB 56) bypasses the fact that – as described at length above – Ms. Butler emphatically confirmed then that she did indeed want and expect to be released in exchange for her testimony. (3 RH Exhs. at 867-869.)

Respondent's most extensive – and most one-sided – report of Ms. Butler's statements repudiating her declarations is its summary of her testimony at the reference hearing. (ROB 56-58.) Disregarding any obligation to report the record evidence fairly and fully, Respondent focuses almost entirely on Ms. Butler's testimony on direct examination, and avoids the many, many times she was impeached on cross-examination. Rather than burden the Court further with detailing the myriad inconsistencies that emerged at trial regarding Ms. Butler's efforts to abandon her earlier sworn statements, we respectfully refer the Court to Petitioner's Opening Brief, at pages 94-103, where we attempted fairly to report Ms. Butler's testimony, both on direct and cross examination, regarding the contents of her declarations.

The point here is simple: Contrary to what Respondent asserts, there is substantial, credible evidence – including subsequent statements made by Ms. Butler herself – to support the Referee's determination that her sworn declarations should be credited in spite of her efforts to disavow them. Respondent nonetheless contends that "[s]ince the referee was in no better position to read the declarations than this Court, the referee's conclusion is not entitled to deference." (ROB 59, citing *In re Roberts*, *supra*, 29 Cal.4th at p. 742.) The contention is an odd one, coming as it does right on the heels of Respondent's arguments about why the Court should reject the declarations on the basis of Ms. Butler's testimony at the reference hearing, in which she tried to disown them. In this instance, once again, the Referee heard the witness's live testimony, as well as the conflicting testimony of Melody Ermachild, and listened as Ms. Butler was impeached extensively on cross examination, and credited the evidence supporting the genuineness of the declarations over the State's efforts

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of the events that had transpired 20 years before had grown so hazy that she "actually even considered going and getting hypnotized to where I remember it well" (3 RH Exhs. 822; see also *id*. at 832 ["I'm having such a hard time remembering, Tam, it's just ridiculous"].)

to discredit them. In short, the Referee did precisely what this Court asked him to do – he heard the evidence and made an informed credibility determination to which deference is due. (See, *In re Price, supra,* 51 Cal. 4th at p. 559 and cases cited therein.)

Respondent next presents a series of arguments asserting that the declarations are inadequate to prove that Ms. Butler's trial testimony was false. (ROB 59, *et. seq.*) The first is a confused and confusing effort to parse some of the language of the declarations, with particular focus on portions favorable to Petitioner but upon which (Respondent admits) neither Petitioner nor the Referee specifically relied. (ROB 59-61.) The point of the exercise, apparently, is to demonstrate that the declarations "only express a newly-acquired uncertainty or concerns, which is insufficient to show that Butler's prior testimony was false. . . . As a result, the declarations are not a recantation of trial testimony." (ROB 61-62.)

Respondent's argument fails, both in its description of the content of the declarations and in its conclusion about their sufficiency. As to the former, it is enough to point out that, in her declarations, Ms. Butler asserted *point blank* that she had "lied" on the witness stand and that she had "often worried over the years that I might have testified against the wrong man. I've always questioned how accurate my identification of Rogers was . . . ." (1 Exhs. 257-58.) That is different, and far more, than merely a "newly-acquired uncertainty," and it most certainly does demonstrate that Butler's prior testimony was false – that is exactly what she said.

And this Court's precedent makes clear that the declarations are indeed "recantations." (See *In re Hall*, *supra,* 30 Cal.3d at pp. 417-18.) While Ms. Butler stopped short of stating with certainty that Petitioner was not the perpetrator, the same was true of the eyewitnesses in *Hall*, whose post-trial statements were nonetheless referred to as "recantations" by the Court because what they did admit undermined the very basis of their prior identification testimony. (*Ibid*.) Ms. Butler's admissions, no less than those of the Lara brothers who testified in *Hall*, clearly undermined the perceptual basis for her identification testimony.[108]

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[108]Not acknowledging *Hall* (even though that case was cited for precisely the same proposition below), Respondent instead seeks to rely on the holding in *Richards I*, 55

Finally, the unshakeable difficulty Respondent faces in discrediting the several declarations Ms. Butler signed and swore to under penalty of perjury is that there is no reason on Earth that she would have done so – particularly if she truly believed that Petitioner was the monster who had kidnaped, raped, robbed and tortured her and then attempted to kill her. Thus lacking any proof of a motive for Ms. Butler to perjure herself on Petitioner's behalf, Respondent invents one: "Butler" (Respondent says) "could reasonably construe Ermachild's visit as pressure to tell a particular story by an agent of a multiple murderer who had forcibly sexually assaulted her, fired a gun in front of her face, threatened her not to tell anyone, and who still had strong supporters in the Kern County law enforcement community." (ROB 63.) In other words, she "could reasonably" have felt coerced to help Petitioner lest he or his friends visit violence upon her. We can put aside the fact that this dangerous man had been safely locked away on death row for almost a dozen years; and the fact that there was not a shred of evidence that, at that point, he "still had strong supporters in the Kern County law enforcement community;"[109] and the fact that there is not a scintilla of proof that anyone in

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Cal.4th at pp. 965-966, that a "new expert opinion questioning [the expert's] trial opinion" was insufficient to support a false evidence claim under section 1473. As discussed in the text, *ante*, that case provides Respondent no support. Again, *Richards I* was explicitly limited to recantations of expert opinion testimony, which the Court explicitly distinguished from the showing needed to establish the falsity of "eyewitness testimony." (*Id*. at p. 966 fn. 5.) Moreover, the portion of *Richards I* on which Respondent relies is no longer good law even in regard to expert opinion evidence; as the Court has recognized, it was explicitly overruled by statutory amendment. (*Richards II*, *supra*, 63 Cal.4th at pp. 309-311.)

[109]At the reference hearing, Respondent expended considerable effort attempting to convince the Referee that Petitioner belonged to a small, tightly-knit squad of Sheriff's deputies that was ready to commit crimes to free or avenge him. The chief culprit in this tale – the (conveniently deceased) Deputy Ulysses Williams – makes a brief appearance in that capacity in Respondent's Opening Brief, at pp. 125-126. Respondent does not acknowledge that Deputy Williams, when called as a mitigation witness in the penalty phase of Petitioner's trial, was asked whether Petitioner should get the death penalty and replied: "It's just hard to say." (RT 5917-18.) Eric Fennel, the only member of that group (and friend of Petitioner's from those days) who was called to testify at the reference hearing did

law enforcement ever threatened *anyone* on Petitioner's behalf; and the fact that Ms. Butler was not threatened or harmed during the months that she was in jail and then back on Union Avenue after testifying against Petitioner. We can also ignore that Respondent's formulation assumes the very fact in dispute – namely that Petitioner was the person who had done all of those things to her.

Rather, the obvious, fatal flaw in Respondent's speculation is that Ms. Butler never said that she cooperated with Ms. Ermachild because she was afraid of Petitioner, or his friends. She never said so in her many, lengthy conversations with Tam Hodgson. She did not so testify when she was on the stand. Given that Tambri Butler was working overtime to find a way to disown the sworn declarations she gave Ms. Ermachild, the fact that she herself never came up with the explanation now advanced by Respondent exposes it for what it is: rank speculation, and simply untrue.[110] The viable explanation that remains is that Ms. Butler signed those declarations, under penalty of perjury, because she believed their contents to be true.

Respondent argues that the Court "'will not disturb the jury's verdict based upon a recantation that must be viewed with suspicion and was subsequently disavowed.'" (ROB

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so as a witness for Respondent, and said without contradiction that neither he, nor to his knowledge any of the others, had any contact at all with Petitioner after Petitioner was arrested. (10 RHRT 2014-2017.) In short, the notion that Petitioner had friends in law enforcement who were prepared to do violence on his behalf was a canard, and a shameless slander on blameless police officers.

[110]In an even greater reach, Respondent asserts that "as far as Butler knew, Ermachild could call the police and have her arrested on the warrant for violating felony probation." (ROB 63.) Again, there is absolutely no evidence to suggest that Ms. Butler was concerned about Ms. Ermachild having the power to "have her arrested" for that or anything else. Rather than instilling in her a fear of Ms. Ermachild (as Respondent tries to suggest), it would surely create concern for her about the vengeance that the prosecuting authorities could visit upon her, should they wish to do so. In fact, she raised that concern with Investigator Hodgson as soon as she contacted him. (3 Exhs. 699, 704.) In short, the only thing that Ms. Butler's concern with her legal status proves is that she was strongly motivated to repudiate her declarations.

58, quoting *In re Roberts*, *supra*, 29 Cal.4th at p. 472.) But *Roberts* does not stand for the proposition that a witness's recantations are irrelevant, nor (as Respondent suggests) that a recantation can never be accepted over the witness's initial testimony. Rather, as the Court pungently put it: "It is true that Long's inconsistent statements lessen his credibility (*People v. Smallwood* (1986) 42 Cal.3d 415, 431, fn. 10 ['Even if the recantation of the trial testimony was not reliable, these events cast some doubt on the credibility of Spencer as a witness.']). Because Long has made inconsistent declarations, it is clear that he has lied at some point. It is not clear, however, that it was Long's trial testimony that was false, rather than his initial recantation." (*Roberts, supra,* 29 Cal.4th at pp. 742-43.)

For the reasons set forth, Petitioner submits that, in this case Tambri Butler's recantation of her trial testimony *was* reliable. At a minimum, however, it is a powerful impeachment of her credibility as a witness. What finally sets this case apart is that Petitioner is not just relying on Ms. Butler's repeated recantations; rather, those recantations are supported by and support in turn a veritable mountain of evidence demonstrating that Tambri Butler testified falsely at the penalty phase of Petitioner's trial when she identified him as the perpetrator of the horrifying assault she suffered.

D. PETITIONER IS ENTITLED TO RELIEF ON HIS FALSE EVIDENCE AND NEWLY DISCOVERED EVIDENCE CLAIMS

The evidence that fills the record – much of it newly discovered as that term is defined in the statute[111] – overwhelmingly supports the Referee's finding that "*Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial."* (R&F 5-6.) As such it satisfies the standards for both "false evidence" and "newly discovered evidence" claims under section 1473, as well as the correlative claims asserted by Petitioner under the Due Process Clause and the Eighth Amendment to the United States Constitution.

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[111](Pen. Code, §1473, subd. (b)(3)(A).) Among evidence that falls into the category of "newly discovered" is that pertaining to Michael Ratzlaff and his attack on Lavonda Imperatrice, as well as Ms. Butler's declarations recanting her trial testimony. (See *In re Hall*, *supra*, 30 Cal.3d at p. 421.)

For the reasons detailed in Petitioner's Opening Brief (at pp. 145-149), Ms. Butler's false testimony was amply prejudicial to require that relief be granted on any and all of those claims. Regarding the false evidence claim, it must be concluded "*with reasonable probability* [Ms. Butler's testimony] *could* have affected the outcome" of the penalty determination. (*Richards II*, *supra*, 63 Cal.4th at p. 312 [emphasis by the Court; citation omitted]). The newly discovered evidence demonstrating that Ms. Butler's testimony was false "would have more likely than not changed the outcome at trial." (Pen. Code, §1473, subd. (b)(3)(A)). Finally, it follows, *a fortiori*, that Respondent cannot demonstrate that the injection of those toxic falsehoods into the penalty determination "'was harmless beyond a reasonable doubt'" under the test applicable to the federal constitutional violations.[112] (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Hamilton*, *supra*, 45 Cal. 4th at p. 917.)

Respondent contends that "Butler's testimony did not have a prejudicial effect on the penalty determination" (ROB 229), and that "the record does not support Roger's claim that it was the deciding factor." (ROB 231.) The assertion is extraordinarily bold, given that the trial judge himself, in explaining why he would not modify the death sentence, opined that the evidence provided by Ms. Butler *was* the deciding factor for both the jury and himself. (RT 5995.)

It is worthwhile remembering exactly what the trial court said, for Respondent reports only a fraction of it:

> 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

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[112]Indeed, even if Petitioner were required to satisfy the now outdated test for newly discovered evidence claims, what is before the Court is far more than enough to "undermine the entire prosecution [penalty] case and point unerringly to innocence or reduced culpability.'" (*Richards II*, *supra*, 63 Cal.4th at p. 307 [citation omitted].)

> 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.)

While Respondent quotes the snippet about the trial judge being "shocked," it carefully omits to mention his statement that Ms. Butler's testimony *"probably influenced the jury, in my view, and the court more than any other*." (*Ibid*.) Nor does Respondent mention the related finding of the Referee, that "*Tambri Butler was a crucial witness whose testimony impressed not only the Jury but also the trial judge, The Honorable Gerald K. Davies*."[113] (R&F 23.) Nor does Respondent report the testimony of its own witness at the reference hearing, trial counsel Eugene Lorenz, that Ms. Butler's testimony "had an enormous effect on the judge and the jury." (8 RHRT 1469, 1471; 5 RH Exhs. 1414.)

Nor does Respondent even allude (much less respond) to the trial court's statements setting forth the judge's underlying point: If Petitioner did those horrible things to Tambri Butler, surely he did the same or similar to Tracie Clark, Janine Benintende – and who can say how many others? As explained in the Opening Brief – and never disputed by Respondent – the incalculable damage done to Petitioner's cause was not merely in the accusation that he had viciously raped, sodomized and tortured Tambri Butler. Rather, the worst prejudice followed from the inevitable assumption that he had done the same things to the other women whom he was convicted of murdering. (See 12 RHRT 2217-2218

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[113]Respondent notes, at a different point in its brief, the prosecutor's recollection that "the jurors were 'all leaning forward, listening, very, very focused on what Ms. Butler was saying,' except for a 'little lady' in back who was 'dabbing her eyes with a Kleenex,' 'but she was listening.'" (ROB 203, citing 10 RHRT 1975-1976.) Respondent does not, however, attempt to square this observation with its assertion that "Butler's testimony did not have a prejudicial effect on the penalty determination." (ROB 229.)

[testimony of capital defense expert Coleman];[114] 8 RHRT 1468 [testimony of trial counsel Eugene Lorenz].[115])

Respondent's failure to acknowledge what the trial court actually said about the effect of Ms. Butler's testimony is a profound disservice to this Court and the process in which we are engaged. Morever, that failure, and Respondent's concomitant failure to address the reasoning underlying the trial court's explanation – reasoning that was reiterated by reference hearing witnesses for both Petitioner and Respondent – is fatal to its arguments regarding prejudice. When the record is reported and viewed in its fullness, it cannot fairly be disputed that there is at least a "reasonable probability" that Tambri Butler's testimony "could have affected the outcome" of Petitioner's penalty trial. He is accordingly entitled to relief from the judgment of death.

II. TRIAL COUNSEL'S FAILURE TO RESPOND COMPETENTLY TO THE BUTLER EVIDENCE DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL

As the Referee found, reiterating both the observations of the sentencing judge and the unrebutted testimony of the capital defense expert:

> *Tambri Butler was a crucial witness whose testimony impressed not only the Jury but also the trial judge, The Honorable Gerald K. Davis. . . . Butler was the most important witness in the entire penalty phase of the trial.*

(R&F at 23.) Yet, as the Referee also found, Petitioner's trial counsel did not investigate Ms. Butler or her evidence "*in a manner to be expected of a reasonably competent attorney acting as a diligent advocate*" (R&F at 16); nor did counsel competently impeach or rebut

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[114] "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."

[115] "[T]hinking about it, you have a jury almost putting Tammy Butler [*sic*] in the place of the actual crime victim."

Ms. Butler's testimony with evidence that was readily available to him (R&F at 21-22); nor did counsel even mention this most crucial witness in his argument to the jury – although surely a "*reasonably competent attorney acting as a diligent advocate, having made an adequate investigation and presentation of evidence would have addressed Butler's testimony*. . . ." (R&F at 24.) Thus, as detailed in Petitioner's Opening Brief (at pp. 149-187), Petitioner was deprived of the effective assistance of counsel just at the moment when that assistance was most critical: when the jury and sentencing judge were determining whether he should live or die.

Respondent takes exception to the Referee's findings and offers a different view: Counsel did sufficient investigation (or at least, Respondent argues, there is nothing to prove that counsel did not do so); counsel effectively cross-examined Ms. Butler with questions "targeted" to impeach her credibility and (in Respondent's view) presented enough rebuttal evidence; and (according to Respondent) simply ignoring Ms. Butler in his final argument was a perfectly sensible thing for counsel to do. (ROB at 168-228.)

As Petitioner's Opening Brief demonstrates, Respondent is wrong about every part of that. We will review again, presently, why there is ample evidence to demonstrate that trial counsel did virtually nothing in the way of investigation (despite there being ample impeachment evidence there for the finding); why counsel's abysmally ineffectual cross-examination and rebuttal of Ms. Butler accomplished nothing – except perhaps to bolster her credibility; and why trial counsel's decision to ignore the most important evidence in the penalty phase in his final appeal to the jury was indefensible.

First, however, we will address Respondent's foundational assertion, on which the entirety of its argument rests – namely, that each of what we have identified as failures by trial counsel, and all of them together, must be ascribed to "a reasonable strategic decision that satisfies the Sixth Amendment." (ROB 168.)

A. The Failures of Trial Counsel to Effectively Investigate, Impeach, Rebut, and Present Argument Regarding Tambri Butler Were Not the Result Of Any Objectively Reasonable Strategic Decision

According to Respondent, trial counsel's "overall penalty phase strategy . . . was to show that there was a 'good' David Rogers and a 'bad' David Rogers; that the 'bad' David's actions were the result of a horrible childhood; and that the actions and character of the 'good' David Rogers outweighed that of the 'bad' and warranted a sentence of less than death." (ROB 170 [citations omitted].) Respondent argues that, based on this mitigation strategy, trial counsel reasonably decided that it was unnecessary and even potentially destructive to devote much attention to Tambri Butler, either in investigating or cross-examining Ms. Butler, presenting rebuttal evidence, or even acknowledging her testimony in his summation. (ROB 197, 204, 207, 211, 213.)

Every part of Respondent's construct regarding trial counsel's supposedly reasonable strategy is contradicted by the record (which Respondent once again reports selectively), by plain logic, or – most often – by both.

1. The Legal Question Is Not Whether Counsel's Choices Were "Strategic" – It Is Whether They Were Objectively Reasonable

Respondent devotes a considerable amount of space to emphasizing the deference that must be paid to counsel's strategic and tactical decisions. However, as the high court held in a case that Respondent repeatedly cites: "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 481; citing, *Strickland v. Washington* (1984) 466 U.S. 668, 688.) And, as this Court has repeatedly reminded, such choices can only be considered "reasonable" to the extent they are based on adequate investigation:

> Although, as noted, trial counsel must be accorded wide latitude and discretion regarding trial tactics and strategy, "the exercise of that discretion must be a reasonable *and informed one* in light of the facts and options reasonably apparent to counsel at the time of trial, *and founded upon reasonable investigation and preparation.*" Because "[r]epresentation of an accused murderer is a mammoth responsibility" the "seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance."

(*In re Jones* (1996)13 Cal. 4th 552, 566 [emphasis by the Court; citations omitted]; *accord*, *In re Lucas* (2004) 33 Cal. 4th 682, 722.)

As the Referee found, and as will be reviewed below, trial counsel's investigation was woefully inadequate, particularly in a case in which his client's life hung in the balance. His resulting choices cannot be afforded deference. (See, *People v. McCary* (1985) 166 Cal. App. 3d 1, 12 ["As our Supreme Court succinctly stated, '"There is nothing strategic or tactical about ignorance."'"]; quoting, *Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [additional citations omitted].) But even if one disregards counsel's failure to conduct a competent investigation, neither his actual strategic vision (to the limited extent that he expressed one), nor the more elaborate one ascribed to him by Respondent, could render his larger failure to respond to Ms. Butler's evidence "objectively reasonable."

2. Pertinent Facts

Respondent begins its discussion of the "factual background" regarding the ineffective assistance claim by touting the credentials of Petitioner's trial counsel, Eugene Lorenz, including his own estimate that he "had done around 15 death penalty trials" prior to 1990. (ROB 173-174.) Respondent does not mention that one of those trials resulted in a much-cited opinion by this Court, overturning the defendant's conviction and death sentence on the ground that Mr. Lorenz had provided constitutionally ineffective assistance by failing to perform necessary investigations that would have yielded crucial exculpatory evidence. (*In re Sixto* (1989) 48 Cal.3d 1247, 1265 & n.3 [ordering that the reversal be reported to the State Bar for "investigation of the appropriateness of initiating disciplinary action against attorney[] Eugene Lorenz . . . ."].)[116]

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[116]Ironically, Respondent relies on *Sixto* (for a different proposition) on the same page of its brief. (ROB 173.) Among the points of interest regarding *Sixto* is the fact that – despite the fact that Mr. Lorenz essentially abandoned his client during trial (he "inexplicably failed to appear in court on several days during the jury selection process" and was then replaced as lead counsel (*In re Sixto, supra*, 48 Cal.3d at p. 1257)) – the Kern County Superior Court continued appointing him in death penalty cases, including Petitioner's. The Court may also take judicial notice of the fact that Mr. Lorenz's alleged

At the reference hearing Mr. Lorenz disclaimed having any memory regarding his investigation (if any) or his cross-examination, of Ms. Butler, or whether he tried to exclude her testimony, or whether he even discussed her in his closing argument.[117] (8 RHRT 1427-1430, 1444-1454, 1456-1460.) However, as Respondent emphasizes, Mr. Lorenz did offer some general speculation as to why he may have chosen to do as little as he did with regard to Ms. Butler:

> [W]hen you are trying cases, if you make a super big deal out of something you may take emphasis away from what you are really trying to do. So I would normally pick out highlights of things that didn't work and go with that. But not make an entire mini trial over one witness where maybe your – you know, maybe that's not going to be favorable.

(8 RHRT 1515.) Pressed as to how that concern applied in regard to the Butler evidence, Mr. Lorenz replied:

> Well, I really don't [know]. You know, I don't have a clear memory of what thoughts were (*sic*) at the time. But I do recall basically thinking, you know, if we are going to go with a psychiatric type of defense . . . we cannot totally dig a hole on some other aspect of the case. But sure. I mean, if this was – if it was her and he and that was a single case that's what it is, you dig in more detail, I would think.

(*Ibid*.) Pressed further ("when . . . you have a potentially very significant aggravation witness like Ms. Butler, wouldn't you want to do what you could to discredit her?"), Mr. Lorenz responded:

> Yeah. I don't disagree with that. In retrospect I'm thinking well, maybe the jury relied on her a lot more that we may have thought at the time. ... I don't remember her being a particularly convincing or powerful type of witness. Maybe I'm wrong.

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ineffectiveness is also the principal claim in yet another pending challenge to a death penalty case dating from that same era. (*Montiel v. Chappell*, Ninth Cir. No. 15-19000.)

[117]Mr. Lorenz allowed that he generally preferred shorter arguments because "you have about a 20 minute attention span with a jury, I think a little longer maybe in a capital case." (8 RHRT 1459 -1460.) Asked why he did not mention Ms. Butler at all, Mr. Lorenz replied: "I don't have thought reasons (*sic*) why I had this strategy or that strategy of the case" (8 RHRT 1460.)

(8 RHRT 1516.)

While Respodoes set out portions of Mr. Lorenz's testimony from the 2011 reference hearing, Respondent neglects to mention that both Mr. Lorenz's memory and the views he expressed regarding appropriate strategy were quite different some 12 years earlier. Thus, when he was first asked, in 1999, about his response to Tambri Butler's evidence Mr. Lorenz averred in a sworn declaration that:

> In my opinion Ms. Butler's testimony had an enormous effect on both the judge and the jury. Mr. Rogers told me that he did not know Ms. Butler and had no memory of ever picking her up or assaulting her. Ms. Butler's testimony was very damaging and I would have done anything to exclude her testimony or to impeach her identification of Mr. Rogers.

