SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID KEITH ROGERS,

On Habeas Corpus.

No. S084292

CAPITAL CASE

SUPREME COURT
FILED
APR 27 2009
Frederick K. Ohlrich Clerk
Deputy

PETITIONER'S TRAVERSE

– noCloo –

Following a Judgment of Death Rendered in the Superior Court
State of California, County of Kern, Case No. 33477
The Honorable Gerald K. Davis, Judge of the Superior Court

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DEATH PENALTY
SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

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On Habeas Corpus.

_____/

PETITIONER'S TRAVERSE

Petitioner David Keith Rogers hereby realleges, and incorporates by this reference, all facts alleged in his Petition for Writ of Habeas Corpus on file in this Court and further reasserts and incorporates by this reference all exhibits submitted therewith, and all pertinent contentions and arguments set forth in said Petition. In particular, Petitioner realleges and incorporates by reference each and every allegation, whether factual, legal, or otherwise, of Paragraphs 1-33, 98-219, 389-408, 450-492, 496-516, 523-30, 557-61, 576-89 of said Petition, and any and all exhibits discussed in those paragraphs.

In response to the Return to this Court's Order to Show Cause, filed by Respondent Director of the Department of Corrections and Rehabilitation (hereinafter referred to as "the Government"), Petitioner asserts the following:

I. OVERVIEW: THE RETURN FAILS TO REBUT THE PETITION

The evidence concerning the