(Pet. Exh. 14 at pp. 2-3.) Called as a witness for Respondent at the reference hearing more than a decade later, Mr. Lorenz admitted on cross-examination that all of that was true. (8 RHRT 1473-74.)[118] He also agreed that – particularly given the likelihood that the jurors would assume that Petitioner had inflicted the same horrors on the two homicide victims as those suffered by Ms. Butler – "it was incumbent on [him] to do what [he] could to either impeach or minimize this evidence." (8 RHRT 1500; see also *id*. at 1468 ["Maybe in retrospect, thinking about it, you have a jury almost putting Tammy Butler (*sic*) in the place of the actual crime victim."].)[119] And, after he asserted that "I think our main focus was on the psychiatric/psychological part of the case," Mr. Lorenz was asked and answered as follows:

> Q: There was no inconsistency between the psychiatric/psychological part of the case on the one hand and impeaching or negating the aggravating evidence on the other, was there?
>
> A: No. No there isn't.

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[118]Mr. Lorenz testified that the entire declaration was "an accurate reflection of [his] recollection as of the time he signed it." (8 RHRT 1467.)

[119]Counsel went on to say: "And maybe, you know, if you think about it, you said well, maybe we should have done a full on assault of Tammy Butler (*sic*) more so because – but I didn't." (*Ibid*.) The Referee sustained an objection to that last sentence as "unresponsive." Petitioner submits that particular evidentiary ruling was made in error.

(8 RHRT 1511.)

Respondent also omits any mention of the extensive testimony given by capital defense expert David Coleman, whom the Referee "*found . . . to be a very credible witness*" (R&F 17), and upon whose opinions, regarding counsel's performance, the Referee explicitly relied.[120] (See R&F 16-17, 19, 23.)

Mr. Coleman's analysis proceeded from the same point suggested by the sentencing judge, later stated explicitly by the Referee and (at least when his memory was better) essentially acknowledged by Mr. Lorenz: That Ms. Butler was "the most important witness in the entire penalty phase." (12 RHRT 2230.) And Mr. Coleman concurred with Mr. Lorenz regarding a principal reason why that was true: Because "Ms. Butler's evidence essentially was a surrogate for the two victims . . . and describe[d] an incident which I believe the jury quite possibly thought was exactly the kind of incident or very similar to the incidents that the two victims had gone through. And it was horrifying ... it gave life to something that was absent from the case." (12 RHRT 2221-2218.) Mr. Coleman made a further point in that regard:

> 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.

(*Ibid*.) Thus Mr. Coleman took the same view articulated by Mr. Lorenz in 1999: That it was imperative for counsel to do everything possible to eliminate or neutralize the Butler evidence. (12 RHRT 2257-2258;[121] see 8 RHRT 1473-74 [Lorenz].)

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[120]Mr. Coleman was for many years the Public Defender for Contra Costa County. He personally tried scores of felony cases, including eight capital cases, supervised attorneys defending many others, and was appointed by the Chief Justice of this Court to serve on the Judicial Council's Criminal Law Commission, where he helped formulate the rule setting minimum standards for appointed counsel in capital cases. (12 RHRT 2205-12.) He testified for almost an entire day at the reference hearing, including extensive cross-examination.

[121]"[Y]ou, as a defense attorney, could not sit idly by and have a witness give an unchallenged statement of a horrific crime and not challenge it. And especially . . . not challenge it when, in my view . . . there was so much material to challenge it with." (*Ibid*.)

From that common ground, Mr. Coleman reached a conclusion about what would constitute an appropriate strategy that was the opposite of the one implied by Mr. Lorenz (and embraced by Respondent). Given what was at stake, trial counsel should have approached Ms. Butler's evidence exactly as if it were itself an independent criminal charge and investigated and challenged it in just that fashion – as a "mini trial." (12 RHRT 2292-2293.) In fact, when queried by the Referee whether his opinion regarding trial counsel's performance in this respect (which he emphatically described as a failure)[122] would have been different if what was at stake "was not the death penalty but a life without parole sentence" (12 RHRT 2293), Mr. Coleman replied:

> [I]t would not change my opinion because I am rendering an opinion about his effectiveness as a lawyer and not with regard to the context in which it occurs. If I were asked these questions about the failure of cross-examination, the failure to investigate the case, and it was a 242 misdemeanor, I would give the same answers for a lawyer who performed in that way. . . . [T]he way to approach aggravating evidence is that they are really just mini trials. . . . [Y]our duty as a defense lawyer is to address that as if . . . the client walked in and said "I'm charged with rape."

(12 RHRT 2292-2293.) When challenged by Respondent's counsel about the possibility that a "mini trial" regarding Ms. Butler would have taken up "far more time than the mental defense, the mitigation defense that was put on at the penalty phase," Mr. Coleman pointed out that the bulk of the "mental defense" evidence had already been put on in the guilt phase.[123] (12 RHRT 2295-2296.) This led to the following exchange:

> Q: The mini trial that you are talking about would have far outweighed in time the mental mitigation defense that Mr. Lorenz was relying on in his case. Is that true?

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[122]Mr. Coleman made clear that, in assessing Mr. Lorenz's performance, he was not talking about "perfection" – he felt that he himself was a "B" lawyer and that the Constitution certainly did not require more than a "C" performance – but that Mr. Lorenz's "performance merited, to use my poorly drawn metaphor, a D or F as a lawyer in the penalty phase . . . especially with regard to the Tambri Butler [evidence]." (12 RHRT 2220.)

[123]Respondent makes precisely this same point (albeit for different reasons) in its opening brief. (See ROB 219.)

A: Well, possibly. And I hope it would. Because it was – it was extremely crucial. And it would have been a good thing if the time had been taken and it outweighed that, yes. Because it would have negated the major factor in the decision on the death penalty.

(12 RHRT 2296-2297.)

3. Assuming, *Arguendo*, That Trial Counsel Made A Strategic Choice Not To More Fully Investigate And More Forcefully Respond To Ms. Butler's Evidence, That Choice Was Objectively Unreasonable

Respondent is correct insofar as it contends that, because Mr. Lorenz could not remember much when he testified, we now cannot really know what strategy Mr. Lorenz had in mind when he approached the Butler evidence. (ROB 177-178.) Indeed, there is no particular basis for concluding that – in his failure to conduct a more thorough investigation, or a more vigorous cross-examination, or to even mention her in argument – counsel was operating from *any* considered strategy, as opposed to mere sloth and inattention. (See, *Wiggins v. Smith* (2003) 539 U.S. 510, 534; *In re Lucas*, *supra*, 33 Cal.4th at pp. 725-726.) But even if the Court were to accept Respondent's invitation to "presume" that Mr. Lorenz was making tactical or strategic choices, Respondent's argument would fail, for the strategy it ascribes to him was objectively unreasonable.

The crux of Respondent's argument is that trial counsel was reasonably exercising restraint in not forcefully attacking the prosecution's aggravation evidence regarding Ms. Butler, lest doing so would eclipse his mitigation case. That mitigation strategy, once again, "was to show that there was a 'good' David Rogers and a 'bad' David Rogers; that the 'bad' David's actions were the result of a horrible childhood; and that the actions and character of the 'good' David Rogers outweighed that of the 'bad' and warranted a sentence of less than death." (ROB 170 [citations omitted]).

Respondent's argument is logically insupportable, for several reasons. We can begin with the point that Mr. Lorenz himself admitted, and that is really indisputable: There was absolutely no inconsistency or contradiction between convincing the jury that there was a "'good' David Rogers" who deserved to live and convincing the jury that David Rogers was not the unspeakable beast who raped and tortured Tambri Butler. The notion, that effort

expended on disproving the Butler accusation would somehow detract from the mitigation case, is simply false.

In fact the truth was quite the opposite: The success of the mitigation strategy articulated by Respondent *depended* on effectively countering the accusation that Petitioner perpetrated those horrors on Ms. Butler. Respondent pretends that there was no real difference between the evidence the jury had previously heard regarding Petitioner's interactions with the murder victims and Ms. Butler's shocking account.[124] (See ROB 224-226.) That simply is not true. Aside from the basic facts of the homicides, there was no evidence at all regarding what transpired between Petitioner and Janine Benintende. The only evidence regarding what happened with Tracie Clark was from Petitioner's admissions and confession, which described a consensual encounter that degenerated into a shooting – first accidental and then deliberate – when Petitioner was unable to perform and Ms. Clark became nasty and physically aggressive.

The theory around which the entire "psychiatric/psychological" mental health defense was built was that Ms. Clark's actions triggered a primal fear and rage, and a mental dissociation, resulting from the terrible physical and sexual abuse Petitioner suffered as a child, and that dissociative reaction temporarily overwhelmed the normally "good David Rogers." (See 22 RT 5965-66). But once the jury accepted that Petitioner had sadistically raped and sodomized Tambri Butler, that theory was useless.

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[124]Respondent throws in, for good measure, the allegations concerning Katherine Hardie and Ellen Martinez. As reviewed above, the assumption that Petitioner was the man who apparently tried to kidnap Ms. Hardie is not supported by the evidence: Ms. Hardie looked at Petitioner, who was sitting there on trial for murder, and said that she could *not* describe the driver of the truck that picked her up. (18 RT 4914-4916.) And while Ellen Martinez did testify regarding an encounter with Petitioner, it bore virtually no resemblance to the attack reported by Tambri Butler. Ms. Martinez's accusation was that Petitioner, after rescuing her from a knife-wielding prostitution customer in a cemetery, had made her take off her clothes and taken nude photographs of her, after which he drove her home. There was no suggestion that he had treated her violently or forced her to have sexual relations. (22 RT 5766-5768).

Letting the jury believe that Petitioner had raped, sodomized, tortured and tried to kill Tambri Butler could only have undercut a mitigation strategy based on Petitioner being a fundamentally good, non-violent person who, due to terrible mental problems caused by childhood abuse, had committed homicides that were (as Mr. Lorenz emphasized in his jury argument) "*not* crimes of torture." (22 RT 5959 [italics added].) No juror, believing that Petitioner had done those things to Ms. Butler, was going to spare his life on the basis of his fine "character," nor accept Mr. Lorenz's argument that there was basically a "good David Rogers," who only killed Tracie Clark because her provocations had awakened the traumas of his abusive childhood. (See 22 RT 5965-66.) Thus, as trial counsel admitted, it was vital to the *entirety* of the defense to "do anything to exclude her testimony or to impeach her identification of Mr. Rogers" (8 RHRT 1473-74) – "to either impeach or minimize this evidence." (8 RHRT 1500; see also 12 RHRT 2217-18 [capital defense expert Coleman].) In short, by ignoring Tambri Butler and thus failing to meet the prosecution's argument in aggravation, Mr. Lorenz effectively doomed his own mitigation strategy as well.

This brings us finally to the reality noted by Mr. Coleman: Even if there had been some danger of a vigorous defense to the Butler accusation overshadowing the mitigation evidence (and there assuredly was no such danger) it would still have been incumbent upon a reasonably competent defense attorney to undertake the former. As Respondent itself points out, "much of [the mitigating evidence] had been presented at the guilt phase some time earlier" (ROB 219) and by the time he was presenting his penalty defense "it must have been apparent to Lorenz that his guilt phase strategy had not persuaded the jury . . . ." (ROB 225.) (Indeed, if one accepts Respondent's contention, elsewhere in its brief, there was ultimately an "almost complete lack of mitigating circumstances. . . ." (ROB 232.) In other words, it was already clear that the jury was unlikely to spare Petitioner's life based on the psychological evidence that formed the crux of the mitigation case. If counsel was to succeed in saving his client's life, it was incumbent upon him to convince the jury that Petitioner was not the loathsome creature who committed the atrocious assault on Tambri Butler. No penalty phase strategy that might have distracted trial counsel from that central

imperative could be considered "objectively reasonable."

To the extent that Respondent makes subsidiary arguments regarding the asserted reasonableness of trial counsel's specific failures of investigation, cross-examination, rebuttal and argument, those will be addressed in the contexts in which they arise.

B. Counsel's Investigation Into the Butler Assault Was Grossly Inadequate and A Competent Investigation Likely Would Have Changed the Outcome of Petitioner's Penalty Trial

1. No Presumption Can Overcome the Demonstrable Inadequacy of Trial Counsel's Investigation

In the Opening Brief we detailed the evidence demonstrating that trial counsel Eugene Lorenz did virtually nothing by way of investigating any of the evidence regarding Ms. Butler. (POB 151-154; 165-169.) After reviewing that same evidence, the Referee found quite clearly that Mr. Lorenz's investigation, such as it was, fell well below the standard of competent representation:

> *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.*

(R&F 16-17.)

Respondent tenders a counter-argument to the effect that, since Mr. Lorenz generally could not remember in 2011 what investigation he did (or did not) conduct in 1986 and 1987, and since the law presumes that he performed competently, Petitioner has not met his burden

of showing that Mr. Lorenz was ineffective in this regard. (ROB at 179-181.)[125] The argument depends on the (unarticulated) assumption that the only way to establish what Mr. Lorenz did and did not do would be through his own testimony.

In other words, Respondent insists that Petitioner not only prove a negative (that counsel did not conduct an adequate investigation) but that he do so through direct evidence (*i.e.*, Mr. Lorenz's own admissions in that regard). The law is not thus; rather, it recognizes that, generally, such proof must be made by way of inference. "Especially when a party must prove a negative . . . without resort to proper inferences the burdened party could be faced with an insurmountable task." (*Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc*. (Fed. Cir. 1989) 892 F.2d 1021, 1024.) Thus our courts have long accepted that proof by inference is the appropriate way to demonstrate a fact when direct evidence is unavailable. (*See, e.g., Hamilton v. Pacific E. R. Co.* (1939) 12 Cal. 2d 598, 604-605; *People v. Manson* (1977) 71 Cal. App. 3d 1, 46 [proof that a missing person was not alive]; *People v. Scott* (1959) 176 Cal. App. 2d 458, 490 ["The law employs the judgment of reasonable minds as the only means of arriving at the truth by inference from the circumstances in evidence. If

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[125]To bolster this argument, Respondent paraphrases something else the Referee said, making it sound as though he found that "the evidence generally fails to show whether and to what extent Lorenz investigated [the Butler assault] or what the results of any such investigation were." (ROB 180.) But Respondent omits both the beginning and end of that sentence (which appears in the middle of page 15 of the Referee's Report). What the Referee said was: "***Respondent agrees*** *that the evidence generally fails to show that whether and to what extent Lorenz investigated items 1,2, or 4, in Question 7 or what the results of any such investigation were,* ***except for the following facts****."* (R&F at 15 [additional emphasis supplied].) The Referee then proceeds to detail the (minimal) results obtained by Mr. Lorenz, what Mr. Lorenz should have done instead, and what evidence would have been adduced had Mr. Lorenz done those things, and concludes (as quoted in the text) that Mr. Lorenz's investigation was incompetent. (*Id.* at 15-19.) The Referee's syntax could have been more lucid; in particular it is hard to discern with whom Respondent was "agreeing" and the sentence could more logically be read as indicating that "Respondent argues . . . ." But one thing is clear: Read in context the Referee's comments do not support Respondent's contention that the Referee found any insufficiency in the evidence; rather he concluded that the evidence amply proved that counsel's investigations and the results obtained were inadequate.

this were not true, an infinite number of crimes involving the element of a specific intent would go unpunished."].)

In this case, the pertinent inferences are to be drawn from the following facts: Mr. Lorenz testified that he did not do his own investigations, but instead relied on investigators. (8 RHRT 1420, 1479.) Mr. Lorenz confirmed that what those investigators did (and by necessary inference, what they did *not* do) can be ascertained by reviewing his billing records which set out payments to investigators, and by the contents of his case file.[126] (8 RHRT 1530.) A comprehensive index of the pertinent contents of that file, prepared by one of those investigators (Larry Crandall) indicates there was no material regarding Ms. Butler other than what was later found in the file itself. (1 Exh. 50-51; 4 RH Exhs. 1024-25.) The testimony of those investigators – particularly that of Chuck Feer, who did the bulk of the (meager) non-mitigation penalty phase investigation work that was performed – was also completely consistent with what the documents indicated about the scantiness of that investigation. (See, 2 RHRT 334-382.) The trial court's file contains the proceedings on the sole discovery request filed by Mr. Lorenz (CT 22-29; 5 RH Exhs. 1423-29) – a request which (as Respondent points out elsewhere in its brief) was inadequate to compel the prosecution to provide any material at all regarding Ms. Butler. (See, ROB 164-165.)

The clinching fact is that Mr. Lorenz did not take the obvious actions, ask the obvious questions, or make the obvious arguments that would have followed had he obtained the

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[126]Mr. Lorenz testified that he turned over his entire file to present counsel (8 RHRT 1467, 1603-1604), who in turn provided counsel for Respondent with all contents pertaining to this proceeding. (12 RHRT 2947.) Citing successor counsel's testimony that the file was in disarray – with some documents bearing tire marks – Respondent asserts that "the record casts serious doubts about the completeness of Lorenz's file when it was turned over to the habeas team." (ROB 164.) But disarray or not, there is not a speck of evidence that anything was actually missing from the file – and certainly nothing to suggest that somehow, remarkably, it was the Butler investigation evidence that disappeared. On the contrary – as will be discussed presently – the fact that the investigation, such as it was, produced only the few random documents that remain in the file is fully confirmed by the related fact that those are the only items noted in Chuck Feer's index and by the reality that Mr. Lorenz used nothing outside of those documents in his response to Ms. Butler.

information readily available through a standard investigation.[127] These things provide more than ample inferential evidence to support the conclusion that the principal reason Mr. Lorenz could not remember his investigation was because he basically did not conduct one. (*Cf., Merrick v. Paul Revere Life Ins. Co.* (9th Cir. 2007) 500 F.3d 1007, 1014-1015 [fact that documents were withheld, despite party's sworn statement to contrary, inferred from what was done (and not done) and the paucity of pertinent information recovered].)

In short, there is ample evidence regarding what Eugene Lorenz did – and more importantly what he did not do – to protect his client by investigating the prosecution's most significant aggravation evidence. At this point, Respondent can no longer rely on some general presumption that trial counsel did an adequate job of investigating the case. (See *Deas v. Knapp* (1981) 29 Cal.3d 69, 77 ["a presumption affecting the burden of producing evidence disappears when evidence is introduced that would support a finding against the presumed fact"], citing, Evid. Code § 604.) Rather, as the Referee found, and as we will now review, Mr. Lorenz's pathetic investigation of the facts concerning Ms. Butler and the assault she suffered fell far below the standard of practice of reasonably competent counsel.

2. What The Evidence Demonstrates About Counsel's Deficient Investigation

a. Regarding the Identity of Ms. Butler's Assailant

After reviewing that evidence – the discovery motion and proceedings, the billing records, the contents of Mr. Lorenz's file, the comprehensive index of investigation materials, the actual recollections of the investigators – it is clear that Mr. Lorenz took no affirmative steps whatever to investigate whether Tambri Butler's identification of Petitioner as her assailant was correct. And, as the Referee found, there were obvious steps any competent lawyer would have taken that would have yielded vital evidence demonstrating that Petitioner was not the man who attacked Ms. Butler.

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[127]This point is the subject of Reference Question 8, in response to which the Referee made explicit findings regarding a number of items of "*highly credible*" evidence that "*an adequate investigation would have produced*." (See R&F at 17.) Those findings are discussed in our Opening Brief (at pp. 162-171) and will be addressed in the text, *post.*

i. The Failure to Review the Actual Contents of the Lerdo Interview

Describing perhaps the most fundamental action to be taken in investigating a complaining witness, the Referee found that "*[t]he attorney should have obtained every possible prior statement that Ms. Butler had made regarding the assault, including the transcript of the Lerdo interrogation itself and he should have listened to the tape and read the transcript."* (R&F at 18.) Respondent insists that there is no evidence to prove that Mr. Lorenz failed to do those things, and thus the Court should simply "presume" that he did. To the contrary: the evidence convincingly demonstrates that Mr. Lorenzo never obtained and reviewed either the Lerdo interrogation tape or a transcript of it.

At some point, the prosecution turned over Detective Soliz's (partially inaccurate) summary of the Lerdo interview (4 RH Exhs. 1027-48), but – although the report referenced a tape recording of that interview – neither the tape itself nor a transcription of the recording was found in Mr. Lorenz's file or noted in the Crandall index. (4 RH Exhs. 1024-25; 12 RHRT 2448.) Given that Det. Soliz's report was specified in the index, as was every other pertinent document (including Tam Hodgson's related report regarding Ms. Butler's statements to Deputy Lockhart (4 RH Exhs. 1025)), and all of those were found in counsel's file, the reasonable inference is that neither the interview tape nor a transcription was ever provided to the defense.

That inference is confirmed by the fact that defense counsel never utilized any of the obvious points of impeachment that would have been gleaned from the actual interview, but were not reflected in the Soliz report:

- Ms. Butler told the detectives that her assailant's vehicle was fairly new – rather than the "1960's or 1970's" model mentioned in the Soliz report;

- At Lerdo she expressed reservations, not reported by Det. Soliz, about differences between Petitioner's picture and the appearance of her attacker;

- Det. Soliz omitted important physical details that Ms. Butler had specified – such as the attacker's extremely big hands, his large chest, and the fact that (except for his moles) he had no markings on his body, even when his shirt was off – details that would have distinguished Petitioner's extremely small hands, slightly concave chest and prominent tattoo;

- Although Ms. Butler told the detectives that she never got out of the truck "not once" and never stood next to her attacker "not once" (points that undercut the reliability of her height estimate), those significant remarks never made their way into Det. Soliz's report.

(See, 9 RHRT 1762-66; *compare*, 4 RH Exhs. 891; 889-90; 897; 910 *with* 4 RH Exhs. 1041-42 [Soliz report].)[128] And without listening to the tape, or reading a transcript of it, counsel missed the obvious fact that the actual "identification," as well as some amount of substantive interrogation, took place before any recording was made (9 RHRT 1746-47) – rendering the entire process subject to attack as improperly suggestive.

Referring to these facts, capital defense expert David Coleman opined that, even though Mr. Lorenz *should* have known about the tape, it appears clear that "he was unaware" of its contents, because "he didn't use anything from it and it was chock full of material that he should have used." (2 RHRT 228.) Mr. Lorenz himself agreed that, if he had been aware of the impeachment material in the tape, he would have used it. (8 RHRT 1520.)

As the Referee found, if Mr. Lorenz had taken even the minimally competent step of obtaining and listening to (or transcribing and reading) the Lerdo interview, and following up on its contents, he would have had a quantity of additional, persuasive evidence that Petitioner did not match Ms. Butler's description, and thus was *not* the man who attacked her. (R&F at 17-18.) He would have had evidence that Ms. Butler's attacker had extremely large hands ("you notice these things," she specified) and could immediately have ascertained that Petitioner has extremely *small* hands. (*Compare*, 4 RH Exhs. 893 *with* 5 RH Exhs. 828-29.) He would have had evidence that the assailant had a large chest – something that Petitioner noticeably lacks. (*Compare*, 4 RH Exhs. 889 *with* 6 RH Exhs. 1384.) Counsel

[128]Without acknowledging any of these differences, Respondent simply announces that the Soliz report "tracked closely with the taped interview." (ROB 180-181.) Det. Soliz was more candid; testifying at the reference hearing he admitted that "[s]ome things [in his report were] wrong," and acknowledging the specific discrepancies. (9 RHRT 1763.)

would have had Ms. Butler's statement that she had seen her attacker with his shirt off, and she was certain that (except for the line of moles, which Petitioner does not have) that man had no noticeable markings on his body – unlike Petitioner, who has a large and quite noticeable tattoo. (*Compare*, 4 RH Exhs. 892 *with* 6 RH Exhs. 1580-81.)

Counsel would have had proof of Ms. Butler's repeated insistence that she never stood up next to her attacker – "not once" – which undermined one of the only points of similarity between her description and Petitioner – namely, the man's height. (See 4 RH Exhs. 891, 910.) And he would have had evidence of a key fact that the tape discloses, but that Det. Soliz's summary of it does not: That Ms. Butler expressed doubts about the match between the perpetrator and the photograph of Petitioner, even as she was "identifying" it as a picture of the man who attacked her. (See, 4 RH Exhs. 889-90.)

Respondent does not deign to discuss – or even mention – most of this persuasive evidence that was lost due to counsel's failure to review the actual Lerdo interview. But the weight of that lost evidence, and the fact that none of it was employed to impeach Ms. Butler's identification testimony, belies Respondent's only substantive response – namely that the Court is required to "presume" that counsel knew of it but for some bizarre reason chose not to make use of it.

ii. The Complete Failure to Interview* Any *Pertinent Witnesses

Beyond Mr. Lorenz's failure to obtain and listen to (or transcribe) the tape of the Lerdo interview, the evidence demonstrates that he did not do anything else, whatever, to investigate the assault on Ms. Butler or the accuracy of her identification of Petitioner as her assailant. As the Referee found, a competent attorney performing in a reasonably diligent investigation *"should have personally, or at the least had an investigator, interview other people who knew Ms. Butler such as Kay Davis and William [Wiese], if still alive, and at the very least interviewed Ms. Butler herself.*"[129] (R&F at 18.) Petitioner's counsel did nothing

[129]Taking exception to this finding, Respondent asserts that such an interview may not "even [have been possible] since Wiese may not have been alive at the time . . . which

of the sort.

On March 21, 1988 – two days before the penalty phase was to begin, and three days before she testified – Mr. Lorenz served a letter on the prosecutor requesting to interview Ms. Butler as well as other potential penalty phase witnesses. (8 RHRT 1505-06; 5 RH Exhs. 5367.) That interview never took place. (*Ibid*.) Nor did he make any effort to interview other obvious witnesses who could have cast doubt on Ms. Butler's testimony, such as her much-mentioned "husband," William Wiese, her friend and cellmate Kay Davis, or Deputy Jeannine Lockhart, who played a pivotal role in connecting Ms. Butler to the prosecution in this case, and whose memory of what Ms. Butler said about the assailant was and is radically different than Ms. Butler's. Nor, finally, did Mr. Lorenz make any effort to determine whether there were indeed other men who more closely resembled Ms. Butler's description and who were preying on Union Avenue prostitutes. (See 2 RHRT 341-45, 362-63.)

In its brief to the Referee (in the context of arguing that the Ratzlaff evidence was not "newly discovered") Respondent vigorously asserted that, had such inquiries been made, they would have led to the discovery of Michael Ratzlaff's activities. (RBFRH 63-64.) As her trial testimony suggested, and her reference hearing testimony made absolutely clear, Deputy Lockhart's recollection of her interaction with Ms. Butler would have put the lie to Ms. Butler's claim that she "identified" Petitioner as her attacker at that time. (22 RT 5806-5809, 5 RHRT 918-921.) If Ms. Butler's many later statements are credited, both Kay Davis and William Wiese would have established that – contrary to her sworn trial testimony – Ms. Butler did indeed see Petitioner on television before identifying him and did indeed discuss the case with other inmates. (3 RHRT 537, 6 RHRT 1067.) And, as capital defense expert David Coleman testified, a pretrial defense interview with Tambri Butler could have

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emphasizes the extent to which the referee's findings are based on speculation." (ROB 186). In fact, it is clear that William Wiese was indeed alive at the time Ms. Butler testified; in the only part of her sworn declarations which Respondent chooses to credit, Ms. Butler avers that she did not want to be released from jail then in part because Wiese was in jail at the same time. (See ROB 123, quoting and relying upon 1 RH Exhs. 221 [Butler decl.].)

provided valuable opportunities both to prepare for her testimony and to establish ways impeach it – especially given that her version of events changed with every telling.[130] (12 RHRT 2238-2239, 2251.)

To the (very limited) extent to which Respondent addresses this shocking failure on counsel's part, it is to assert that it is merely "speculative" to conclude that a more thorough investigation would have produced more or better evidence. (See ROB 185-186.) Petitioner respectfully submits that this is another example of Respondent being confused about the difference between speculation and fair and necessary inference.

iii. The Failure to Establish That Petitioner Did Not Have a Light-Colored Truck

Perhaps Mr. Lorenz's most baffling investigative failure was in not making any attempt to develop evidence regarding whether, at the time of the Butler assault, Petitioner owned or had access to a truck that met the description she gave. This was crucial, given the extremely high probability that the jury conflated her description of the assailant's light-colored "Ford" pickup truck with the truck Petitioner bought from Toby Coffey and was driving when he killed Tracie Clark. Upon hearing Ms. Butler's evidence, Petitioner had himself attempted to tell Mr. Lorenz that he did not own the truck at the time of the attack on Ms. Butler (8 RHRT 1545-46), and during the guilt phase the prosecution had (perhaps inadvertently) adduced the fact that Petitioner did not acquire the truck until January, 1987 – after the Butler assault. (RT 4666-67.)

As the Referee found, Mr. Lorenz "*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.*" (R&F at 18.) But counsel never interviewed Coffey – who would have added, as he did at the reference hearing, that he never loaned his truck to Petitioner or anyone else. Nor did counsel search motor vehicle

[130]Mr. Coleman also testified that, in his experience, jailed witnesses are often willing to talk with defense investigators (lest they be viewed by other inmates as favoring law enforcement) and are surprisingly forthcoming when they do. (12 RHRT 2251-2252).

records, or take any other steps to gather evidence that would have disabused the jury of the easy assumption that Ms. Butler was assaulted in a truck associated with Petitioner.

Respondent insists that the guilt phase testimony, regarding when Petitioner took possession of Mr. Coffey's truck, amply demonstrated this point to the jury and relieved counsel from investigating the matter further. (See ROB 184.) First of all, this argument relies on the unlikely premise that, during the penalty phase the jurors retained firmly in mind testimony that had been adduced almost in passing, months earlier at the guilt phase, in the context of a very different set of issues. Given that trial counsel himself appeared to have forgotten about that evidence (for he made no mention of it, as helpful as it might have been in responding to Ms. Butler), it is inappropriate to assume that the jurors – with no reminders or guidance from defense counsel or anyone else – connected those points.

In making this argument Respondent also appears to have forgotten the conflicting argument that it pressed vociferously earlier in its brief – namely that the fact that Petitioner did not own the truck until later did not foreclose the possibility that had previously borrowed Mr. Coffey's truck (or a similar one from someone else) to use in committing crimes. As we have demonstrated, Mr. Coffey (if asked) could have put any such intimations to rest, for he was adamant that he did not loan out his truck and he recalled clearly that, although he saw Petitioner's vehicles every day (they lived within yards of each other), he had never seen Petitioner with another light-colored truck. (2 RHRT 330.)

As the Referee found, "*[a]n adequate investigation would have produced . . . credible evidence [that] Petitioner had no access to the 1966 truck at the jury associated with petitioner until almost a year after Butler was attacked . . . establish[ed] through Toby Coffey's highly credible [testimony]*." (R&F at 17.) There is no explanation for trial counsel's failure to do so other than sheer ineffectiveness of representation.

b. Regarding Whether Ms. Butler Saw Petitioner On Television

As Mr. Lorenz testified at the reference hearing "it would have been extraordinary if [Ms. Butler] didn't see [Petitioner] on television," before she identified him as the man who

attacked her. (8 RHRT 1528.) The story, counsel said, "was carried, you know, every half hour on the news," and "people watched TV all day long in the jail." (*Ibid.*) Proving that Ms. Butler had seen Petitioner on television – in custody, charged with murdering other prostitutes – just before her first recorded identification of him as her attacker could have dealt a decisive blow to the veracity of that identification and thus the prosecution's case in aggravation.

Yet the record evidence – including counsel's billing records, the reports and testimony of the investigators, and (perhaps most persuasively) his own cross-examination of Ms. Butler – demonstrates persuasively that he made no effort to gather the facts that would have proved that to the jury, and that thus would have revealed that Ms. Butler's identification testimony was hopelessly tainted. Not only did he not interview Ms. Butler, he made no effort to interview her jailors or fellow inmates regarding those facts. He developed no evidence to prove that she was housed in a large cell with two television sets that were on almost constantly. (5 RHRT 917; 12 RHRT 2420-31.) He did not even attempt to show that – as he testified at the reference hearing – there was near-constant television coverage of Petitioner's arrest at the time that Ms. Butler was interviewed at Lerdo.

The conclusive proof of counsel's failure in this regard is in the fact that, cross-examining Ms. Butler at trial, he aggressively demanded that she admit having seen Petitioner "on television or in the newspaper before you talked to the police" – but when she simply denied it, he had no other questions, and simply moved on. (RT 5802.) Quite obviously, if Mr. Lorenz had any evidence with which to impeach that denial, he would have used it. He had none, because he had collected none.[131]

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[131] Respondent asserts that counsel already "possessed a portion" of the pertinent evidence – namely tapes of some of the news coverage, which he tendered in support of a pretrial motion to change venue. (ROB 185.) But that material in itself would not have been sufficient to prove that Ms. Butler (as well as her fellow inmates) had almost certainly seen the coverage while she was in jail, and counsel made no effort to use it in that regard.

As to the truly crucial evidence that was never gathered, Respondent argues that counsel already *knew* about the televisions in the jail and the fact that there was constant television coverage of Petitioner's arrest. (ROB 181 ["Lorenz was aware that petitioner's case 'was widely discussed by the Union Avenue prostitutes, that petitioner was shown on television appearing in jail clothes, and that people in jail watch television 'all day long.'"]; ROB 185.) Thus (Respondent implies) Mr. Lorenz did not need to "investigate" the matter.

It is elementary that the purpose of an investigation in a criminal case is not merely to put to rest counsel's own uncertainties about the facts – rather, and more importantly, it is to gather evidence for counsel to use at trial in order to *prove* those facts. (See, *e.g.*, *United States v. La Salle National Bank* (1978) 437 U.S. 298, 303.) What Mr. Lorenz "knew" was immaterial if he could not prove it, and his failure to investigate ensured that he could not impeach Ms. Butler's testimony and prove that she saw Petitioner – in jail clothes, charged with the murder of one of other Union Avenue prostitutes – just before she picked out his picture as being that of her attacker.

The Referee accordingly concluded that competent counsel should and would have obtained the evidence necessary to "*[e]stablish Butler saw petitioner on television before identifying petitioner* . . . ." (R&F at 17, 18.)

Respondent contends that the Referee's findings in this regard were "unreasonable" (ROB 185-186) – and bases that contention on a series of assertions that are themselves patently unreasonable. Respondent's principal argument is that "it appears unreasonable for counsel to go to such lengths to investigate whether a [*sic*] aggravating witness, whose identification was not disputed, saw Rogers on television some time before she identified him." (ROB 185.) This argument describes a perfect circle. The only sense in which Tambri Butler's "identification [of Petitioner] was not disputed" is that counsel did not gather and adduce the evidence necessary to dispute it *effectively*. But – as both the trial judge and this Court's Referee confirmed – Ms. Butler's identification of Petitioner as her assailant was the single most important piece of evidence in the penalty phase of Petitioner's

trial. Accordingly, as both the capital defense expert and Mr. Lorenz himself testified, it was vital for counsel to do anything he could to demonstrate that the identification was unreliable – that Petitioner likely was not Ms. Butler's tormentor. There is thus absolutely nothing "unreasonable" about the Referee's finding that counsel should have undertaken the (relatively modest) investigative efforts needed to demonstrate that Ms. Butler's only verified pretrial identification of Petitioner was almost certainly corrupted by her having seen him on television, accused of murdering other prostitutes, the day before she was shown his photograph.

Respondent's secondary argument is that, even if trial counsel had adduced evidence showing (a) that there were multiple televisions in Ms. Butler's cell, that were (b) on constantly during waking hours, and (c) the station to which they were tuned "was covering the case 'around-the-clock,' counsel still could not affirmatively establish that Butler watched those televisions at the exact moment when Rogers was shown walking in handcuffs." (ROB 185-186.) The argument fails on its own terms, for it would not have been necessary for counsel then (just as it is not necessary for Petitioner now) to prove beyond all doubt that Ms. Butler was watching the television at any of the (apparently) dozens of times that day when the news of Petitioner's arrest was being broadcast. It is sufficient that the foundational facts (*i.e.*, televisions present and on constantly; incessant coverage of Petitioner; the fact that Ms. Butler was quite literally a "captive audience;" the undeniable reality that the arrest of a Sheriff's deputy for killing prostitutes would be of supreme interest) are more than adequate to support an overwhelming inference that – as she eventually admitted – Ms. Butler did indeed see Petitioner on television, and that she lied about that fact at trial.

Of course, counsel should not have needed to rely on that inference, for there were other inmates present who could have confirmed the fact. Indeed, according to Ms. Butler, her friend and cellmate Kay Davis pointed out the coverage to her as it was happening, and they talked about it. Respondent, however, attacks the Referee for having "speculated,

without evidence in support, that counsel would have obtained this evidence . . . ." (ROB 186.) There was no speculation: the evidence in support, which comes directly from Ms. Butler, is that Kay Davis knew the truth – but counsel made no effort to talk to her or any of the many other women who were there and could have confirmed it. To this Respondent argues that Ms. Davis simply would not have spoken to the defense (and presumably would have lied about it on the stand if called as a witness) because she was Ms. Butler's friend. (*Ibid*.) Now *that* is speculation – but it is still more supportable than Respondent's accompanying assumption that Ms. Davis was "[t]he only person who may have helped establish that Butler saw Rogers on television ...." (ROB 186.) It was established at the hearing that Ms. Butler (and apparently Ms. Davis) were housed at the Lerdo jail in a large, dormitory-style cell. (12 RHRT 2430-2431, 5 RH Exhs. 1330-1333.) Any number of other women being held there also "may have helped establish" the pertinent facts – but counsel made no attempt to interview anyone.[132] As the Referee found, there was no excuse for counsel's failure to take the most basic investigative steps needed to save his client's life.

c. Regarding Ms. Butler's Criminal History

The Referee also found that Mr. Lorenz failed to investigate "*Butler's criminal history* (R&F 17); that a competent attorney would have "*obtained a compete and thorough criminal record of Ms. Butler*" (R&F 18); and that if counsel had taken this basic step "*Ms. Butler could be impeached with a felony conviction of H&S 11351 us[ing] Court conviction records.*" (R&F 17.)

Respondent takes exception to these findings, labeling it a mere "assumption" that Mr. Lorenz did not in fact obtain a complete criminal history of Ms. Butler, and asserts that "the record does not provide enough evidence about Lorenz's investigation to conclude that the investigation was inadequate." (ROB 182-183.) In any event (Respondent argues) "counsel had, at a minimum, Butler's 'arrest record' and possibly a complete criminal history report

[132]These same potential witnesses could also have established that Ms. Butler lied on the stand when she denied that "the case was a matter of jail gossip . . . ." (22 RT 5803.)

from the prosecution." (ROB 185.)

Respondent fails to mention that "Butler's 'arrest record'" did *not* disclose that she was convicted of (or even arrested for) the drug trafficking crime proscribed by section 11351 of the Health and Safety Code. Rather, the document to which Respondent refers – the only evidence in counsel's file regarding Ms. Butler's criminal history – shows (inaccurately) that she was arrested only for simple possession of a controlled substance. (See 2 RH Exhs. 356 [noting arrests for H & Safety Code §11350].) And, putting aside that *everything* is theoretically "possible," the record evidence amply supports the Referee's finding that, in fact, counsel did *not* obtain Ms. Butler's "complete criminal history."

So far as the record discloses, Mr. Lorenz took only two "actions" that can be construed as efforts to investigate Ms. Butler's criminal history, neither of them effective. First, the boilerplate discovery motion he filed prior to the preliminary hearing included a request for "[a]ll records of any felony convictions of any witnesses to be called to testify against the defendant." (5 RH Exhs. 1428.) As Respondent helpfully points out, the motion was not a reliable means of obtaining any information about Ms. Butler. As Respondent explains, because the motion was filed in the Municipal Court rather than the trial court, and was a "'pre-preliminary hearing motion,'" the prosecution could not have been compelled to provide anything sought solely for trial – such as information regarding penalty phase witnesses like Tambri Butler. (RB 125 n. 120, quoting 1 CT 22-29.)[133] In any event,

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[133]Respondent is less forthright when, a few sentences later, it asserts that, in the Municipal Court hearing on the discovery motion, Mr. Lorenz made clear that he wanted information about witnesses' criminal history that could be relevant to "bias or interest." (ROB 165, citing 1 CT 27-30.) In the cited passage, however, Mr. Lorenz only expresses concern regarding one specific *guilt phase* witness – the "confidential informant" who turned out to be Connie Zambrano. (1 CT 27-30.) Neither there nor anywhere else does Mr. Lorenz indicate any particular interest in the criminal histories of potential penalty phase witnesses. We note that Respondent made this same set of baseless assertions in its briefs before the Referee; that they were thoroughly disproved then makes it difficult to excuse Respondent's insistence on reiterating them.

everything found in trial counsel's file corresponding to that discovery request was reflected in the "Receipt for Discovery," signed by Mr. Lorenz's daughter when she picked up a discovery packet (6 RHRT 1096-97;4 RH Exhs. 1027-48.) All of it was also included in the Crandall index. (4 RH Exhs. 1024-25.) There were no discovery documents regarding Ms. Butler's criminal history.

That Mr. Lorenz did not have that information is further established by the fact that – in his sole investigative effort specifically regarding Tambri Butler – he dispatched investigator Chuck Feer to do a "criminal records check" of five potential witnesses, including Ms. Butler. (2 RHRT 345-49.) Mr. Lorenz gave Mr. Feer that direction on Friday, March 18, 1988 – the end of the week before the penalty phase was to begin – and the resulting report was delivered to Mr. Lorenz in court at 10:30 a.m. on March 23, 1988, roughly an hour before Ms. Butler began her testimony.[134] (2 RHRT 347-51; 353; 8 RHRT 1504-05.)

That report – what Respondent refers to as "Butler's 'arrest record'" – was limited to a list of criminal cases actually filed against Ms. Butler and the other named women, with filing dates and charges. (2 RHRT 349-50; 2 RH Exhs. 355-359.) It provided no

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[134]In this regard, the Referee explicitly endorsed and adopted the explanation given by capital defense expert David Coleman as to why Mr. Lorenz's investigation fell below the standard to be expected of a reasonably competent attorney, observed: "Nothing speaks louder than the timing. . . . This is the most important witness in the entire penalty phase. So, first of all, you simply – no diligent reasonable attorney would prepare for trial requesting material to impeach such a crucial witness the day before that witness testifies . . . it was way, way too late in the game for that to be happening. . . . I think that these dates and the critical nature of this information speak volumes about a lack of preparation and investigation." (12 RHRT 2230-31.) Reminded that Mr. Lorenz did not actually receive the information until the same morning on which Ms. Butler testified, Mr. Coleman opined, "[o]f course . . . It just aggravates or makes it worse." (12 RHRT 2231; accord, R&F at 16-17 [finding that "*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 has as to the timing of Mr. Lorenz's investigation . . . . The Court found Mr. Coleman to be a very credible witness.*])

information regarding the dates of arrest, what the police arrested the person for, nor how the case was disposed, whether by plea or trial. The report did not set forth whether the resulting conviction, if any, was for a felony or a misdemeanor, and said nothing about whether probation or some other penalty was imposed. (*Ibid*.) As Mr. Feer explained at the reference hearing, all of that (far more useful) information was readily available in the respective case files which the Court's clerk would have provided upon request – but Mr. Lorenz did not instruct him to gather any of it.[135] (2 RHRT 350-51.)

Respondent argues that Mr. Lorenz surely already had all of the necessary records and did not need to do any further investigation because the prosecutor, Sara Ryals, claimed at the reference hearing that she must have handed over all documentation regarding to Ms. Butler's criminal history for it was her invariable practice to do so. (ROB 182.) Respondent here ignores the fact that the Referee found Ms. Ryals' testimony in this regard "*not credible*," and instead explicitly found that "*the prosecution did not disclose information about Tambri Butler's criminal history to the defense.*"[136] (R&F at 14.)

As the Referee emphasized, the real proof that Mr. Lorenz did not have Ms. Butler's criminal records is in the proverbial pudding. If the prosecution had provided those documents, they would have been the only known material to have mysteriously disappeared from Mr. Lorenz's files. They also mysteriously disappeared from his consciousness, for when Ms. Butler misrepresented the nature of the crime for which she was incarcerated, counsel made no effort to impeach her. The only reasonable inference is that he could not

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[135]All told, the time devoted to investigating Ms. Butler's criminal history *and* that of the other four potential penalty witness totaled roughly one hour. (2 RHRT 351-52.)

[136]As the Referee observed, at the reference hearing Ms. Ryals "*contradicted herself*" and "*appeared to be overly defensive in her testimony.*" (*Ibid*.) The Referee also pointed to a note from Ms. Ryals to her investigator, Tam Hodgson, instructing 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)." (*Ibid*., citing 5 RH Exhs. 1206.)

do so, because he did not have the actual information.[137]

The other proof that counsel never obtained Ms. Butler's criminal history is in the fact that he dispatched Mr. Feer to look into it, just days before the penalty trial. Respondent disputes this inference (which it mistakenly refers to as an "assumption"), arguing that "[i]t would have been reasonable for [Lorenz] to double-check any information he received from the District Attorney's Office on the possibility that information from Butler's 'rap sheet' was incomplete, especially as to recent events." (ROB 182.) Respondent's argument actually underscores the feebleness of Mr. Lorenz's efforts. Regardless of whether (as it appears) he had never before obtained information about Ms. Butler's criminal history, or whether (as Respondent insists) it was "reasonable for him to double-check" information that he supposedly had received, the fact remains that his efforts were ineffectual. The cursory and truncated search that he directed the investigator to perform would have been inadequate to serve either purpose.

d. Regarding Prior Law Enforcement Encounters Between Petitioner and Ms. Butler

The undisputed fact is that Ms. Butler's first recorded arrest in Kern County, in April, 1985, resulted in a citation and summons signed by then-Deputy Sheriff David Rogers. (2RHRT 278-79, 6 RHRT 1045-47; 1 RH Exhs. 59.) Thus the Referee found that "*the credible evidence indicates there was some contact between them at that time* . . . ." (R&F at 19; see also R&F at 16.) The point is extremely significant because – as the eyewitness identification expert testified, without contradiction – that interaction in itself could explain why Ms. Butler identified Petitioner as her attacker when presented his picture in a photo lineup. (4 RHRT 665-66.)

Respondent does not dispute the fact that trial counsel failed to uncover that

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[137]To again quote capital defense expert Coleman, "the information that he got at such a late hour . . . 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." (12 RHRT 2232.)

potentially important piece of evidence, which would have surfaced in any thorough search of Ms. Butler's criminal record in Kern County. Instead, Respondent insists on addressing only the narrowest possible reading of the Court's reference question, which asked "'whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant.'" (R&F at 2, quoting RQ #7(4).) In this regard, Respondent relies on the Referee's finding that, "*No. Petitioner had not previously arrested Butler.*" (R&F at 1, discussed in ROB 181, 186.)

This is one of the extremely rare points where Petitioner takes (a very minor) exception to the Referee's findings: while it is not clear whether Petitioner was the officer who arrested Ms. Butler on that occasion, that is neither what the Court asked nor what is pertinent. The Court did not phrase its question in terms of whether Petitioner *arrested* Ms. Butler, but rather whether he was "involved" in her arrest. That the Court phrased the question as such quite apparently reflects the fact that the Court was referring to the evidence of the signed citation and summons, which was already before it. Thus the question clearly contemplates all of the components of the arrest procedure, including the necessary processing in which Petitioner was undeniably "*involved*."

The more important point, however, is one the Referee recognized – namely that there was clearly (entirely lawful) contact between Petitioner – as a police officer – and Ms. Butler prior to the time she identified him, and even prior to whatever encounter they may have had in the jail. That, as Dr. Pezdek testified, could have been enough to explain why Ms. Butler thought she recognized him when (and if) she saw Petitioner in the booking area of the jail, and why she later was prepared to identify him.[138] (See 4 RHRT 664-666.) Thus a

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[138]As Dr. Pezdek explained (without contradiction) the science of facial recognition, and specifically of the phenomenon known as "source monitoring," is as follows:

> There are six people in the photographic lineup. And you ask, do we know that the eyewitness has had prior exposure to any of those six people at some

reasonably competent attorney would certainly have presented the jury with the facts indicating that Ms. Butler's identification of Petitioner was the result of their earlier encounter.

Respondent argues that the evidence "would not have been discovered had an adequate investigation occurred [because a] reasonably diligent counsel, whose strategy did not involve disputing a witness's identification of his client, would not scour police records in an effort to find any possible interation between his client and the witness." (ROB 186.) The fatal defect in that argument is plain in its phrasing: there is no such thing as a "reasonably diligent counsel" whose strategy would not involve disputing Tambri Butler's identification of Petitioner. To the extent that Mr. Lorenz's failure to do just that could be ascribed to a "strategy" on his part, it was an unreasonable, incompetent one that led directly to a death penalty verdict.

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As the Referee properly concluded, in this case "*the investigation was not conducted in a manner to be expected of a reasonably competent attorney acting as a diligent advocate.*" (R&F at 16.) And, as the Referee further found, an adequate investigation would have produced a wealth of "*highly credible*" evidence that would have tended to undermine Tambri Butler's credibility, and to demonstrate that, when she identified Petitioner as the man who savagely attacked her, she (in her words) "testified against the wrong guy . . . ." (3 RH Exhs. 797-798; see R&F at 17.)

> time in her past that was not during the attack? So, if we happen to know that one of those people gave her a traffic ticket at some point in time . . . then that could be a reason why she would have identified [that person].

(4 HRT 664).

C. TRIAL COUNSEL'S FAILURE TO BRING A *PHILLIPS* MOTION

Closely related to trial counsel's primary failure to investigate the Butler evidence was his failure to bring on a motion, prior to the penalty trial, to exclude it entirely. On the one hand, trial counsel's failure to bring on such a motion is (at least in part) a product of his antecedent failure to gather the evidence to support it; on the other hand, it was in a sense another investigative failure for – even if the motion did not succeed – it likely would have produced further valuable material with which to impeach Ms. Butler.

In the Opening Brief, we reviewed the testimony of capital defense expert David Coleman regarding whether a reasonably competent attorney would have brought a pre-trial motion to exclude Ms. Butler's testimony, pursuant to *People v. Phillips* (1985) 41 Cal.3d 29 ("*Phillips"*). Mr. Coleman explained that, after conducting an adequate investigation, competent counsel certainly would have brought on such a motion, asserting that a reasonable juror could not find beyond a reasonable doubt that Ms. Butler's identification of Petitioner was "true" (*i.e.*, accurate). (12 RHRT 2249-50, 2297.)

Mr. Coleman offered two reasons for this conclusion. *First*, because an adequate investigation would have provided so much evidence that the identification was likely mistaken, and otherwise impeaching Ms. Butler, her credibility would have been "in tatters," and there was at least a significant likelihood that a judge would grant the motion. *Second*, regardless of whether the motion succeeded in barring Ms. Butler's testimony, it would have been a great benefit to have whatever version of her story she gave that day on record. 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." (12 RHRT 2250.)

Although Mr. Lorenz never expressed a tactical reason for failing to bring a *Phillips* motion, the Referee was willing to "*presume he had a tactical reason though not expressed*."

(R&F at 20.)[139] The Referee further found that "*[r]easonably competent counsel, after conducting an adequate investigation into the 1986 assault, would not have brought the motion 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.*" (*Ibid*.)

Respondent contends that "[t]he referee's finding precludes relief on this particular issue." (ROB 199.) However, Respondent only gets to that conclusion by completely ignoring (and, of course, failing to cite for this Court) the last portion of the Referee's finding. The point the Referee was making – namely that "*the benefit of having Ms. Butler on the record would have warranted an attempt by reasonable counsel to bring the motion*" – was completely consonant with Petitioner's claim.

Other than its misleading truncation of the Referee's finding, Respondent has little to offer in reply.[140] First, based on how this Court evaluated a different, much later case involving an a challenge to the testimony of an identification witness, Respondent simply asserts that such a motion surely would have failed. (ROB 199-200, discussing, *People v. Boyer* (2006) 38 Cal.4th 412, 477 ["*Boyer*"].)

According to Respondent, the trial court "likely" would have refused to hold a live

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[139]This is another, relatively minor, finding regarding which Petitioner takes exception. We submit that there is no basis for such a presumption in this case. The record clearly demonstrates that Mr. Lorenz gave virtually no thought at all to addressing the Butler evidence. The only, paltry (and ineffective) bit of investigation that he essayed was begun a few days before she testified, and resulted in him being handed an inadequate summary of her criminal history just minutes before she took the stand. Simply put, counsel had not gathered the evidence that would have permitted him to make an informed tactical decision about the efficacy of bringing a *Phillips* motion. Again, "[a]s [this] Court succinctly stated, '"There is nothing strategic or tactical about ignorance."'" (*People v. McCary* (1985)166 Cal. App. 3d 1, 12; quoting, *Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [citation omitted].)

[140]This is in part because Respondent insists on ignoring Mr. Coleman's expert testimony (and indeed, his very existence), and thus cannot speak directly to the points that he made.

hearing on it, and instead could have just decided the motion on the basis of offers of proof and argument. (ROB 200, *citing Boyer*, 38 Cal.4th at p. 477 n.51.) The argument ignores the reality that live *Phillips* hearings were the usual practice and held in the vast majority of cases at the time this case was tried in 1988, as evidenced by the fact that the defendant in *Boyer* assumed that he was entitled to one as a matter of right.[141] (*Ibid*.) The fact that this Court held in *Boyer,* many years later, that *Phillips* hearings were not mandatory does nothing to alter that reality.

We are left, then, with the points that Mr. Coleman made about why a diligent attorney would have filed a *Phillips* motion: Because there was a significant likelihood that it could succeed, and thus remove Ms. Butler's devastating testimony from the penalty case; because there was an even more significant probability that Ms. Butler would give testimony at a hearing on the motion which could be used to impeach her later testimony at trial; and because, in any event, there was no "downside" to doing so – nothing to lose in trying.

Respondent seizes on this last point, citing *Knowles v. Mirzayance* (2009) 556 U.S. 111, for the proposition that it is not ineffective assistance for counsel to fail to file a motion he believes is "hopeless," even if there is nothing to be lost in making the effort. (*Id.* at pp. 126-27.) But this ignores the other side of the equation, which was not present in *Mirzayance* – the great likelihood of an outcome that would benefit the defense.

In short, the Referee was absolutely correct regarding the thrust of his finding: a reasonably competent attorney would have brought on a *Phillips* motion – not because he had nothing to lose but because there was so much to be gained by putting Tambri Butler on the

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[141]We also submit that Respondent is mistaken when it describes the identification in *Boyer* as "weaker" than Ms. Butler's turns out to have been. Whatever her uncertainties, the witness in *Boyer* – unlike Ms. Butler – had not given a description of the perpetrator that differed from the defendant in almost every significant detail; nor had she seen the man she identified on television, dressed in jail clothes and charged with crimes against similar victims the very day before she "identified" him. Nor, for that matter, is there any indication that the witness in *Boyer* had any reason to be biased in favor of the prosecution.

stand. Petitioner's counsel did not bring on such a motion, and he was ineffective for failing to do so.

D. Trial Counsel Failed To Respond Effectively To Ms. Butler Either Through Cross-Examination Or Adducing Impeaching Evidence

1. The Referee's Findings Regarding Deficient Performance Are Amply Supported

The Referee, finding that "*a reasonably competent attorney acting as a diligent advocate would have impeached or rebutted Butler's testimony,*" set out a list of "*impeaching or rebuttal evidence*" that Mr. Lorenz should have, but did not, utilize – including the facts that "*petitioner 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,*" and concluded (in response to this Court's question) that Mr. Lorenz had "*no tactical reasons . . . for failing to impeach or rebut Tambri Butler's testimony.*" (R&F at 20-21.) The Referee also found that "*a reasonably competent attorney acting as a diligent advocate would have called an eyewitness identification expert*," whose testimony would have *"demonstrated to the jury the . . . how Ms. Butler's . . . identification of the petitioner was unreliable."* (R&F at 22.) Put simply, the Referee's findings compel the conclusion that Eugene Lorenz provided ineffective assistance in failing competently to perform his duty to challenge and rebut the Butler evidence.

As discussed at length in Petitioner's Opening Brief (at pp. 172-182), the record not only amply supports the Referee's conclusions but bolsters them with many other examples of missed opportunities for impeachment and rebuttal, including: that Ms. Butler's assailant had a hairy chest while Petitioner's chest was virtually hairless; that the assailant had no other visible marks on his body, while Petitioner had a prominent tattoo; that none of the very specifics objects that Ms. Butler reported seeing in the assailant's truck – the stun gun, the big silver thermos, the watch with an expandable band, the tool box – were found in the

exhaustive searches of Petitioner's home, vehicles or locker; that Petitioner did not have the young son, daughter and dog described by the attacker. Nor did counsel show the jury that Ms. Butler had been issued a summons by Petitioner – a fact that could have been extremely important, especially if an eyewitness identification expert had testified. Counsel did nothing to explore – much less disprove – Ms. Butler's false testimony on direct examination that the crime for which she was incarcerated was only simple possession of drugs. Nor – as capital defense expert David Coleman pointed out – did trial counsel make use of the veritable gift Ms. Butler handed him when she suddenly, for the first time, announced that her attacker said his name was "David." (See 12 RHRT 2253, 2324-2325.) As Mr. Coleman testified, it was absurd to suggest that she had known the man's name and not reported it to the detectives at Lerdo; the fact that she came up with it while testifying was a sure indication of her bias and commitment to seeing Petitioner convicted. (*Ibid.*)

In short, Mr. Lorenz passed up myriad opportunities to demonstrate that Ms. Butler's identification of Petitioner was unreliable and that her testimony as a whole was infected with bias. [142] His virtually complete failure to challenge the single most important witness in the penalty phase – the witness whose testimony likely made the difference between life and death – deprived Petitioner of the effective assistance of counsel.

2. Respondent's Reliance on Counsel's "Limited, Targeted Attacks" Is Both Logically and Factually Insupportable

Defending trial counsel's feeble response to the Butler evidence, Respondent offers a refinement of its larger (failed) argument about the reasonable strategy that the Court must presume that counsel adopted. Thus Respondent argues that, rather than conduct a "mini-

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[142]Even the foregoing is only a partial list, for it does not include the important areas in which counsel did challenge Ms. Butler's evidence, but did so ineffectually – for instance, in regard to her criminal history, or whether she had seen Petitioner on television before she identified him, or whether she had discussed the case with other inmates. The defective – and indeed, counterproductive – nature of counsel's "attacks" in these areas was discussed in the Opening Brief and will be touched on again in the text, presently.

trial" regarding Ms. Butler's accusation, Mr. Lorenz could reasonably have chosen to make "limited, targeted attacks," focusing his purposely minimal cross-examination of Ms. Butler on her "credibility" – and specifically "on Butler's motivation to testify, rather than on the accuracy of her identification." (ROB 195-197.)

This argument makes no sense on its own terms. If Ms. Butler's testimony was to be challenged at all, the *only* issue was "the accuracy of her identification." The sole function of revealing Mr. Butler's "motivation to testify" would be to show that she was biased, and that therefore her identification testimony should not be credited. Conversely, if (as Respondent seems to posit) there was no dispute as to whether she was correct in identifying Petitioner as the man who assaulted her, then her "credibility" was beside the point.

Respondent's argument is also betrayed by the record. Mr. Lorenz's cross-examination of Ms. Butler – aggressive in tone but desultory in execution – hit various, apparently random points. He did question her about her drug addiction, penal status and expectations of being rewarded for her testimony (*i.e.*, her "motivation"). But he also cross-examined Ms. Butler about having seen Petitioner on television and (in Respondent's words) "highlighted the fact that Butler said her assailant had a mustache while his client had never worn one before trial" (ROB 195) – questions that bore solely on "the accuracy of her identification."

Respondent itself also contradicts that first argument in the argument that follows it. (ROB 206-208.) Respondent next asserts that "Lorenz could reasonably have believed he accomplished what he wanted by making his points about Butler's criminal record, drug addiction, mustache description, names of her assailant and likely reasons for bias against Rogers. He could reasonably have thought he had adequately suggested that Butler had lied in saying that her assailant was Rogers." (ROB 206-207.) This underscores the fact that Mr. Lorenz was indeed attempting to target the "accuracy" of Ms. Butler's testimony, and not only by challenging her "credibility."

Beyond that, Respondent's second argument fails as completely as its first. To begin

with, the argument is based on sheer speculation about trial counsel's supposed strategy. Mr. Lorenz himself never said anything like what Respondent proposes – indeed, his testimony suggested that, at least in retrospect, he had made a mistake by not doing more to respond to Ms. Butler's testimony.

But the fundamental defect in Respondent's second argument in its assumption that, just by asking Ms. Butler about various things – what Respondent refers to as "making his points" – trial counsel effectively cross-examined her about them. Precisely the opposite is true. When trial counsel demanded: "Isn't it true that you saw photographs of Mr. Rogers on television or in the newspaper before you talked to the police, did you not?", Ms. Butler replied simply: "No, sir, none whatsoever." (22 RT 5795.) When he insisted that she admit that the case was being discussed among the other inmates in the jail, and "it was a matter of jail gossip before you talked to Mr. Hodgson, was it not?", Ms. Butler just replied: "No." Pressed as to whether there was any interest "on your deck at all," Ms. Butler answered: "In my part, I kept it to myself." (22 RT 5803.) She similarly parried counsel's insinuations that she hoped and expected to be released early as a reward for her testimony, responding that she had no such hopes – "I don't expect any help." (22 RT 5801.) In response to a question implying that she was avoiding a prison sentence by testifying, Ms. Butler replied evenly: "I have already been sentenced to county [jail]." (*Ibid*.)

Respondent's basic premise is that simply by asking the questions that he did – which were firmly denied by Ms. Butler, without further testing through impeachment, rebuttal, or even follow-up questions – counsel did all that he needed to do to establish that Ms. Butler's responses were false, and thus "to discount Butler's testimony . . . ." (ROB 197.) Again, the opposite is true. The logical effect of Ms. Butler's uncontradicted denials was to allay any doubts the jury may have had regarding her credibility on those subjects. Respondent's unsupported assumption does nothing to explain why Mr. Lorenz did not obtain, adduce and argue the vast amount of available material that truly would have impeached Ms. Butler's testimony.

In regard to Ms. Butler having seen Petitioner on television, Respondent asserts that "[a]dditional evidence about televisions in jail would not have done anything to change or undermine Butler's answer . . . ." (ROB 197.) Perhaps Respondent honestly holds that view, but, as the Referee found and as is discussed above, it is beyond reasonable dispute that the "additional evidence" available to counsel – there were television sets in Ms. Butler's dormitory cell which were on constantly, with frequent news coverage of Petitioner's arrest on charges certain to interest every inmate in that room – would have rendered Ms. Butler's denial untenable.[143] Similarly, Respondent contends that counsel could "reasonably have believed" that his cross-examination regarding Ms. Butler's criminal history and expectations regarding lenient treatment "was enough to thoroughly damage Butler's credibility." (ROB 198.) Capital defense expert David Coleman punctured that notion in his testimony, pointing out that what Mr. Lorenz propounded were,

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[143]In this regard, Respondent offers the (frankly confusing) suggestion that, although counsel made some effort to get Ms. Butler to say that she had identified Petitioner as a result of the television coverage, he did not *really* want to pursue that possibility because "it could lead the prosecutor to introduce Butler's testimony that she had seen Rogers in the Union Avenue area following her within days after the assault [which] would both bolster Butler's identification and show consciousness of guilt as an implied threat . . . ." (ROB 207.) Again, Mr. Lorenz never gave any indication that he had any such concern – and with good reason. First of all, if that was counsel's concern, he wouldn't have interrogated Ms. Butler about the media coverage, jail gossip, *etc*., at all. Second, if the prosecutor thought that testimony about Ms. Butler's later encounters with the perpetrator would have bolstered her case, the prosecutor had every reason to introduce it. In fact (as discussed above) that evidence was a double-edged sword, for Ms. Butler would have testified to having later, random encounters with an assailant who was still sporting a bushy mustache that Petitioner never had and driving the distinctive truck with wooden sideboards that Petitioner never possessed. Third, Respondent's contention that the prosecutor was holding that evidence in reserve lest trial counsel attack the accuracy of the identification is directly contrary to Respondent's contention that trial counsel *did* effectively land such an attack through his "limited, targeted" questioning. Finally, the business about "consciousness of guilt" makes no sense: The jury would only draw that inference if it had already decided the very question at issue – namely that Ms. Butler's identification of Petitioner as the attacker was accurate.

> . . . an extremely cursory set of questions. And even more troubling is the fact that a jury would have no way of understanding the significance of what he is asking her or perhaps the significance it has in her mind either. [J]urors don't come with knowledge of exactly how many . . . heroin arrests lead to what particular punishment or anything like that. So it really . . . had no significance for the jury.

(12 RHRT 2311.)

Respondent closes with the observation that "Butler was potentially a very harmful witness" whom counsel would want to "get . . . off the witness stand as quickly as possible." (ROB 208.) But there was nothing "potential" about the harm Ms. Butler did to the defense; as the trial judge opined, her testimony made the difference between a sentence of life or death for Petitioner. The point was made at the reference hearing when Respondent's counsel asked capital defense expert Coleman about the possibility that, in a more fully litigated case, the prosecution might have put on evidence, "that could have been even more damaging to Mr. Rogers." To that, Mr. Coleman drily replied: "I don't get the concept of 'even more damaging.'" (RHRT 2315.)

Without even getting into the many, potent areas of cross-examination that Mr. Lorenz left untouched – *e.g.,* about the contradictions between Ms. Butler's testimony and the description that she gave to the investigators at Lerdo; about the uncertainties she expressed while "identifying" Petitioner's picture; about her access to television (including news coverage of Petitioner's arrest); about her vulnerability to law enforcement; about why her story had suddenly become more inculpatory of Petitioner in details such as "he said his name was David," and the assailant's truck changing from a newer Chevrolet to an older Ford – trial counsel's efforts to challenge the testimony of the most important penalty phase witness were utterly and inexcusably ineffectual.

3. Competent Counsel Would Have Called An Eyewitness Identification Expert

The Referee found that "*a reasonably competent attorney acting as a diligent advocate would have called an eyewitness identification expert*," and that – just as Dr. Pezdek did at the reference hearing – such an expert would have "*demonstrated to the jury*

. . . how Ms. Butler's descriptions of the assailant were reliable, but in contrast, her identification of the petitioner was unreliable." (R&F at 22.)

In taking exception to the Referee's findings, Respondent's thesis is that "the crucial issue was not the 'reliability' of Butler's 'identification' of Rogers by picking him out of a set of six photos in the interview [at Lerdo], but the credibility of her story about how she recognized him at A Deck." (ROB 213.) The most basic defect in this formulation is that it depends on a very specific – and, in this context, unhelpful – definition of "credibility" as being a matter of whether the trier of fact would believe that *Ms. Butler* believed she was telling the truth: that is, whether she was sincere. But, syntax aside, the "crucial issue" for the jury was simply whether Ms. Butler's testimony that Petitioner was her assailant was *accurate* – or whether, as she put it, she "had the wrong guy." And that is exactly the question that "reliability" addresses.

In her testimony, Dr. Pezdek carefully and thoroughly charted why Tambri Butler's identification of Petitioner as her assailant was unreliable and very likely to have been inaccurate. Along the way, Dr. Pezdek explained very clearly why Ms. Butler's "story about how she recognized [Petitioner] at A Deck" was just that – a story told years after the event, which (sincere or not) was subject to so many distorting factors that have been well-charted in the science of memory as to have no particular reliability. (4 RHRT 767.)

Ignoring the actual content of Dr. Pezdek's testimony – except to take whatever snippets it believes will support its thesis – Respondent proceeds to the astonishing conclusion that "Pezdek . . . confirmed that Butler's account of having recognized petitioner was supported by research but [*sic*] the crucial issue was credibility." (RB 144, citing 4 RHRT 798-99.) As will be shown, Dr. Pezdek "confirmed" nothing of the sort, and she testified to exactly the opposite. To reach the conclusion it does, Respondent fashions a summary of her testimony that is so selective and decontextualized as to be affirmatively

misleading.[144] Petitioner respectfully suggests that the account and discussion of Dr. Pezdek's testimony set out (respectively) at pages 104-111 and 175-176 of Petitioner's Opening Brief provides a far fuller and fairer report of the evidence adduced at the reference hearing. We will not burden the Court by reiterating all of that here, but it is necessary to retrace its outline in order to demonstrate just how far afield Respondent has strayed.

As the Referee observed, the crux of Dr. Pezdek's testimony (never acknowledged as such by Respondent) was that Ms. Butler's *description* of her assailant during the Lerdo interview was very reliable, while her *identification* of Petitioner as the assailant was highly unreliable. (4 RHRT 640-41, 651, 784-86, 792.) The first part was true because Ms. Butler's encounter with the assailant bore six of the seven basic hallmarks of reliability (4 RHRT 634-40), indicating that Ms. Butler "got a very good look at her perpetrator and saw him very clearly." (4 RHRT 641.)[145] As such, her description was especially reliable to the extent that she recalled specifics, such as the mustache, the line of moles, the man's "big hands" and large, hairy chest, the Chevrolet pickup with gray sideboards, *etc*. (4 RHRT 706-07.) On the other hand, general descriptors, such as the perpetrator being of roughly average height and weight, were not so dependable. (See 4 RHRT 660.)

Dr. Pezdek went on to explain why Ms. Butler's identification of Petitioner just before the Lerdo interview – the very first time that Ms. Butler's alleged recognition of Petitioner as her attacker was documented or in any other way corroborated – was itself the result of a tainted, suggestive process and was unreliable. As Dr. Pezdek testified, there has been extensive study and research devoted to differentiating the procedures which result in an

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[144]We have previously pointed out many instances in which Respondent abandoned its duty to fairly report the pertinent contents of the record, including the portions that supported the Referee's findings and thus contradicted Respondent's own argument. But there is probably no other context in which Respondent so flagrantly disregarded that duty.

[145]The only contrary reliability factor was the passage of time – *i.e*., the fact that 13 months elapsed between the assault and Ms. Butler's first documented description of the assailant. (4 RHRT 640.)

accurate identification from those that are more likely to result in a false identification. (4 RHRT 618-24.) Among the most basic principles confirmed by the unchallenged scientific research is that, in composing a lineup (photographic or otherwise), the investigator must start with the witness's description of the perpetrator. It is then of critical importance that the investigator assemble a group, including the suspect and "foils," that match the description. (4 RHRT 686-88; 689-90.) The greater the deviation from the description given, the higher the likelihood of a false identification. (4 RHRT 669, 689.) It is undisputed that the lineup in this case was constructed prior to obtaining any description from Ms. Butler. In fact, it was assembled for a completely different purpose (the investigation of the Clark homicide) and explicitly designed to reflect *Petitioner's* characteristics without regard to whether or not they corresponded to those of Ms. Butler's assailant. (9 RHRT 1736.)

It was on this basis that Dr. Pezdek testified that the lineup was both "biased" and likely to be inaccurate. (4 RHRT 653-655, 684-691, 721-723.) Remarkably, however, Respondent asserts that Dr. Pezdek "stated nothing [about the lineup] that would bias the viewer toward identifying Rogers. As a result, the latter opinion made no sense and would not have been persuasive." (ROB 214.) In so asserting, Respondent simply disregards the actual content of Dr. Pezdek's testimony. Put simply: If the jury had been told that a reliable lineup should have been created on the basis of Ms. Butler's description of the assailant (which did not match Petitioner), but that the lineup here was created specifically to resemble Petitioner, it would have been easy for them to understand that the lineup "biased the viewer toward identifying Rogers."

This leads to another essential aspect of Dr. Pezdek's testimony that Respondent chooses to ignore – namely why it was that, out of six photographs of men that did *not* match the description she gave, Ms. Butler picked Petitioner's picture. On this point, a jury would have found invaluable Dr. Pezdek's explanation of the remaining pertinent factors that research indicates lead to incorrect identifications by eyewitnesses: "source monitoring;"

media exposure; and the lack of a "double-blind" procedure. (4 RHRT 663-65, 701-02.) "Source monitoring" comes into play when one of the pictures is of someone that the witness has seen and interacted with before – even if the witness has no conscious recollection of that interaction. The witness recognizes the face but cannot say from where – she cannot recall the "source" – and so interprets that recognition as an identification of the person pictured. (4 RHRT 663-64.) The fact that Petitioner had previously issued a citation and summons to Ms. Butler would be an apt example of that phenomenon, and could in itself explain why she picked his photograph. (4 RHRT 664.)

But, as Dr. Pezdek testified, the effect of such relatively subtle source monitoring is magnified by a great power when the witness has previously been exposed to media coverage of one of the persons pictured:

> [I]f she saw him on television or saw wanted posters or any kind of media exposure, that's going to increase the familiarity of the defendant's face. So when she goes to the photographic lineup again, she could be picking out the most familiar person in the lineup but making again a source monitoring error, she is confusing who's familiar from media exposure and who's familiar from the crime itself. And these effects of suggestibility and media exposure are quite potent influences on memory and they are not sources that any of us are aware of. In other words, when we are making a source monitoring error, or if 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. So it is not – unfortunately you can't – once 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.

(4 RHRT 666-67.) If Mr. Lorenz had also adduced the readily available evidence regarding the likelihood that Ms. Butler did in fact see Petitioner on television, Dr. Pezdek's testimony on this point could have had a powerful effect on a jury, for it would have made clear that Ms. Butler's identification of Petitioner was irremediably tainted – even if Ms. Butler was

completely sincere in insisting that it was accurate.[146]

In short, a careful review of the scientific research in the area of eyewitness identification, of the sort offered by Dr. Pezdek at the reference hearing, could have been very helpful to the jury in understanding why Ms. Butler's identification testimony could not properly be credited. Respondent does not actually address any part of that analysis, quite apparently because it cannot. Instead, Respondent composes a kind of counter-narrative from bits and pieces of Dr. Pezdek's testimony that are consistently taken out of context and glued together with Respondent's own unsupported assumptions.

According to Respondent, Dr. Pezdek's testimony would support a prosecution argument that Ms. Butler's earlier "recognition" of Petitioner, when she supposedly encountered him in the booking area of the jail, was even more reliable than the documented identification at Lerdo, because it was closer in time to the attack. (ROB 213-216.) As Dr. Pezdek carefully and repeatedly explained, what Respondent now refers to as a "recognition" (but insisted below was an "identification") in the booking area of the jail was not an identification at all within the meaning of that term as it is used in scientific analysis. (See, 4 RHRT 763-67, 770-72, 791.) There was neither documentation nor any other corroboration, even of Ms. Butler's claim that she recognized Petitioner as her assailant at

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[146]Dr. Pezdek also pointed out another breach of accepted protocol that likely affected Ms. Butler's identification – the lack of a "double-blind" procedure. As she explained, the pertinent research has established that it is crucial "that the officer administering a lineup should be blind as to which . . . person the suspect is in that lineup." (4 RHRT 703-04.) The reason is the same that applies to any controlled experiment – if the officer knows the "correct" answer, he is likely to "shape the response that's given" by the witness – even if he does so completely unconsciously. (*Ibid*.) In this case, the opposite procedure was utilized: All of the officers involved in the identification procedure were aware of who the suspect was – indeed, the lineup was framed around that suspect. Moreover, because the actual photographic identification was not recorded, it would have been impossible for the prosecution to dispel the inference that one or more of the investigators did one or more things, "inadvertently or otherwise," that telegraphed to Ms. Butler that picking Petitioner's photograph was the "correct" answer.

that time, much less that she did so under circumstances supporting the reliability of an "identification." (4 RHRT 763-64, 770-71.)

As Dr. Pezdek observed, all we have are Ms. Butler's memories, months and years later, of having recognized someone that she later identified as Petitioner and having concluded that the person she saw was the same man who attacked her. (4 RHRT 764, 771.) The first time on record that she shared those recollections was at the Lerdo interview, long after the events in question; as such, her reported memories of having recognized Petitioner at those earlier times raise the same basic questions about their reliability as the identification of Petitioner's photograph, made in the course of that same interview. (4 RHRT 764, 767, 770-71.) Accordingly, Dr. Pezdek described Ms. Butler's recollection about having recognized Petitioner on A Deck as "subject to so many possible memory and memory distortion errors that I would not consider it a reliable source of information about who her attacker was." (4 RHRT 767.)

Respondent accuses Dr. Pezdek of "placing unreasonable restrictions on the types of identifications she would find acceptable." (ROB 215.) But the evidence before the Court nicely proves exactly the point that Dr. Pezdek was making about the unreliability of Ms. Butler's reports. Her recollection of the encounter on A Deck changed significantly with each telling – including the information about what she was doing there[147] what she and Petitioner allegedly said to each other,[148] and Petitioner's supposed activities and demeanor

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[147]Ms. Butler's story went from visiting her "husband" while he was incarcerated (4 Exhs. 920, 931); to being visited by him while she herself was in custody (RT 5780); to enjoying an arranged meeting while both of them were in jail – something that the deputies who worked in the jail testified never could have happened. (5 RHRT 914; 6 RHRT 1100-1101; 11 RHRT 2086-2087.)

[148]The "facts" metamorphosed from simply an account of an officer telling an inmate who has cursed him to turn around and keep her mouth shut (22 RT 5792), to leering remarks fraught with menace, sexual innuendo and admissions of past misconduct. (3 Exhs. 826, 4 Exhs. 938.)

when she saw him.[149] As Dr. Pezdek fairly observed, we do not and cannot know what actually happened on that occasion – indeed, Ms. Butler does not really know herself.

This brings us to the gross misrepresentation of Dr. Pezdek's testimony in which Respondent claims that – because the expert testified that it might take a multiple encounters with someone before the other person is able to "place" him – "Pezdek . . . confirmed that Butler's account of having recognized petitioner was supported by research but the crucial issue was credibility." (ROB 215, citing 4 RHRT 798-99.) In fact Dr. Pezdek was talking about recognizing someone in the sense of having seen them before *somewhere*, and she made clear that the "placing" of that person referred to the viewer's own idea about where they had seen that person – and not to the accuracy of that "placement," which is subject to the same "source monitoring" phenomenon, which gives rise to misidentifications, that she had already described. (4 RHRT 798-99; see also, 4 RHRT 803 [noting specifically that Ms. Butler's reported reaction to seeing Petitioner in the jail did not demonstrate that she knew him from the assault].)

Whatever one makes of this (rather complicated) interchange with Respondent's counsel at the hearing, one thing is crystal clear: Dr. Pezdek *never* "confirmed that Butler's account of having recognized petitioner was supported by research . . . ." Rather, everything Dr. Pezdek said on the subject confirmed that Ms. Butler's account failed to meet basic standards of reliability recognized in all of the pertinent scientific research on eyewitness identifications.

But the most egregiously false part of Respondent's formulation is the assertion that "Pezdek . . . confirmed that . . . the crucial issue was credibility." In fact, Dr. Pezdek was emphatic in confirming that exactly the opposite was true: that the crucial issue is not Ms.

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[149]She alternated between reporting that he was booking other people, that he booked her, and that he was instead just standing around with a cup of coffee. In the initial versions he was businesslike, but later she claimed to hear him making "a derogatory remark about girls" to another officer, and still later he was "cutting up with his buddies." (1 Exhs. 218, 254; 3 Exhs. 675-76, 786-87, 861; 4 Exhs. 937-38.)

Butler's credibility, but "the reliability of her memory." (4 RHRT 764.) When Respondent's counsel pressed the point, accusing Dr. Pezdek of making "a judgment of [Ms. Butler's] credibility when she says 'I know that I saw him,'" Dr. Pezdek replied:

> I'm not making that assessment. I'm not judging her credibility at all. I'm judging her memory ability. And given that accuracy does not – I'm sorry, that confidence does not predict accuracy, if she is saying I knew that was him, I'm sure it was him, she is being very confident. But confidence does not – confidence is not a good predictor of accuracy. So I'm assuming she is well intended, she is trying to do her best and so forth. I'm not questioning her credibility. I'm just questioning her memory ability.

(4 RHRT 767.)

Dr. Pezdek's point brings us back to the beginning of this section: However much Respondent wants to cast the pivotal question as turning on Ms. Butler's credibility – in the sense of whether she was sincerely attempting to tell the truth – the real crux of the matter was whether her identification of Petitioner was *accurate*. Testimony like that presented by Dr. Pezdek would have provided invaluable support for the conclusion that the identification likely was not accurate – and that it certainly was not reliable enough to dispel reasonable doubt. By failing to call an eyewitness identification expert, Mr. Lorenz forfeited the opportunity to present compelling evidence that would have undermined the jury's confidence in the accuracy of Ms. Butler's testimony, without even having to suggest that she was "not credible."

Finally in this regard, Respondent places great reliance on the companion finding in which the Referee "*presumes [Mr. Lorenz] had a tactical reason for not using an eyewitness expert.*" (R&F at 21-22.) As the Referee points out, however, Mr. Lorenz *"never mentioned a specific reason*" for not calling such an expert. (*Id.* at 22.) Rather, the only explanation Mr. Lorenz gave was that – although doing "might have been a good idea in retrospect" – he had never used one and did not know of anyone else "using an actual expert" in Kern

County during that time period.[150] (8 RHRT 1454-1455.) This can hardly be dignified as a "tactical reason."

But even assuming, *arguendo*, that Mr. Lorenz did have a tactical or strategic reason for failing to consult or present an eyewitness identification expert, that is of no aid to Respondent. Again, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." (*Roe v. Flores-Ortega, supra*, 528 U.S. at p. 481.) In finding that a reasonably competent attorney in the same situation would have called such an expert, the Referee necessarily – and accurately – found that Mr. Lorenz's choice not to do so was unreasonable.

4. Respondent's Argument Regarding Sheila Bilyeu Is A Red Herring

Respondent argues that trial counsel would have been reasonable to tread lightly in challenging Ms. Butler's testimony out of concern that the prosecution might retaliate by presenting the aggravation evidence of witnesses Ellen Martinez and Sheila Bilyeu. As to Ms. Martinez, the argument is easily dispatched – the prosecution *did* introduce Ellen Martinez's testimony "as aggravating evidence." (See 22 RT 5764-77.) In fact, she was the lead witness in the prosecution's penalty case, testifying just before Ms. Butler took the stand. (*Ibid.*) By the time he cross-examined Ms. Butler, Mr. Lorenz had no further reason to be worried about that – it was a *fait accompli*.[151] As to Ms. Bilyeu, the argument requires

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[150]Respondent, while relating Mr. Lorenz's testimony regarding not having used an eyewitness identification expert, leaves out the part where Mr. Lorenz testified that it might have been good if he did. (8 RHRT 1455.) Even more to the point, Respondent never mentions that Ms. Pezdek herself had been called to provide such testimony in Kern County during that time period, and even earlier. (4 HRT 626-627.) Dr. Pezdek pointed out that the use of eyewitness identification experts had been a well-accepted practice since, four years before Petitioner's trial, this Court issued its decision in *People v. McDonald* (1984) 37 Cal.3d 351 – a seminal case on the subject of which Mr. Lorenz certainly should have been aware. (See 4 RHRT 698.)

[151]Petitioner brought out these facts in response to the identical argument made by Respondent in its brief to the Referee. (See PRBFRH 150.) It is unfortunate that Respondent now tenders the same argument, based on the same factual error, to this Court.

a bit of unpacking, but once unpacked it is clear that there was nothing there to begin with.

a. The Bilyeu Evidence

The evidence concerning Ms. Bilyeu came out when Det. Mike Lage, on the stand at the reference hearing, was asked about a "supplemental report," dated February 24, 1987, chronicling a conversation he had the day before with Ms. Bilyeu. (9 RHRT 1846-48; 6 RH Exhs. 1589-92.)[152] Det. Lage had no recollection of talking with Ms. Bilyeu, and reading the report did not refresh his recollection – but he affirmed that he had written the report. (9 RHRT 1847-48.) Over strenuous objection, the Referee admitted the report but – after several rounds of argument about it – ruled that it could not be used for the truth of its contents, but rather limited its admission to the "non-hearsay" purposes of showing what evidence the prosecution might have had in rebuttal and what concerns, if any, trial counsel may have had about such evidence.[153]

In the report, Det. Lage recounts that Ms. Bilyeu contacted him after she learned from the media that Petitioner had been arrested. (6 RH Exhs. 1589.) She said that, starting in 1982, she had conversations with Petitioner while she was working as a street prostitute in Bakersfield and he was a Sheriff's Deputy. (6 RH Exhs. 1589-90.) Ms. Bilyeu then related an incident that, she said, had occurred some four years earlier, in 1983, when Petitioner, then on-duty as a police officer, had confronted her on the street, asked for identification and

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[152] Ms. Bilyeu was on Respondent's witness list for the reference hearing. (11 RHRT 2179-80.) Two weeks prior to the reference hearing, Petitioner's counsel had inquired whether Respondent planned to call Ms. Bilyeu as a witness. Respondent replied that it would not call her, as Ms. Bilyeu appeared to be mentally ill. (11 RHRT 2180-81; 2201.) Thus the introduction of evidence regarding what Ms. Bilyeu might have testified to, 25 years before, came as a surprise to Petitioner's counsel. (11 RHRT 2180-82.)

[153] In its briefing below, Respondent conceded that the evidence regarding Ms. Bilyeu could not have been properly introduced in rebuttal (RBFRH 132), and it does not assert otherwise in its opening brief before this Court. Thus the only possible significance of the Bilyeu evidence would be if it somehow influenced Mr. Lorenz to be less than vigorous in examining Tambri Butler.

– when she could not produce any – had handcuffed her and driven her to a cemetery. (6 RH Exhs. 1590.) Once there, she said, he had told her to take off her clothes and to put on some lingerie he had in a bag, had masturbated (while verbally abusing her) and then had forced her to commit various sexual acts, including oral copulation and intercourse. (*Ibid.*) Ms. Bilyeu said that, after that incident, she continued to have apparently friendly conversations with Petitioner when he was on duty, as if nothing had happened. (6 RH Exhs. 1590-91.) She also "dated" him two or three times after that, she said; those dates consisted of him picking her up on Union Avenue, handcuffing her, putting her in his patrol car and driving her back to the cemetery where they would have sex. (6 RH Exhs. 1591.) He would pay her $20.00 for these dates – an amount she found insultingly low. (*Ibid.*)

Ms. Bilyeu claimed that, a few weeks later, she had told Deputy Ray Lopez what had happened. Later, she said, she had discussed it with (then) Sergeant Fred Ross, who had picked her up and driven her around, talking with her and asking if she "knew anything about a deputy who was taking girls to the cemetery." (*Ibid.*) Sgt. Ross had asked her if she would testify about it. She had told him she would not. (6 RH Exhs. 1591.)

In the course of Det. Lage's cross-examination, Petitioner's counsel introduced another "supplemental report," dated March 2, 1987, which the detective similarly could not remember but acknowledged writing. (10 RHRT 1901-02; 4 RH Exhs. 1174-76,) In it, Det. Lage reported interviewing Lieutenant Fred Ross (who had been promoted) regarding what Ms. Bilyeu had said the previous week. (4 RH Exhs. 1174.) After reviewing the earlier "supplemental report," Lt. Ross said that:

> "SHEILA BILYEU (aka: 'Star') had never told him (Lieutenant ROSS) anything about any misconduct of any kind regarding DAVE ROGERS. He said that on the contrary at one point in time, SHEILA BILYEU had made the statement that she would testify in ROGERS' behalf if she was subpoenaed to do so during the 1983 Civil Service hearings on DAVID ROGERS. . . .
>
> "Lieutenant ROSS went on to explain that he had, in fact, talked with SHEILA BILYEU on at least two occasions and that this only had to do with the charges being brought against ROGERS by the internal affairs

> investigation witness ELLEN MARTINEZ. Lieutenant ROSS told me that at that time, SHEILA BILYEU stated that ELLEN MARTINEZ was spreading it around that she was going to get ROGERS because she did not like him. But SHEILA BILYEU never gave any type of statement or indicated in any way that anything had happened between her (SHEILA BILYEU) and DAVID ROGERS."

(4 RH Exhs. 1174.) In this second report, Det. Lage also recounted that, on March 2, 1987 he had:

> ". . . talked with DEPUTY RAY LOPEZ and advised him of the contents of the supplemental report in question and the statements made by witness SHEILA BILYEU. Deputy LOPEZ told me that he has never had anyone report to him the circumstances related in the supplemental report in question and that he would certainly remember this type of incident if it had been reported to him."

(*Id*. at 1175.)

Ms. Bilyeu's name was included in the "notice of aggravation" (4 RH Exhs. 1011-12), and was on prosecutor Sara Ryal's witness list.[154] However, Ms. Ryals testified that, once she interviewed Ms. Bilyeu, she was *never* going to call her as a witness – "[n]ot after I talked to her, no." (10 RHRT 1975.)

Investigator Hodgson testified that he was the one who determined that Ms. Bilyeu was not currently in her right mind, and thus could not be called as a witness at the reference hearing (11 RHRT 2177-78.) He reported that her statements to him were erratic and disconnected, and that she had claimed being in the room both when Michael Jackson died and when Osama Bin Laden was killed. (11 RHRT 2178.) Mr. Hodgson claimed, however, that he had known Ms. Bilyeu in 1987 and that then she was "coherent and not having the same issues she appeared to have now." (11 RHRT 2178-79.)

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[154]Testifying at the Reference Hearing, Ms. Ryals initially denied that she had even put Ms. Bilyeu on her witness list (10 RHRT 1946), but had to change her testimony when shown the list. (10 RHRT 1974-1975.) (Indeed, at that point Ms. Ryals indignantly denied ever having ever testified as she did initially. (*Ibid*.).) The Referee commented in this regard that Ms. Ryals "*appeared to be overly defensive in her testimony.*" (R&F at 14.)

b. Concern About the Bilyeu Evidence Was Not A Reasonable Tactical Justification For Taking It Easy On Tambri Butler

Again, the only possible relevance of Ms. Bilyeu's apocryphal tale pertains to Respondent's contention that it was reasonable for trial counsel to tread lightly with Ms. Butler, lest the prosecution turn up the heat by calling Ms. Bilyeu as a witness. The contention fails for several reasons.

The simplest is this: Mr. Lorenz had absolutely no reason to think that the prosecutor was *not* going to call Ms. Bilyeu, regardless of how he proceeded with Tambri Butler. Ms. Bilyeu was on the prosecutor's witness list, and Mr. Lorenz had made the same (demonstrably deficient) preparations for meeting her testimony as he had for Ms. Butler's.[155] It would have been *un*reasonable for him *not* to assume that the prosecutor would utilize that testimony, if it would help the State secure a death penalty.

Which leads to the second, equally obvious reason why the specter of the Bilyeu evidence was not and should not have been a factor for defense counsel.[156] As a witness, Ms. Bilyeu would have been a disaster for the prosecution. Ms. Ryals, the prosecutor, realized as much when she decided not to call Ms. Bilyeu.[157] As capital defense expert David

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[155]Mr. Lorenz's preparations for Ms. Bilyeu's possible testimony consisted, in their entirety, of (a) obtaining (as part of a discovery packet) Det. Lage's report of the interview with Ms. Bilyeu, and (b) receiving a list of criminal cases filed against Ms. Bilyeu as part of the report from Southwest Investigations which handed to him in court on the morning that the penalty phase trial commenced. (6 RHRT 1045-48; 2 RH Exhs. 355-57.)

[156]For what it is worth, Mr. Lorenz himself never suggested, in his testimony or anything that he said or did, that he even considered any such tactical decision.

[157]Cutting and pasting Ms. Ryals' testimony, Respondent reports that she decided not to use Ms. Bilyeu "after speaking to her" – but suggests that was just because Ms. Ryals "'felt' that the evidence of the two murders was sufficient" to compel a death verdict. (ROB 210.) In the very next sentence – with no hint of awareness of the contradiction – Respondent says that Ms. Ryals "decided to use Butler after speaking to her." (*Ibid*.) Thus the only plausible explanation is that the prosecutor thought that Ms. Butler would be an effective witness, and that Ms. Bilyeu would not.

Coleman explained:

> [T]he officers who talked to Ms. Bilyeu denied that the things that she said to one officer were ever said. In fact, one was a lieutenant, I believe, in the Sheriff's Department who said she never told me any of that. And that was in Mr. Lorenz' file. And I find it inconceivable that – I would be afraid that with that type of – I could call a lieutenant from the Sheriff's Department who says that witness never said what you say. I wouldn't fear that in the least. And, in fact, I would think that Ms. Ryals feared it and I would think that it is sort of like if that's what they have to go to to deal with, what I'm assuming [is] effective cross-examination, bring it on.

(12 RHRT 2329-30.)[158]

But the ultimate, fatal defect in Respondent's argument is that – once the jury heard and believed Tambri Butler – there was no evidence available to the prosecution that would make things worse for Petitioner. When the Referee posed Respondent's contention directly to him, Mr. Coleman first assumed, *arguendo*, that there might have been substance to the Bilyeu evidence and responded that, nevertheless:

> [A] defense attorney could not sit idly by and have a witness [*i.e.,* Tambri Butler] give an unchallenged statement of a horrific crime and not challenge it. And especially, especially not challenge it when, in my view, my opinion, there was so much material to challenge with. I would have felt very comfortable arguing to a jury. And I feel that even a B lawyer like myself could have convinced several jurors that Tambri Butler's accuracy and her credibility were so impugned that they could not rely on that as a factor for their decision about the right penalty. So, I would have not been deterred at all about the possibility.

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[158]Respondent suggests that it is "plausible" that Sheriff's Lieutenant Ross (and presumably the other officer) would have forgotten the conversation with Ms. Bilyeu. (ROB 210.) We can note, and put aside, the sheer implausibility of the notion that the lieutenant would have forgotten about a report that a police officer under his command had committed a kidnapping and rape. More basically, Respondent ignores the fact that both officers remembered it well enough when they spoke with Det. Lage, three years after the fact. The notion that maybe, somehow, they would have forgotten all about it before Petitioner's trial is rank, unmitigated speculation that only betrays the weakness of Respondent's response.

(12 RHRT 2258.)[159]

In short, the possibility that the prosecutor might put Sheila Bilyeu on the stand neither played any part in trial counsel's approach to Tambri Butler, nor should it have. Such was clearly the conclusion of the Referee, who heard all of the testimony regarding Ms. Bilyeu and held three separate hearings regarding the admissibility and significance of that evidence. In the final analysis, the Referee concluded that "*a reasonably competent attorney acting as a diligent advocate [would] have impeached or rebutted Butler's testimony*" and that Eugene Lorenz had no reasonable tactical justification for failing to do so. (R&F 20-21.) That failure deprived Petitioner of the effective assistance of counsel.

E. THE ONLY SENSE IN WHICH IT WAS "REASONABLE" FOR COUNSEL TO FAIL TO REQUEST A JURY INSTRUCTION REGARDING EYEWITNESS IDENTIFICATION WAS THAT HE HAD FAILED TO DEVELOP THE EVIDENCE NECESSARY TO MAKE THE INSTRUCTION HELPFUL

Trial counsel's failure to request that the jury be instructed in accordance with CALJIC 2.92 is adequately addressed in Petitioner's Opening Brief, at pp. 197-182, and in Petitioner's (separately submitted) "Exceptions to Referee's Report and Findings" at pp. 8-9. As discussed there, the Referee's finding – that a reasonably competent attorney would not have requested the instruction, given the underdeveloped state of the record (R&F at 23) – makes sense on its own terms, but a better analysis would start from the assumption that counsel had instead done an adequate job of investigating and presenting evidence, in which case CALJIC 2.92 would indeed have been helpful to the defense.

Respondent's central assertion – that counsel's failure to request the instruction was merely consistent with his supposed strategy of attacking Ms. Butler's "credibility" rather than the accuracy of her identification (ROB 220) – has been fully addressed, above.

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[159]It was on this specific point that Respondent's counsel suggested that the prosecutor could have presented evidence "that could have been even more damaging to Mr. Rogers," to which Mr. Coleman replied: "I don't get the concept of 'even more damaging.'" (12 RHRT 2315.)

Similarly, Respondent's argument that the instruction would not have been helpful to the defense, and so would not have been requested by competent counsel (ROB 220-221), ignores the fact that competent counsel would have properly investigated the matter and adduced the evidence necessary to render the instruction helpful. As noted, this argument was dispatched in our prior briefing and there is nothing more that need be said about it.

The only point regarding this issue that merits a response is Respondent's insistence that the Court presume that Mr. Lorenz did request instructions that were helpful to the defense. According to Respondent, that presumption is required because the evidence only shows that counsel could not remember whether or not he submitted penalty phase instructions – it does not show that he failed to do so. (ROB 222-223, citing1 RHRT 146-47.) The point is easily dispatched: As is required, the Clerk's Transcript on Appeal following Petitioner's trial contains copies of all penalty instructions requested by either party.[160] (CT 696-706). Not only is CALJIC 2.92 absent from that compilation, *no* defense or other instruction was submitted apart from the general penalty phase instructions that the Court was required to give *sua sponte*. (*Ibid*).

The contrary "evidence" cited by Respondent in fact only demonstrates its mistake. Respondent relies on an exchange between Mr. Lorenz and the trial court, during the *guilt* phase, in which the court sustained an objection to the testimony of a defense psychologist who purported to describe the facts of Petitioner's earlier problems with women. (ROB 222-223, citing RT 5399.) Mr. Lorenz asked that the testimony be permitted, subject to a limiting instruction, and the court agreed. (*Ibid*.) But in the end, Mr. Lorenz never proposed such an instruction, and none was given. The closest thing was a very standard limiting instruction proposed by the *prosecution*, addressed generally to all evidence as to which a limiting admonition had been given (which did not occur here) and given at the close of the guilt

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[160]We note the "presumption of regularity" which mandates the conclusion that the Clerk's office did its duty and included all requested instructions in the record. (See, *People v. Delgado* (2008) 43 Cal. 4th 1059, 1070, citing, Evid. Code, §§ 660, 664,)

phase. (See CT 613.) Respondent's conclusion, that this "shows that Lorenz requested instructions when it could benefit his client" (ROB 223) is a flat misstatement of the record.

F. Trial Counsel's Failure To Even Mention Tambri Butler In His Closing Was Not Reasonable Strategy – It Was Incompetent Representation

It is established that Tambri Butler's testimony had an tremendous, visceral effect on the jurors – reducing one to tears and leaving all of them transfixed – and that (in the words of the trial judge) it "influenced the jury and the court more than any other [evidence]" in fixing their determination that Petitioner be put to death. (RT 5995.) There was a wealth of available evidence that could have impeached and rebutted Ms. Butler's testimony identifying Petitioner as her attacker – ranging from the fact that the specific descriptors she gave (such as the 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, to the overwhelming likelihood that she had seen his image on television the night before she identified him; to the fact that she misrepresented to the jurors the offense for which she was in custody; to the corresponding fact that she was desperately vulnerable to law enforcement and thus biased towards testifying in a way that would satisfy them; to the fact that her story had become suspiciously more inculpatory in various respects (including changing the make of the assailants truck from Chevrolet to Ford, and her saying for the first time, "I think he told me his name was David"). And, while trial counsel had negligently failed to investigate and otherwise develop much of this evidence, even the paltry record that did exist offered a good deal that could have been used to raise a reasonable doubt regarding the accuracy of Ms. Butler's testimony – including that Petitioner never had a mustache, that he did not a light-colored pickup truck at the time of the attack, and that no stun gun was found amongst the many inculpatory items seized from him. As Respondent itself points out, Ms. Butler's claims that she never saw Petitioner picture on television and did not discuss the case with other inmates, as well as her assertion that she did not expect leniency, were "implausible." (ROB 207-208.)

Thus, setting out the many points that should have made about the defects in Ms. Butler's evidence, the Referee found that "*a reasonably competent attorney acting as a diligent advocate [would] have addressed Butler's testimony in closing argument at the penalty phase.*" (R&F at 23-24.) Yet Mr. Lorenz did not make any such argument. As Respondent acknowledges, he did not mention Tambri Butler even once in his argument to the jury. (ROB 224.)

Respondent contends that this omission was just a reflection of Mr. Lorenz's professed preference for short arguments (ROB 226), and that it was tactically reasonable for him to avoid "excessively tiring the jury" before they heard his argument regarding mitigation. (ROB 228.) Petitioner submits that Mr. Lorenz was in no danger of exhausting the jurors: His entire penalty phase summation – the totality of the argument he made in defense of his client's life – consumes exactly 10 pages of transcript. (RT 5956:11 - 5966:11.) It takes approximately 15 minutes to read aloud; even if Mr. Lorenz talked slowly, it could not have consumed more than 20. We will grant that not every capital case requires a "masterful" 12 hour summation like the one Clarence Darrow famously delivered to save the lives of Leopold and Loeb. (See, Urbana Daily Courier, Sept. 10, 1924.) But as the Referee found, in rejecting Respondent's argument on this score: "*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.*" (R&F at 23.) It is absurd to suggest that the jury in this case would have found it oppressive to hear even a few minutes of argument devoted to the reasons why it should not credit Ms. Butler's testimony, given her crucial significance to the case. (See, R&F at 23-24.)

There is only one reasonable conclusion to be drawn: As Mr. Coleman put it, counsel's "closing argument was incredibly inadequate with regard to [the] assertion that there was reasonable doubt about whether or not David Rogers was the assailant of Tambri Butler. So, his argument was not competent." (12 RHRT 2255.)

Nonetheless, in a triumph of zealous advocacy over rational analysis, Respondent insists that "it is difficult to conceive of an argument substantially more likely to be effective than the one Lorenz gave." (ROB 228.) Respondent argues that Mr. Lorenz chose the wiser course by ignoring Ms. Butler entirely and instead concentrating on "'sympathy factors,' and the evidence of '[Petitioner's] reputation and character.'" (ROB 226 [record citations omitted].)

We have already discussed the rotten underpinnings of such an approach. Once again, as Mr. Lorenz himself conceded, there would have been no contradiction between making those mitigation arguments while simultaneously attacking the most explosive and damning aggravation evidence presented by the prosecution. (8 RHRT 1511.) More important: By letting the prosecution argue – without offering challenge or counter-argument – that Petitioner had raped, sodomized, tortured, robbed and attempted to kill Tambri Butler, Mr. Lorenz fatally undermined his mitigation case. No juror, believing that Petitioner had done those things, was going to spare his life on the basis of his fine "character," nor accept Mr. Lorenz's argument that there was basically a "good David Rogers, " who only killed Tracie Clark because her provocations had awakened the traumas of his abusive childhood. (See 22 RT 5965-66.) In short, by ignoring Tambri Butler and thus failing to meet the prosecution's argument in aggravation, Mr. Lorenz effectively doomed his own mitigation strategy as well.

Respondent itself underscores this point by suggesting that, if counsel had discussed Ms. Butler in his argument, it would have led the jury to "think about petitioner's practice of victimizing prostitutes, including Ellen Martinez, Janine Benintende, Katherine Hardie, and Tracie Clark . . . ." (ROB 227.) We will put aside the fact that there was no proof that Petitioner "victimized" Katherine Hardie,[161] and that whatever happened with Ellen Martinez

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[161]As reviewed, *ante*, Ms. Hardie testified that she had been picked up in – and escaped from – a pickup truck that she identified as the one that Petitioner bought from Toby Coffey much later. She pointedly failed to identify Petitioner as the person who picked her

bore no resemblance to the attack on Ms. Butler.[162] The more important – and exceedingly obvious – point is that the jury never *stopped* thinking about Petitioner's treatment of prostitutes, especially Ms. Clark and Ms. Benintende, whom they convicted him of killing. That was what the entire case was about. As Mr. Lorenz acknowledged, the effect of the unchallenged Butler evidence was that the jurors would disbelieve Petitioner's (much less horrifying) account of the events leading up to Ms. Clark's death, and would instead infer that what happened to Ms. Butler happened to the two dead victims as well. In Mr. Lorenz's words: "thinking about it, you have a jury almost putting Tammy Butler [*sic*] in the place of the actual crime victim." (8 RHRT 1468; see also, *id*. at 1500.) Capital defense expert Coleman expressed the same point:

> 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.

(12 RHRT 2217-18.)

Trial counsel's failure to meet that critical evidence throughout the penalty phase, and

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up – even though he was sitting right in front of her, as the defendant in a double murder case, when she testified tht she could not describe the man. (18 RT 4914-16.)

[162]Ms. Martinez's accusation was that Petitioner, after rescuing her from a knife-wielding prostitution customer in a cemetery, had made her take off her clothes and taken nude photographs of her, after which he drove her home. There was no suggestion that he had treated her violently or forced her to have sexual relations. (22 RT 5766-5768.)

especially his failure to address it at all in his closing argument, was irredeemably, fatally incompetent. There was no reasonable tactical justification for that failure, and none of the ones asserted by Respondent can even come close to salvaging that terrible omission.

G. There Is A Reasonable Probability That Counsel's Egregious Failure To Deal With the Crucial Penalty Phase Evidence Affected the Outcome

The last piece of the ineffective assistance of counsel analysis has already been put securely in place. The second prong of the *Strickland* standard requires Petitioner to "prove '"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*, *supra*, 466 U.S. at p. 694.)

Simply reviewing trial counsel's myriad failures in responding to the evidence of "*the most important witness in the entire penalty phase of the trial*" (R&F at 23) is more than sufficient to "undermine confidence in the outcome" of that proceeding. And – as has been noted repeatedly, both in this brief and Petitioner's Opening Brief – any doubt in that regard is conclusively put to rest by the frank statement of the trial judge to the effect that Tambri Butler's testimony is what made the difference, for both him and the jury, in deciding between a life sentence and condemning Petitioner to death. (RT 5995.) If that extraordinary bit of evidence were not enough, the Court has before it the testimony of both defense counsel and the District Attorney regarding the "enormous" impact that the Butler evidence had on the jurors. (8 RHRT 1468, 1471; 10 RHRT 1975-1976.)

The pertinent prejudice analysis was set out in our Opening Brief (at pp. 186-188) and in the discussion of the "false evidence" claim in this brief, *ante*, where Respondent's contrary arguments are fully addressed. Petitioner will not burden the Court with reiterating it yet again. It is established beyond fair dispute both "'"that counsel's representation fell

below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial. . . .""" (*In re Champion*, *supra*, 58 Cal.4th at p. 1007 [citations omitted].)

Accordingly Petitioner is entitled to a new, fair penalty phase proceeding at which he is represented by competent counsel.

III. THE MANY ACTS OF MISCONDUCT BY THE PROSECUTING AUTHORITIES DEPRIVED PETITIONER OF A FAIR PENALTY TRIAL

A. THE REPEATED FAILURE TO CORRECT CRUCIAL FALSE TESTIMONY

Petitioner's principal allegation – that the prosecuting attorney knowingly failed to correct false testimony given by her star witness – is not addressed directly in Respondent's brief, and is really unrebuttable.[163] The prosecution knew full well that, at the time Ms. Butler testified, she was doing time for a drug trafficking offense – specifically, possessing heroin with the intent to sell it in violation of the felony provisions of Health and Safety Code, section 11351. (See RHRT 1994; 1 RH Exhs. 165). Yet, as the Referee found, when "*the 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 ...; that is a completely different – and far more serious – offense than simply possessing heroin . . . . [which is] a crime of moral turpitude.* (R&F at 9-10.)

We have already discussed the significance of this bit of perjury in the context of both Petitioner's "false evidence" and ineffective assistance of counsel claims. But it still bears emphasis that the prosecutor stood there and let her witness mislead the jury. "'Under well-established principles of due process, the prosecution cannot present evidence it knows is

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[163]Respondent does contend that the failure to tell the jury the truth about Ms. Butler's crime of commitment was not "material." That contention is presented in the context of Respondent's arguments concerning the prosecution's failure to disclose the information to defense counsel, and we will respond to it in that context, *post*.

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." (*People v. Morrison* (2004) 34 Cal. 4th 698, 716-717.)

Nor is this the only instance of the prosecution breaching its duties under the Due Process Clause of the Fourteenth Amendment in just this manner. As the Court also reiterated in *Morrison*, the prosecution's duty to correct the false testimony of its own witnesses "applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution . . . ." (*People v. Morrison, supra* 34 Cal. 4th at pp. 716-717.) Members of the prosecution team – including, incontestably, District Attorney Investigator Hodgson – were very well acquainted with the women's jail facilities at Lerdo, including the fact that there were televisions in Ms. Butler's cell that were on constantly, and knew full well that Petitioner's arrest was being shown on those televisions around the clock. (See 12 RHRT 2430-2431.) Yet they said nothing when Ms. Butler lied to the jury, denying that she had seen Petitioner on television before she identified him. Moreover, Ms. Butler herself repeatedly insisted that she had disclosed the truth about this to Mr. Hodgson and the other detectives who interviewed her. (3 RH Exhs. 838, 841; 6 RHRT 1023-24.) Again, we have dealt thoroughly with the grave importance of Ms. Butler's false testimony in this regard; the remaining, vital point is that the prosecution committed misconduct and violated Petitioner's right to due process by failing to correct it.

B. THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE TO THE DEFENSE

1. Failure to Disclose Ms. Butler's Criminal Record

Intertwined with the prosecution's unlawful failure to correct the false testimony of its witness was its concomitant failure to provide the defense with the evidence that would have demonstrated Ms. Butler's untruthfulness.

As the Referee found: "*The prosecution did not disclose information about Tambri Butler's criminal history to the defense*." (R&F at 14.) Respondent takes strong exception to this finding, arguing that "the record fails to disclose any evidence to prove that the prosecution team did not disclose Tambri Butler's criminal record." (ROB 163-165.)

That is just not true. As shown above, in the discussion of trial counsel's ineffectiveness, there is ample evidence demonstrating that the prosecution did not provide Ms. Butler's criminal history to the defense. Respondent – once again abdicating its responsibility to candidly report the record evidence that supports the Referee's findings – mentions only one piece of that evidence: The fact that no such disclosure was found in trial counsel's file. (ROB 164.) Respondent insists that this fact proves nothing, given that trial counsel's file was "'in a state of complete disarray.'" (*Ibid*. [citation omitted].) What Respondent omits to mention is that (a) trial counsel testified that he turned over his entire file to successor counsel (who shared it with Respondent); (b) included in the file was a complete index that listed every piece of discovery obtained from the prosecution; (c) no document pertaining to Ms. Butler's criminal record was on that list; (d) every item that *was* listed in the index was in the file provided to successor counsel and there is no evidence that *any* document of any description was missing from the file; and (e) the prosecution had no "discovery receipt" indicating that it had provided any such evidence to the defense. (10 RHRT 1988-1991.)[164] But the final, inescapable bit of evidence is: (f) Trial counsel clearly did not have that information, for although (as Respondent argues elsewhere) counsel "cross-examined [Butler] on [her] criminal histor[y]" (ROB at 203-204, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 904), he never impeached her false testimony regarding that criminal history with the truth of her record.

In short, the circumstantial evidence clearly and overwhelmingly points to the conclusion reached by the Referee – that the prosecution never provided the defense with the

[164]The significance of the discovery receipts will be discussed in the text, presently, in connection with the testimony of Sara Ryals.

basic and critical information regarding the criminal record of its star witness. Ignoring all of these facts, Respondent insists that the Court accept the (self-serving) testimony of the prosecuting attorney, Sara Ryals, that she had disclosed everything in her file, including Tambri Butler's record. (ROB 164-165.)

Respondent's problem is that the Referee did not believe Ms. Ryals' testimony in this regard; rather, after seeing and hearing her on the stand, he concluded – as kindly as he could – that she was "*credible but not credible enough to support her testimony on the issue* . . . ." (R&F at 14.) It is precisely in respect to such credibility determinations that this Court gives greatest deference to the Referee's findings. (*In re Boyette, supra*, 56 Cal.4th at pp. 876-877; see also, ROB 20, discussing *In re Marquez* (1992) 1 Cal.4th 584, 603.) And in this case there was objective evidence that reinforced the Referee's unwillingness to credit Ms. Ryals' account. As the Referee put it, she was "*overly defensive in her testimony.*" (R&F at 14.) Immediately after Ms. Ryals testified that she had provided defense counsel with the criminal records of Ms. Butler and every other "potential witness" on her list, she was asked: "Was a Sheila Bilyeu ever on your potential witness list" – to which she replied: "No." (10 RHRT 1945-46). Yet, minutes later, when she was asked on cross-examination: "Ms. Bilyeu that was discussed on direct examination, she was never on your witness list. Is that correct?" Ms. Ryals responded, indignantly: "no, **I did not say that at all**. I said she was on my witness list, I just did not know whether or not I was going to call her . . . ." (10 RHRT 1974-1975 [emphasis supplied].)

Perhaps less odd, but even more telling, was an exchange on cross-examination in which Ms. Ryals was asked if she had a "discovery receipt" in her file, indicating that the evidence had been turned over. (10 RHRT 1988.) Ms. Ryals firmly denied that she ever obtained discovery receipts from defense counsel – "I just didn't operate that way." (*Ibid*.) She was then shown a discovery receipt provided to Mr. Lorenz (regarding other evidence in this case) with her initials on it, in her handwriting. (10 RHRT 1990.) Attached to the receipt was a note from Ms. Ryals, instructing her investigator, Tam Hodgson, 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.) The clear implication of the note was that there indeed had been lapses in regard to the discovery provided to defense counsel which Ms. Ryals was seeking to – quite literally – paper over. Thus the Referee made reference to Ms. Ryals "*'cover your knees' memo she wrote to Tam Hodgson*" in explaining why he could not credit her testimony. (R&F at 14.)

In short, the evidence demonstrates that Ms. Ryals was not truthful and the prosecution failed to give the defense the evidence regarding Ms. Butler's actual criminal record – evidence that would have soundly impeached her testimony. As such the prosecution violated its duty, outlined in *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny to "disclose material exculpatory evidence whether the defendant makes a specific request . . . a general request, or none at all." (*In re Brown* (1998) 17 Cal.4th 873, 879 [citations omitted].)

Finally in this regard, Respondent insists that there was no *Brady* violation because "defense counsel obtained Butler's criminal history before she testified." (ROB 166, relying on *People v. Wright* (1985) 39 Cal.43d 576, 589.) According to Respondent, "[t]he undisputed record shows that defense counsel had Butler's criminal record, at the latest, the morning of Butler's testimony." (ROB 166.) That assertion is indeed disputed: In truth, the *indisputable* fact is that what trial counsel obtained on the morning of Butler's testimony – and all that he ever obtained regarding her record – was a report stating inaccurately that her commitment arrest was only for simple possession of a controlled substance. (See 2 RH Exhs. 356 [setting out arrests for H & Safety Code §11350].)

2. Failure to Provide the Tape Recording of the Lerdo Interview

The same evidence that demonstrates that the prosecution never provided Tambri Butler's criminal record to the defense also proves that neither the tape recording of the Lerdo interview, nor a transcript of that recording, was ever turned over to the defense. Neither tape nor transcript were found in counsel's files, and neither are listed in the

comprehensive Crandall Index that sets out all of the discovery obtained from the prosecution. (4 RH Exhs. 1024-25.) And prosecutor Ryals' "cover our knees" memo provides even stronger evidence of the failure to make discovery in regard to this material, for it explicitly instructs Investigator Hodgson to create a post-hoc paper trial indicating that defense counsel was contacted regarding "tapes and videos" (RHRT 1990-91 & 5 RH Exhs. 1206) – of which the tape of the Lerdo interview would have been among the most important. Thus Respondent's arguments in this regard fail for the same reasons as, and even more fully than, its related arguments regarding the prosecution's failure to disclose Ms. Butler's criminal history.

As the Referee found, there were numerous ways in which the actual tape recording (or its equivalent) would have provided potent opportunities for impeaching Tambri Butler – opportunities not supplied by the inaccurate Soliz Report upon which counsel was left to rely. (R&F at 18.) We have already discussed at some length the nature and importance of those suppressed details: The fact that Ms. Butler told the detectives that her attacker had notably big hands and a large chest (unlike Petitioner's very small hands and sunken chest); that she had seen her attacker with his shirt off, and saw no noticeable markings (and thus clearly did not see the tattoo on Petitioner's arm); that she had never stood up next to her attacker, "not once" – a fact that would have undercut her report about his height; that she had described the assailant's truck as a newer model – like a "dealer truck" – instead of the 1960's vintage in her testimony, which conflated it with the vehicle that Petitioner later owned; and the fact that she herself expressed doubts about her identification of Petitioner's photograph, even as she was making it. (See, 4 RH Exhs. 891, 893, 889-891, 910.)

It follows that the prosecution's failure to provide the defense with the tape of Tambri Butler's Lerdo interview, or even a transcript of the tape, constituted a *Brady* violation that was as bad, or even worse, that the concomitant failure to disclose her criminal record.

3. Failure to Disclose Ratzlaff's Other Attacks

As traced in Petitioner's Exceptions to Referee's Report and Findings (at pp. 2-4), the

prosecuting authorities, which perforce included the Kern County Sheriff's Department, were well aware that a man who matched the description of Tambri Butler's attacker and who drove a truck just like the one she described had been attacking Union Avenue prostitutes, but failed to disclose that information to Petitioner before or during trial. Perhaps most shamefully, the same prosecuting authorities arrested and charged Michael Ratzlaff for a virtually identical attack on Lavonda Imperatrice just weeks after Petitioner was sentenced, but still failed to disclose those facts and instead made efforts to ensure that Petitioner would not be able seek redress. (See, POB 194-196.)

Much of the evidence demonstrating law enforcement's knowledge of Ratlzaff's activities – both prior to and after Petitioner's trial – is traced in the Referee's Report and Findings (R&F at 12), but the Referee largely absolved the prosecution of committing *Brady* error in this regard. (R&F at 12-13.) This is one of the few areas in which the Referee's findings are contrary to Petitioner's claims, and Petitioner's Exceptions and Opening Brief make clear why the Court should not defer to the Referee in this particular regard. Respondent offers nothing of substance beyond what the Referee already said on this subject, and thus Petitioner has no need to make additional argument.

For the reasons set forth in Petitioner's Exceptions (at pp. 2-3) and Opening Brief (at pp. 194-196), the Court should hold that the prosecuting authorities violated the constitutional principles outlined in *Brady v. Maryland* and its progeny in failing to disclose information about the alternative perpetrator who was actually responsible for the attack on Tambri Butler.

C. THE PROSECUTION'S FAILURES TO DISCLOSE WERE "MATERIAL;" PETITIONER IS ENTITLED TO RELIEF

As Respondent accurately points out, Petitioner is only entitled to a remedy for *Brady* violations if he shows that the failures to disclose were "material – that is, "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (ROB 166-167, quoting, *United States v. Bagley*

(1985) 473 U.S. 667, 682.) As Respondent also reports, a "reasonable probability" is a probability sufficient "to undermine confidence in the outcome." (*Id*. at 166, quoting *Bagley, supra*, 473 U.S. at p. 678.)

This is precisely the same standard that applies to the "prejudice" prong of the *Strickland* test for ineffective assistance of counsel. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) The point is significant here because we have already discussed – in the context of counsel's ineffectiveness in failing to investigate Ms. Butler and her allegations – why there is a "reasonable probability" that the jurors would have come to a different conclusion about Ms. Butler's testimony, and thus reached a different penalty verdict, had they learned of the evidence suppressed by the prosecution. Ms. Butler would have been impeached with the truth that she was in fact in custody for a drug trafficking offense, a crime of moral turpitude – and had falsely testified about that fact. She also would have been shown to have falsely testified about the vintage of the assailant's truck, which would have pointed up both her unreliability and her bias. The jury would have learned that she described her attacker as having exceptionally large hands and a big, hairy chest – the opposite of Petitioner – and that her attacker did not have the tattoo prominent on Petitioner's shoulder. The jury would have heard that she never stood up next to her attacker, and thus was in no position accurately to judge his height. And the jurors would have heard that, unlike the confidence she expressed in her testimony, she indicated to the detectives that she still harbored doubts about the accuracy of her identification.

The omission of those facts are themselves enough to undermine confidence in the outcome of the penalty phase; if one adds in the undisclosed information about Michael Ratzlaff – the man who did fit Ms. Butler's description and had a pattern of violent attacks on Union Avenue prostitutes, the conclusion is truly undeniable. The prosecution in this case violated the constitutional mandates set forth in *Brady v. Maryland*; accordingly, the judgment of death entered against Petitioner should be vacated.

CONCLUSION

As the Referee's findings demonstrate, the evidence points overwhelmingly to the conclusion that Tambri Butler's testimony, identifying Petitioner as her attacker, was false. That the jury did not know that is ascribable both to trial counsel's failure to provide competent representation and to the prosecution's failure to honor its constitutional duty to disclose material, exculpatory evidence. Accordingly the judgment should be reversed.

Dated: September 9, 2017

Respectfully submitted,

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Appendix:
Pertinent Aspects of Tambri Butler's Statements 1987-2011

REGARDING THE ASSAULT

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence of Ratzlaff's Attacks on Other Women
"[H]e was obviously drunk. A lot of booze smell in the car." "[H]e'd been to a few bars." 4 Exhs. 904				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•Very drunk 3 HRT 415			**•Very drunk at the time of the attacks. Got mean when he was drunk.** RTR 7; 7 HRT 1319-20; 1323; DW 11; Pet. Exh. 22; Pet. Exh. 45; 4 Exhs. 1100
"Nice as could be" until he was unable to climax and she asked for more money, then increasingly brutal 4 Exhs. 887-88, 912-14, 927				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256	•Got abusive when she asked for more money. 3 Exhs. 721	•Became aggressive when she said she needed to go home. 3 Exhs. 773			•Got "rough" during oral sex, grabbed her by the head, made "[m]ortifying remarks." •She asked for more money, he refused, became "aggressive" and demanded sex. 3 HRT 414-16			**•"[A]cted like a normal person," then became vicious when unable to perform sexually.** RTR 6-7, 10; DW 9; 7 HRT 1321; 5 HRT 863-64, 876-77
Held a stun gun to her neck "until [she] couldn't scream anymore." 4 Exhs. 887, 917	•Put a stun gun to her neck RT 5784	•stun gun 1 Exhs. 224	•"he had a stun gun and held it to her throat 3 Exhs. 680, 682	•"stung me with a stungun" 1 Exhs. 253		•Held stun gun to her neck until she stopped screaming 3 Exhs. 773	•Used a stun gun 3 Exhs. 847		•Put "stinger" (stun gun) to her neck, gave a short burst at the base of her throat. Later shocked her again for so long that she could no longer scream. 3 HRT 422-25, 431, 444-45	•Assailant used a stun gun 6 HRT 1084	**•No stun gun found amongst Rogers's effects** **•Had no stun guns** 9 HRT 1780-81, 12 HRT 2389; JR 15; RT 2389; 4 Exhs.1150-51	**•Kept a stun gun in his glove box** **•Used stun gun on Imperatrice's stomach and vagina.** **•Bragged of using a stun gun on another "gal"** 5 HRT 862, 1323; 9 HRT 1645, 1646-48; 4 Exhs. 1118; RTR 22-27
Held a small gun to her head. **Put gun across the bridge of her nose, fired a shot out the window.** 4 Exhs. 918-19, 928, 933	•Held gun to her temple •Put gun to "bridge of [her] nose and shot it out the window." RT 5785-86	•fired a gun 1 Exhs. 224	•"held a gun to my head" 3 Exhs. 682	•"threatened me with a gun" 1 Exhs. 253		•Put a small gun to her head and fired, she "just knew to backup and the bullet went out the window" 3 Exhs. 774	•Fired a gun 3 Exhs. 847		•After sodomizing her, he put gun to her temple and pulled trigger, she backed up "just enough" and the shot went across the bridge of her nose, burning her, out the window on the drivers' side. •Gun was used prior to sodomy, which convinced her to cooperate. 3 HRT 435, 439, 446-47		**•Had 3 handguns** 11 HRT 2119-21; 4 Exhs.1150-51	**•Regularly carried a small handgun** **•Held handgun to Imperatrice's temple, fired it into a cup** 5 HRT 862, 1275; 9 HRT 1646; 4 Exhs. 1118; RTR 10-12

REGARDING THE ASSAULT (Cont.)

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence of Ratzlaff's Attacks on Other Women
"I never got out of the truck. Not once. Not from the time I got into it until he pushed me out." 4 Exhs. 891, 910				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256		•She stood outside the truck while she being sodomized 3 Exhs. 774	•She "stood up." 3 Exhs. 846		•Stood outside of the truck, on the ground, without her shoes on, and sock-footed, while he sodomized her 3 HRT 427-28	•Acknowledged telling dectectives that she never got out of the truck, "not once." 5 HRT 845-46, 6 HRT 1077-78		
He forced her into anal sex while she laid in the truck. She never got out of the truck. 4 Exhs. 888, 928	•Forced anal sex, then oral sex RT 5785, 5788	•forced anal sex 1 Exhs. 224		•Affirmed accuracy of 2/18/87 account 1 Exhs. 256		•Clamped his chin on her shoulder during sodomy; she stood outside the truck. 3 Exhs. 774	•Held her shoulders with his chin; sodomized her. 3 Exhs. 846-87	•Held his chin on her shoulder during sodomy 3 Exhs. 861	•Clamped chin on her shoulder and sodomized her; she stood outside the truck. She can't remember when he was holding her down with his chin, before or after the gun went off. 3 HRT 427-30, 449, 551		**•No evidence re: anal sex**	**•Sodomized Imperatrice; inserted fist into her rectum** **•Frequently sought anal sex from women** RTR 30; RCT 15; 7 HRT 1321, 1333
Tried to take gold watch 4 Exhs. 888				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256		•Tried to take her pearls, after finding them in her pocket 3 Exhs. 775, 783			•"[E]yeball[ed]" the pearls She wore around her neck 3 HRT 457			**•Robbed Imperatrice** 4 Exhs. 953

PAGE 2

REGARDING THE PHYSICAL CHARACTERISTICS OF ASSAILANT

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	Suppl. Decl.: 11/23/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Ref. Hearing: Re-Direct Examination	Evidence re Rogers	Evidence re Ratzlaff
Had a mustache--"thick brush one." 4 Exhs. 889	•"I recall a mustache." RT 5798	•"thick bushy mustache that hung over his upper lip" 1 Exhs. 218	•"a very bushy mustache" 3 Exhs. 680, 698	•"thick bushy mustache that grew long over his upper lip. . . he wanted to kiss a lot and I found it disgusting." 1 Exhs. 253, 254		•"I remember a mustache." "[T]his one came down over his lip, and that disgusts me." 3 Exhs. 723	•"I do not recall a mustache at all . . . he was all over me, kissing me." Mustache came from Ermachild. 3 Exhs. 791-92, 795	•"I never ever kissed any of my tricks." "I don't believe he had a mustache, but [Ermachild] kept putting it in my head." 3 Exhs. 819	•Her statements about his "thick bushy mustache were true." •Could not recall whether he had a mustache. •Only said that he had a "thick bushy mustache" after Melody Ermachild showed her pictures of Ratzlaff. 3 HRT 517, 523, 524, 547	•Admitted telling detectives at Lerdo that her attacker had a "thick brush mustache" 6 HRT 1072		**•Never wore a mustache.** **•No false mustache found amongst Rogers's effects.** JR 23, 50-51	**•Had a thick mustache during the mid-1980's and "pretty much all the time of his life"** 7 HRT 1261-62
As compared to Rogers's photo, assailant had thicker hair on sides than on the top 4 Exhs. 889-90				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•Hair was "thinner. . . . older looking hair. It wasn't curly." Thinner on top, and thicker on the sides. 3 HRT 518	•Thick hair, long on the sides 6 HRT 1074		**•Thin hair, receding hairline** 5 Exhs. 1199	**•Thick hair on his head, long on the sides** 7 HRT 1259; 5 Exhs. 1344-46
Big chest, larger than his stomach. 4 Exhs. 889, 892				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•He was "flabby" with "ugly nipples not nipples like you see on most men" 3 HRT 420	•Big chest 6 HRT 1073		**•Not flabby, not a big chest, normal small nipples** 6 Exhs. 1581	**•Big chest; chest bigger than his belly** 5 Exhs. 1345-47; 6 Exhs. 1716
Dark moles across back, above fanny 4 Exhs. 889				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•In a strip she saw about four inches above his "butt crack," he had "lots of moles or dark splotches" that were "black." 3 HRT 425-26	•Big dark moles above his "fanny." Acknowledged that Rogers's photo showed no such marks. 6 HRT 1076-77; 2 Exhs. 466	•Viewing a photo of Rogers's back, Butler saw "disgusting pimples," that she remembered feeling and seeing. 6 HRT 1227	**•No moles across his back** 5 Exhs. 1384; JR 18	**•If he had moles in 1986, they were not obvious in 2003.** 5 Exhs. 1384; 6 Exhs. 1715
No other markings on body 4 Exhs. 892				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256	•He "took off his shirt, so I saw most of his upper body." "I did not see a tattoo anywhere on his body." 1 Exhs. 267				•Did not think he ever took off shirt 6 HRT 1232	•His shirt was off at one point. Acknowledged that she did not see any body markings, including a tattoo. 6 HRT 1077		**•Large and prominent tattoo on his upper right arm** 6 Exhs. 1580-81	**•No tattoos or other markings** 6 Exhs 1715-16

REGARDING THE PHYSICAL CHARACTERISTICS OF ASSAILANT (Cont.)

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	Suppl. Decl.: 11/23/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Ref. Hearing: Re-Direct Examination	Evidence re Rogers	Evidence re Ratzlaff
Brown chest hair that was thick, but not "real thick . . . [b]ut it wasn't just a little bit. Across the front and down belly." 4 Exhs. 889-90				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•He "wasn't hugely hairy chested," with light-colored chest hair. 3 HRT 420	•Acknowledged stating that his chest was "covered with hair," not "just a little bit", it was brown. 6 HRT 1074-75		**•No chest or abdomen hair** JR 8-11, 50-51; 6 Exhs. 1580-81	**•Brown hair partially obscuring chest and abdomen** 5 HRT 857-58; 7 HRT 1263; 5 Exhs. 1347; 6 Exhs. 1714
His height was between 5'6"-5'9" tall, but she never stood next to him ("[n]ot once") 4 Exhs. 891-92				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256		•Shorter than her; she fought him. 3 Exhs. 711, 724-25, 759	•When they stood outside the truck, he "barely came past her head." 3 Exhs. 774, 793-94	•She "stood up" next to him 3 Exhs. 846	•"[W]asn't a large man, but he was bigger than [her]." She is 5'9.5". •He was shorter than her—they were standing outside the truck and he locked his chin on top of her shoulder. 3 HRT 420, 428-30	•She admitted saying that she never stood next to her attacker, and never got out of the truck, "not once." 5 HRT 845-46, 6 HRT 1073-74		**•5'9"** JR 49	**•6'3", other witnesses estimated between 5'10" and 6'** 7 HRT 1259; 5 HRT 859; DW 31-32; 7 HRT 1318; 9 HRT 1641
"He's strong. His hands were big. . . rough, and big. I mean you notice these things. 4 Exhs. 893				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256								**•Exceptionally small hands (w/in 1st-5th percentile for adult males)** 5 HRT 828-29	**•Big hands (w/in 95th-98th percentile). Strong.** 5 HRT 826-28, DW 31

REGARDING THE CLOTHING, EFFECTS, AND FAMILY OF ASSAILANT

Lerdo Jail: 2/18/1987	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence re Ratzlaff
Wore a blue plaid shirt 4 Exhs. 893-94			•Affirmed accuracy of 2/18/87 account 1 Exhs. 256				•Always thought it was a plaid blue shirt, but doesn't remember 3 HRT 418	•Blue plaid shirt 6 HRT 1074		•In a contemporaneous photo, wearing a **blue plaid shirt** 5 Exhs. 1346
Short, dark brown boots (not cowboy boots) 4 Exhs. 900			•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•Boots 6 HRT 1077-78		•Regularly wore **brown workboots**. Multiple pairs found in his residences. 7 HRT 1265; 9 HRT 1642, 1658
Boxer shorts 4 Exhs. 911			•Affirmed accuracy of 2/18/87 account 1 Exhs. 256				•When he pulled down his pants, she couldn't tell if he had underwear on 3 HRT 413	•Boxer shorts, not briefs 6 HRT 1074	**•Never wore boxer shorts** JR 16	**•Never had boxer shorts** 7 HRT 1292
Gold colored metal watch, expansion band 4 Exhs. 893			•Affirmed accuracy of 2/18/87 account 1 Exhs. 256					•Wore watch, notable watchband 6 HRT 1077-78	**•No similar watches found amongst Rogers's effects** •Joyce Rogers testified that Rogers wore a watch with a chrome expansion band. 4 Exhs.1150-51; JR 16-17	**•Metal watches with expansion bands** found at Ratzlaff's home and apartment •Ratzlaff's wife testified that Ratzlaff wore a **gold watch with an expansion band.** 9 HRT 1658, 1660; 7 HRT 1263
Big set of keys 4 Exhs. 895			•A lot of keys 1 Exhs. 254	•Affirmed accuracy of 2/18/87 account 1 Exhs. 256				•Large number of keys on his keyring 6 HRT 1077-78	**•Key ring with 8 keys.** 6 Exhs. 1516	**•Large key ring with lots of keys on it** 7 HRT 1265

REGARDING THE CLOTHING, EFFECTS, AND FAMILY OF ASSAILANT (Cont.)

Lerdo Jail: 2/18/1987	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence re Ratzlaff
Butler asked questions about his family. He said he had "two kids, a wife and a dog." **The children were "a boy and a girl." He said they were "not babies."** **Butler did not mention any photos of children.** 4 Exhs. 886-87, 908-09	•"He showed me photos of his children, a boy and a girl." 1 Exhs. 218	•"He showed me family pictures. Showed me pictures of . . . his two children." •"it was two sons" 3 Exhs. 691-92	•He "showed me photos of his children . . . a boy and a girl. I think maybe the girl was a little blond girl." 1 Exhs. 253		•Saw old photo of two boys aged 9 & 10, so boys were "15ish" at the time 3 Exhs. 782-84	•"Rogers showed me pictures of his wife and children." •The children were "the son and the daughter" 3 Exhs. 863, 866	•"At the time I thought he had a wife and two—daughter and son. But . . . I remember seeing two boys . . . in a picture he shows me" •He had shown her photos "of his children, a boy and a girl." The daughter was "a little blond girl." 3 HRT 407, 524, 548	•In response to her questions, he had told her that his children were a boy and a girl, and that he had a dog. •Acknowledged that she did not mention being shown a photo of her attacker's family. 6 HRT 1081-84	•**Two adult sons, by a prior marriage. No dog.** •As far as Joyce Rogers knew, there were no pictures of Rogers with his two sons. 12 HRT 2388, JR 27-28	•At the time of Butler's attack, Ratzlaff had **a wife and two school-aged children, a boy and a girl, and a dog.** 7 HRT 1258; 5 HRT 860; DW 23
Assailant said nothing more about his wife **Did not mention any photos of wife** 4 Exhs. 908		•"He . . . [s]howed me pictures of his wife". •"Later on, I did know her from the truck stop and then when I saw her in the court". The wife "knew me well enough, she liked me". 3 Exhs. 691, 693-95	•Affirmed accuracy of 2/18/87 account 1 Exhs. 256	•Wife was "a friend" from the truck stop and Butler saw Rogers in a photo at the truck stop. •"I remember at one point looking at her [Rogers's wife] and thinking, this poor woman, she has no clue. And she needed to know, but I wasn't going to be the one to tell her." 3 Exhs. 744-45, 759-60	•It "didn't click" until Butler saw his wife at trial, sitting in the courtroom. 3 Exhs. 783-86	•Saw pictures of wife •Saw wife in court, knew her from the truck stop; didn't recall having seen a photo of her at that time 3 Exhs. 863-65	•Showed her a photo including his wife. Butler didn't recognize the female at first. Later recognized the wife as a "counter lady" at truck stop. Saw woman again at trial and recognized her from truck stop. 3 HRT 407-08	•Acknowledged that she had not mentioned seeing any photographs of his family. •Acknowledged that she specified that the man had said nothing about his wife. •Acknowledged that she never told the investigators anything about recognizing Rogers's wife. 6 HRT 1081-84, 1138	•Wife worked at a truck stop •Because she was a witness, Joyce Rogers was not in the courtroom when Butler testified or during the penalty phase. JR 20, 29-30; JR 6-7, RT 5905, *et seq.*	•Wife was a schoolteacher 7 HRT 1256

REGARDING THE TRUCK AND ITS CONTENTS

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence re Ratzlaff
Newer truck, "it wasn't . . . like a '60 or '70. It wasn't old." 4 Exhs. 897				•"1960s or 1970s model" 1 Exhs. 253			•Would not have given dates for the truck, would have just said it was an older truck. 3 Exhs. 822-23	•It was not a "newer truck, wasn't shiny and bright." 3 HRT 401	•Acknowledged that at Lerdo, had said it was new, like a "dealer truck," but not brand new. •Recollection was better 25 years after the event, because knows more about trucks. 6 HRT 1087-88	**•Had no similar truck until almost a year after Butler's attack. Then, truck from 1960's.** 2 HRT 325-30	•Purchased truck (probably used) from a dealer around 1977 5 HRT 860, 7 HRT 1265-66, 8 HRT 1465-66, 9 HRT 1642
White truck 4 Exhs. 920	White pickup truck RT 5794	•White pickup,no camper 1 Exhs. 218	•"[W]hite pickup, white to cream" 3 Exhs. 680	•White pickup truck, no camper shell 1 Exhs. 253	•"white pickup truck" 3 Exhs. 717	•Cream or white truck 3 Exhs. 774-75		•"[W]ant[ed] to say" he was driving a white pickup truck. 3 HRT 401		**•Had no similar truck until almost a year after Butler's attack. Then, beige pickup.** 2 HRT 325-30	•Drove a **white pickup truck** with a black top 5 HRT 860, 7 HRT 1266, 8 HRT 1465-66, 9 HRT 1642
Grayish sideboards around bed of truck 4 Exhs. 897-99				•grayish sideboards 1 Exhs. 254	•"boards on the side" 3 Exhs. 717		•"I'm positive I didn't see a camper shell." 3 Exhs. 822-23	•Running boards, weathered two by six planks across its bed "for somebody to load wood or something" 3 HRT 402		**•Had no similar truck until almost a year after Butler's attack. Then, a camper, no sideboards** 12 HRT 2390-91	**•Weathered gray sideboards on the bed of the truck. Sometimes camper.** 5 Exhs. 1348; 5 HRT 860-61, 7 HRT 1267
"Chevrolet" written on tailgate "in red letters" 4 Exhs. 896	•"closest I could figure was a Ford" RT 5794			•Affirmed accuracy of 2/18/87 account 1 Exhs. 256				•Had "always said I thought it was a Chevy but that's because I have been around Chevys" •Told detectives at Lerdo it was a Chevy, now thought that was inaccurate 3 HRT 519	•Told detectives it was Chevrolet because saw "Chevrolet" in red letters on tailgate. 6 HRT 1088-89	**•Had no similar truck until almost a year after Butler's attack. Then, Ford.** 2 HRT 325-30	**•Ford** 5 HRT 860, 8 HRT 1465-66, 9 HRT 1642
Bench seat with dark gray material 4 Exhs. 895-96				•Affirmed accuracy of 2/18/87 account 1 Exhs. 256		•brown seats 3 Exhs. 775	•bench seat 3 Exhs. 824	•Tan or brown bench seat; interior of truck was "brown to grayish in color" 3 HRT 412	•gray interior; bench seat 6 HRT 1089-91	**•Had no similar truck until almost a year after Butler's attack.** 2 HRT 325-30	**•Bench seats, covered in dark fabric** 7 HRT 1270
Hook or light next to big back window 4 Exhs. 899				•hook behind seat, large back window 1 Exhs. 253, 254			•Did not remember a hook. Never looked behind the driver's seat 3 Exhs. 823		•hook or light attached behind the drivers' seat 6 HRT 1089-91	**•Had no similar truck until almost a year after Butler's attack. No hook or big back window.** 2 HRT 325-30	

REGARDING THE TRUCK AND ITS CONTENTS (Cont.)

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence re Rogers	Evidence re Ratzlaff
Stun gun 4 Exhs. 918-19, 928, 933	•stun gun RT 5784	•stun gun 1 Exhs. 224	•stun gun 3 Exhs. 680, 682	•stun gun 1 Exhs. 253		•stun gun 3 Exhs. 773	•stun gun 3 Exhs. 847	•Put "stinger" (stun gun) to her neck 3 HRT 422-25, 431, 444-45	•Assailant used a stun gun 6 HRT 1084	**•No stun gun found amongst Rogers's effects. Had no stun guns.** 9 HRT 1780-81, 12 HRT 2389; JR 15; 4 Exhs. 1150-51	**•Kept a stun gun in his glove box. Used stun gun on women.** 5 HRT 862; 7 HRT 1323; 9 HRT 1645, 1646-48; 4 Exhs. 1118; RTR 22-27
A lot of trash in truck 4 Exhs. 894				•cluttered with trash 1 Exhs. 254					•a lot of trash on the floor 6 HRT 1089-91	**•Had no similar truck until almost a year after Butler's attack. Then, kept it clean.** 2 HRT 325-30, JR 14-15	**•Truck always messy, strewn with trash** 5 HRT 860; DW 24; 7 HRT 1272-73; 4 Exhs. 1116
Big box on floor 4 Exhs. 894				•tool box, valise or suitcase 1 Exhs. 254		•"grey, silver-ish, older tool box" 3 Exhs. 774	•"I don't even know what a valise is." "I don't remember a suitcase." 3 Exhs. 823	•tool box 3 HRT 412	•tool box 6 HRT 1089-91	**•No suitcase or tool box** 6 Exhs. 1514	•Always a **briefcase or suitcase in the truck.** 5 HRT 862; 7 HRT 1273-74, 1295
Big silver thermos 4 Exhs. 894				•large silver thermos 1 Exhs. 254					•big thermos rolling around 6 HRT 1089-91	**•No thermos found amongst effects** 4 Exhs.1150-51	•Always had a **silver foot long thermos** 7 HRT 1274-75
Followed her a number of times after the assault, always with the same white truck 4 Exhs. 932-33		•Followed her after attack in same white truck 1 Exhs. 218		•Followed her in days after the attack, same white truck. 1 Exhs. 254	•In same white truck when he followed her. 3 Exhs. 717			•Butler saw him several times after her assault, always with the same vehicle. 3 HRT 466-67, 524	•Acknowledged that when he was stalking her, he looked "the same" as he had that night. 6 HRT 1095	**•Had no similar truck until almost a year after Butler's attack.** 2 HRT 325-30	**•Owned truck fitting Butler's description at the time of attack and afterwards** 5 HRT 860-62; 7 HRT 1265-75; 9 HRT 1645, 1649

REGARDING BUTLER'S SUBSEQUENT ENCOUNTERS WITH ROGERS

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence from Other Sources
Butler saw Rogers 2-3 times after she was assaulted, while at jail visiting her "husband" **"I'd seen him two or three times but I didn't . . . snap to who he was until about the third visit that I had with my husband."** 4 Exhs. 920, 931	•*She* was in jail when she saw Rogers. "My husband came to visit me." •Recognized Rogers from only two places: "[o]n Union Avenue and on A deck . . . [o]f the Kern County Jail." RT 5780, 5791, 5802	•Was arrested and in booking at the Lerdo jail when she saw Rogers. He wasn't booking people. He was standing drinking a cup of coffee. 1 Exhs. 218	•Saw Rogers in booking. "He was booking somebody else entirely." 3 Exhs. 675, 676	•Upon arrest, "saw a deputy sheriff at the Lerdo jail who looked like the man who attacked me." He was "in booking" but wasn't booking people. He was standing drinking a cup of coffee." 1 Exhs. 254		•In booking, Rogers made "a derogatory remark about girls" to another officer. •Before seeing Rogers on the news in jail: "the last I knew is that this man booked me in." **•Learned Rogers was a police officer in Lerdo jail, when she saw him on TV, before talking to the police.** 3 Exhs. 786-87, 790, 805-07	•Saw Rogers in booking at the county jail downtown, not Lerdo. Rogers "was actually booking people." "He wasn't standing around drinking coffee." 3 Exhs. 824-25	•Saw Rogers in booking, "cutting up and laughing with his friends, and it was the way he maneuvered his body that it clicked in my head that I knew this man." 3 Exhs. 861; 4 Exhs. 937-38	•Saw Rogers in booking, cutting up with deputies and buddies. Did not know he was her attacker at first, but recognized him and wasn't sure how. It was "something about his demeanor and attitude--the way he was cutting up." 3 HRT 469-70	•Saw Rogers when both she and her husband were in jail, having an arranged visit. 6 HRT 1100-01	•Rogers was assigned to patrol duty during the period when Butler said the man who had assaulted her was working in the jail. Rogers was not working in the jail at that time. •Dep. Lockhart testified that Rogers was "wound tight and he hardly ever smiled." •Deputies Simon and Lockhart testified that arranged visits were not allowed and could not have happened. 5 HRT 914; 5 HRT 944; 10 HRT 2006-14; 11 HRT 2041-45; 11 HRT 2086-87
After she recognized Rogers, he said, "I arrested you in Arvin." 4 Exhs. 920	•She asked Rogers if he had arrested her before and he said, "yes, in Arvin." RT 5792	•She recognized him. "He said he had arrested me. . . in Arvin." 1 Exhs. 218-19	•Recognized Rogers at jail and he said, "I busted you in [Arvin]." 3 Exhs. 675	•"He said he had arrested me before, in Arvin, but I had never been arrested in Arvin." 1 Exhs. 255		•Recognized Rogers in booking. He said he had arrested her in Arvin. 3 Exhs. 788, 804		•He said, "I know where you know me from. . . Arvin, California." •"that . . . told me that he thought I was one of the girls that he messed up in Arvin." 3 Exhs. 861-62	•She recognized Rogers. He responded, "Yeah, I arrested you in Arvin." 3 HRT 470	•She said, "You drive a white truck," he responded that he had arrested her in his white squad car, in Arvin." 6 HRT 1099	•In April 1985, shortly after Butler had moved to Bakersfield, she was arrested for being under the influence of heroin. At jail, she was cited and released by Rogers. •No evidence that Rogers had "messed up" any girls in Arvin. 6 HRT 1045-47; 1 Exhs. 59
She then "got real smart with him" and he said, "I suggest if you want that visit you turn your ass around and keep your mouth shut." 4 Exhs. 921	•She said, "you son-of-a-bitch" to him; he told her to turn around and keep her mouth shut. RT 5792	•"I cursed him, and he told me words to the effect of turn around and be quiet." 1 Exhs. 218-19	•She said, "son of a bitch" and he said, "yeah, and you got five months to do and I'm still here." 3 Exhs. 676, 677	•"I cursed him and he told me . . . turn around and be quiet." 1 Exhs. 254	•"he told me to turn around and keep my mouth shut and not be talking to everybody." 3 Exhs. 719	•He said, "you've got at least 5 months to do in this jail. You can do it the easy way or you can do it the hard way." 3 Exhs. 788, 804	•Rogers said, "you know and I know we need to keep our mouth shut 'cause we got five months to do here." 3 Exhs. 826	•She only said, "I know exactly where I know you from." He got close to her face and said, "We can do this my way, we can do this your way or we can do this the hard way, which is my way." 4 Exhs. 938	•She said, "I know who you are you son of a bitch" and stared at him. Rogers got close to her face and said, "You have got time to do. And you can . . . do it the easy way or the hard way." 3 HRT 471-73	•He said, "I suggest if you want that visit, you turn your ass around and keep your mouth shut." •She acknowledged that she never told the detectives that he had said, "I know you and you know me…" 6 HRT 1100	

REGARDING BUTLER'S SUBSEQUENT ENCOUNTERS WITH ROGERS (Cont.)

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence from Other Sources
No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•No mention of improper contact with Rogers while in jail.	•Rogers molested her three times in the interrogation rooms while she was in jail 25 years prior. Told Lockhart about the first two occasions, without naming Rogers. •Rogers "called [her] down three separate times to a little bitty room. No windows." The room was a floor below, "around the corner and down some stairs." She was not escorted. •**1st molestation**: "he felt me up" "on my boobs and on my crotch" •**2nd molestation**: "he made me take my clothes off and stand there." •**3rd molestation**: "he took me". He put his penis in both her vagina and her anus. 4 Exhs. 938-42, 944-47; 6 HRT 1208-1212, 1214	•Had not seen Rogers between the time of booking and when she saw the name "Rogers" in the "Behind the Badge" book. •**1st molestation:** Rogers took her to a windowless interrogation room, told her to take off her clothes and brushed up against her "fanny." Did not escort her back to the matron's desk. •**2nd molestation:** 10 days to two weeks later, in the same cell. Told her to remove her clothes and used a "device" to "ruin [her] anus." •**3rd molestation**: two days before she went to Lerdo, in the same room. Made her undress, but nothing really happened. 3 HRT 485-95	•She told Dep. Lockhart that she had been molested twice by a deputy in jail, but Dep. Lockhart had taken no action, other than showing her the "Behind the Badge" book. •**3rd molestation:** Rogers walked into the interrogation room, but nothing happened. Mistakenly told Hodgson that Rogers had put his penis in her vagina and anus because she had confused that incident with another time Rogers had done that. •She had been **molested a 4th time** by Rogers, but had never mentioned it before. 6 HRT 1209-10, 1214, 1216	•Dep. Lockhart testified that Butler never said, nor implied, that there was "a deputy who liked to take women into interrogation rooms without anybody else knowing about it." •Dep. Lockhart testified that the interrogation rooms in the jail had windows, which were never covered. •Dep. Lockhart and Dep. Norman Simon testified that inmates were never allowed to travel between floors of the jail without a deputy escort. The staircases were blocked by heavy, locked doors, as was the women's wing, so no inmates could have traveled between floors unescorted. 5 HRT 916-17; 11 HRT 2082-83; 12 HRT 2376-77

BUTLER'S CONVERSATION WITH DEPUTY LOCKHART

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Evidence from Other Sources
Dep. Lockhart initiated a conversation with Butler, in which Butler told Dep. Lockhart that she had been raped by a sheriff who worked in the jail 4 Exhs. 921-22	•Dep. Lockhart initiated conversation with Butler. RT 5792, 5797	•Butler initiated conversation 1 Exhs. 219-20	•Butler initiated the conversation 3 Exhs. 677-78	•Butler initiated conversation 1 Exhs. 255	•Butler initiated conversation by mentioning a "bad cop" to Dep. Lockhart 3 Exhs. 714-16	•Butler told Dep. Lockhart "there was a bad cop in there." 3 Exhs. 787, 790		•Butler told Dep. Lockhart about a cop who took women "into interrogation rooms." 4 Exhs. 940	•Dep. Lockhart initiated a conversation with Butler. Butler told her that a Kern County officer "right downstairs raped me" and that he had "raped the heck out of me right below us." 3 HRT 476, 479-80		•Dep. Lockhart testified that Butler had told her that she was raped by someone who worked at the jail, but when Butler looked at the Behind the Badge book, she "said she did not see him." RT 5809, 5 HRT 918-21
Butler "d[id]n't know" if he told her his name. **Butler "kept wanting to say his name was Burch, which was not it."** **Dep. Lockhart suggested "Lemski or Nowatski" but Butler said no.** 4 Exhs. 920-23	•"I think he told me his name was David." •"I didn't know the man's name at the time." •Gave Dep. Lockhart the name, "Birch" •Dep. Lockhart suggested "Lenski" or "Loski", but Butler said no. RT 5782, 5792, 5796-97	•"I did not give [Dep. Lockhart] a name." •"Dep. Lockart mentioned the name 'Birch' to me, and she might have said Lenski or Laski." 1 Exhs. 219-20	•"I told [Dep. Lockhart] quite honestly I don't know the name." •Butler said, "I don't know the name, but I do know the face." 3 Exhs. 677-78	•"I did not give [Dep. Lockhart] any name at all." •Dep. "Lockhart mentioned the name 'Birch'", "she might have said Lenski or Laski." 1 Exhs. 255		•Butler already knew Rogers's name from booking when she spoke to Dep. Lockhart. •Dep. Lockhart suggested "Burke" or "Burgess Burke" but Butler said no because she knew his name. 3 Exhs. 790		•"I didn't know his name. I just knew his face." •"[W]hen I was in booking I already knew his name was Rogers" from his name tag. •Dep. Lockhart suggested "Burke or Berg"; Butler said no. 4 Exhs. 940, 943-45	•Had seen Petitioner's name on his name tag during booking, but continued to think his name was "Birch." •Dep. Lockhart suggested "Lewenski" or something similar, Butler said "no." At that point, Butler knew Rogers's name. She saw his name tag in booking, but thought his name was "Birch." 3 HRT 476, 479-80	•Butler learned he was "David" on the night of the attack •Acknowledged that she went through the book looking for a man named "Birch." Not finding him, showed Dep. Lockhart a "picture of a guy who looked like [the] assailant because he had a mustache and thicker hair." •Saw "David" on name tag in booking. Name tag said "Rogers". •She knew he was named "Rogers" when she spoke to Dep. Lockhart and looked through the book. 6 HRT 1093-99, 1141-42, 1216	•Rogers was assigned to patrol duty during the period when Butler said the man who had assaulted her was working in the jail. Rogers was not working in the jail at that time. •Dep. Lockhart testified that she had not suggested names like, "Birch," "Loski," "Lanski," or anything else. •Butler did not pick a picture, said she had not seen the man. RT 5809, 3 Exhs. 668; 5 Exhs. 1252-53, 1258; 5 HRT 918-21, 7 HRT 1259
Butler looked in the "Behind the Badge" book, and said, "he looked like this guy but it, it wasn't him." **She picked out a guy who "had a mustache and . . . thicker hair."** 4 Exhs.923-24	•Butler "never pointed a face out," but told Dep. Lockhart that she "saw the face in" the "Behind the Badge" book. RT 5793	•Told Dep. Lockhart that she saw her assailant's picture on one of the pages 1 Exhs. 219	•Butler "flipped through" the book until she "saw his face." Told Dep. Lockhart that "he was on one of these two pages." 3 Exhs. 678	•"I told her I'd seen the man's picture on one of those pages." 1 Exhs. 255	•Dep. Lockhart "had a sheet of paper of 12 different faces and he was in that" but Butler "didn't show [Dep. Lockhart] the picture." 3 Exhs. 716	•She found Rogers's picture in the book, but said, "He is on one of these two pages" to Dep. Lockhart. 3 Exhs. 790	•Told Dep. Lockhart that his picture was on page 12 of the "Behind the Badge" book. 3 Exhs. 827	•Told Dep. Lockhart, "he's on one of these 2 pages, but I still got 5 months to do and I ain't saying nothing else." 4 Exhs. 940	•Found Rogers's photo on a page with 12 pictures, facing another page with 12 pictures. Saw the name "Rogers" in the book and recognized the name from when she had seen him in booking. Had not seen him in the interim. •Butler told Dep. Lockhart, "he is on one of these two pages," but did not specify "because I've got to do a lot of time here, I would like to get out"; pretty sure he was still working in the jail--he had "made it clear in booking." 3 HRT 482-85	•Butler said, "he looks like this man. But this is not him. He is one of the 12 on this page or that page." •Told Dep. Lockhart his picture was "on one of these 12 pages and when it came up on the news, his face was one of those 12. Out of 24." Petitioner's face had already been on the news, so she thought Dep. Lockhart knew which of the faces she meant. 6 HRT 1148-49, 1186-87	•Dep. Lockhart testified that Butler looked in the "Behind the Badge" book for about an hour and then told Dep. Lockart that she did not see her assailant in the book. •Rogers was on the news months *after* Butler's conversation with Dep. Lockhart. RT 5806, 5 HRT 918-21

PAGE 11

BUTLER'S REACTIONS TO PHOTOS OF ROGERS & RATZLAFF, & INFLUENCES ON BUTLER'S IDENTIFICATION TESTIMONY

Lerdo Jail: 2/18/1987	Trial: 3/23/1988	1st Decl.: 5/31/1998	To Hodgson: 10/27/1998	2nd Decl: 11/14/1999	To Hodgson: 4/12/2001	To Hodgson: 8/4/2008	To Hodgson: 10/17/2008	To Hodgson: 10/11/2011	Ref. Hearing-12/9/2011: Direct Examination	Ref. Hearing: Cross-Examination	Ref. Hearing: Re-Direct	Evidence from Other Sources
Viewing photo of Rogers: "He didn't look quite so fat. He didn't have as much of a stomach. He had a mustache." It "seemed like he had more hair…like there was more through here and right through here." "He had a big chest." 4 Exhs. 889-90			•Ermachild showed Butler "family" pictures of Rogers. Butler said those photos showed a man who was "older and stabler looking, with no mustache" (an "older feebler man"). 3 Exhs. 696, 700							•Butler acknowledged that during the taped portion of the Lerdo interview, she was comparing a picture of Rogers to her memory of her attacker and saying that they were, in some respects, different. 6 HRT 1078-79		•Rogers has been in custody since the beginning of 1987; any "family" photos would have been taken before that time.
		•**Viewing photo of Ratzlaff: "I cannot be certain he was not the man who raped me."** 1 Exhs. 224	•Photos of Ratzlaff: "she's pulled him out of the past and that's him." 3 Exhs. 696, 700	•"Ratzlaff looked like the man who attacked and raped me. I was particularly haunted by one of the photographs." 1 Exhs. 258-59			•"I am certain that [Ratzlaff] is not the man. . . .that attacked me. Although I will say he did look familiar. I can't deny that he didn't" •"[W]hen we were going through the photographs, I was going wow [Ratzlaff] looks familiar, as in if I had seen him before." 3 Exhs. 847-49		•When she saw pictures of Ratzlaff, she did not think he looked like her attacker, and told Ermachild that. •She told Ermachild that Ratzlaff resembled her attacker, but it was not true. Ratzlaff was "handsomer" than Rogers. Ratzlaff "was somebody that I might have dated personally because of his height, his weight, his demeanor, his darkness, his dark hair." 3 HRT 521, 543, 559	•Admitted that when she saw pictures of Ratzlaff, she thought he "looked like the man who attacked and raped me", and was "particularly haunted by one of the photographs." 6 HRT 1180-81		

BUTLER'S REACTIONS TO PHOTOS OF ROGERS & RATZLAFF, & INFLUENCES ON BUTLER'S IDENTIFICATION TESTIMONY (Cont.)

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		Butler made additions to her declaration, crossed words out and changed them, and signed the declaration under penalty of perjury. 1 Exhs. 218-225	•Butler questioned her identification of Rogers as the attacker because Ermachild told her that: (1) Rogers never had a mustache; (2) Rogers was never associated with a stun gun and (3) Rogers did not have a white pickup truck when she was attacked. 3 Exhs. 680, 681, 687, 700	•Butler attested: "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." •Butler initialied every page, made additions and crossed words out, and signed the declaration under penalty of perjury. 1 Exhs. 244-51, 253-59	•Butler states that Ermachild "was bringing up to my confusion . . . the mustache and the white pickup truck." 3 Exhs. 711-12	•Butler says the whole notion of the mustache was introduced by Ermachild, to confuse her. •Butler did not remember saying anything about her attacker's mustache when she testified at trial: "I don't remember anything about a mustache in any form, until Melody Ermachild brougt it up to me." •Butler signed her declarations, even though she did not believe them to be correct: "I pretty much washed my hands of it then." 3 Exhs. 792, 795, 809-10	•"I don't believe he had a mustache, but [Ermachild] kept putting it in my head that he did." •Butler's typewritten declaration was mailed to her. She signed it, quickly read it, initialed it, and sent it back. •Ermachild returned to her house with the typed declaration "and we went through it, just like you and I are, line for line." •"I skimmed [the declaration.] 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." •Butler doubted Rogers was her attacker only after "Ermachild came and reinterviewed me and got me questioning." 3 Exhs. 817, 819, 831, 845		•Butler suggests that the statements in her sworn declarations were fabricated by Ermachild and that Butler just signed the declarations because she "just wanted Melody Ermachild out of [her] house" and to be done with the whole thing. •Butler states that the only time she had harbored doubts about her identification of Rogers as her attacker was when Ermachild showed her pictures of Ratzlaff and "made me question myself to the point of near--near insanity." 3 HRT 511, 521-22, 544-45, 6 HRT 1231	•Acknowledged that she felt comfortable with Ermachild, talked freely, invited Ermachild to stay for dinner. •Acknowledged that Ermachild read the handwritten declaration aloud to Butler and had her read it. Buter asked for changes in the declaration, which were made. In a 2nd appointment, they read and reviewed the revised typewritten declaration. Butler asked for changes, which were made and initialed. Ermachild sent her a supplemental declaration that Butler dated, signed, and mailed back. Butler knowingly verified and signed the declarations under penalty of perjury. •Butler harbored doubts about her identification of Rogers because of Ermachild. Ermachild caused her to doubt by pointing out that Rogers did not have a white pickup truck when Butler was attacked, he was never associated with a stun gun, and he never had a mustache. 6 HRT 988-1000, 1160, 1197, 1172-85		•Ermachild's initial interview with Butler lasted a couple of hours. Ermachild wrote a statement, asked Butler to read it, and read it to her aloud. Butler wanted some additions, Ermachild made those changes. •Ermachild set up an appointment with Butler to review the typewritten declaration, brought the declaration to Butler's house, read it to Butler, had Butler read it, and then made the corrections pointed out by Butler--all of which Butler initialed. •It was true that Rogers had no pickup truck, no stun gun, and no mustache. 1 HRT 136-40
	•Did not see Rogers on TV before talking to the police. RT 5795	•"I lied when I said I hadn't seen Rogers on TV". "I had just seen [him] on television the day before" the identification at Lerdo. 1 Exhs. 220-22	•"I was in Lerdo when I saw...the news...that [Rogers] had killed women." 3 Exhs. 678-79, 702	•Saw Rogers on TV while in jail, day before photo lineup 1 Exhs. 255-56	•Saw Rogers on TV night before the photo lineup. Hodgson said it'd be a problem for her to testify to that; she then denied seeing his picture on TV. 3 Exhs. 714-15, 727	•Learned Rogers was a police officer in Lerdo jail, when she saw him on TV, before talking to the police. 3 Exhs. 786, 790, 806-07	•On the day of the photo lineup, she told detectives she had seen Rogers on TV the night before. 3 Exhs. 838-39, 841	•Butler saw Rogers's face on TV in the Lerdo jail. 4 Exhs. 940	•Was reading a book when Rogers was on TV, never saw his face, just his badge 3 HRT 498, 500, 552, 556	•Acknowledged that her prior statements regarding seeing Rogers on TV were her words, not Ermachild's. •"I'm pretty sure I didn't see his face. If I did, it was just so fast." 6 HRT 1018	•Saw TV picture go "from a face to a badge," but "it didn't matter at that point..." 6 HRT 1224	

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	•Did not discuss the case with others in jail before her Lerdo interview RT 5803, 2 Exhs. 386	•Admitted she lied when she said "other women in jail were not discussing the case." •In 1986, there was "a lot of talk...about attacks by a man driving a white pickup." 1 Exhs. 220, 222		•In 1986-87, "a lot of talk" about attacks by a man in a white pickup. 1 Exhs. 255		•Agreed to talk about Rogers at Lerdo after she "got like 150 kites from the guy's end" telling her to do so. 3 Exhs. 807	•Agreed to give her statement at Lerdo because she got "175 kites from the boys' side." 3 Exhs. 836		•A "lot of women" told her she would "get out" if she testified •Urged to talk to detectives by men in jail who sent her "kites" 1 HRT 110; 6 HRT 1030, 1066, 1103-04	•Acknowledged that from reading and "a lot of talk on the streets," she knew her importance as a witness. 6 HRT 1133-34		
	•At the time of the attack, she "shot up" with heroin three times a day. RT 5799-800			•Was "a prostitute to support my drug habit." 1 Exhs. 253	•Used heroin "regularly" at the time of attack, but her "memory was still good." 3 Exhs. 734-35	•She saw Rogers in booking and was "pretty strung out," but had "come down from the high." 3 Exhs. 805		•"I probably was impaired [by drugs]," but recalled sodomy. 3 Exhs. 876	•"[G]etting high" on heroin three times a day at time of attack had no effect on her ability to perceive or remember. 3 HRT 396	•"[A]s I got further...away from my drugs, my mind got clearer." •At Lerdo, she "was still coming off of heroin. I was still very unclear." 6 HRT 1144-45, 1178		
	•Was in custody for "possession of heroin" at trial, but received no promises to testify. RT 5779, 5794, 5801	•"Everyone knew that if they could testify against him, it was a sure and fast way out of jail." 1 Exhs. 221	•Received no promises to testify; she was released 3 months early. 3 Exhs. 703-04	•No promises for testimony; she was released shortly after. 1 Exhs. 257		•Arrested for "giving someone drugs and possession." Didn't expect early release. 3 Exhs. 788, 808-09	•Surprised when she was released early after Rogers's conviction. 3 Exhs. 842-43	•Testified against Rogers "to save my freedom." "I didn't want. . . to do that much time." "I knew that if I testified. . . I was doing the state a huge favor by putting this man away, and that the state would probably let me go. I knew this in my guts because I'd seen it time and time again." 3 Exhs. 867-69	•No promises. Didn't want to be on felony probation when released. Released early. 3 HRT 535-36, 554-55	•Stated that her real concern was violating felony probation, and it wasn't true that she had testified for her freedom. 6 HRT 1029-32		•Butler was released from jail on May 2, 1988--the same day that Rogers was sentenced to death. 11 HRT 2171; 2173

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		•6 men (3 D.A.s) told her Rogers had killed 9 women, and that Tracie Clark had been pregnant and mutilated. 1 Exhs. 222		•She was told that Rogers killed 9 women, Clark was pregnant and mutilated 1 Exhs. 256-57			•Denied stating that investigators had told her Clark was pregnant and mutilated. 3 Exhs. 834-35		•They told her Rogers killed "nine women and probably more." Clark being mutilated was "more of [her] speculation." 3 HRT 554-55	•She asked them about the number of women killed and whether Clark was mutilated. One man "rolled his eyes," which led her to assume it was true. 6 HRT 1119-20		
		•The men from the D.A.'s office "indicated a lot of things it wasn't going to be good to say" at trial. 1 Exhs. 223	•Concerned about being charged with perjury for her testimony against Rogers 3 Exhs. 698-700	•They "indicated a lot of things it would not be good to say." 1 Exhs. 257			•The D.A's men only influenced her to "not keep quiet"; didn't influence testimony. 3 Exhs. 837-38, 842					
		•Butler jumped bail when "Ms. Ryals' 'right hand man'" "said [she] should leave California and never come back". 1 Exhs. 223		•Ryals' right hand man suggested she leave CA while on bail 1 Exhs. 257-58		•Left Bakersfield while on felony probation because friends told her to flee for safety. 3 Exhs. 810	•Reaffirmed Hodgson visited her and suggested she leave California while on bail. 3 Exhs. 843-44		•Hodgson only told her that she was in danger and should get off the streets. 3 HRT 540	•Acknowledged saying that Hodgson did suggest she "leave CA" while on bail and "a file would just drop behind a file cabinet and [her] name would never be mentioned in CA again" 6 HRT 1035		
		•"I have often worried that I might have testified against the wrong man. I've always questioned how accurate my identification of Rogers was". 1 Exhs. 224	•Rogers "doesn't match the description that I remember in my head." 3 Exhs. 697	•"For years, I've told my husband that I am now uncertain and it weighs on my mind." 1 Exhs. 253, 258	•"I'm set sure [Rogers's] the guy who raped me. I'm set sure." "With certainty." 3 Exhs. 720, 755		•Her uncertainty weighed on her mind, but only after speaking with Melody Ermachild. 3 Exhs. 844-45		•Never been bothered by her identification of Rogers; never told husband she was uncertain •Ms. Ermachild made her question herself 3 HRT 511, 560			

PAGE 15

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Electronically FILED on 9/29/2017 by April Boelk, Deputy Clerk

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.

2. My email address used to e-serve: **ajkutchins@earthlink.net**

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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/AJ Kutchins

Signature

Kutchins, AJ (102322)

Last Name, First Name (PNum)

Law Office of AJ Kutchins

Law Firm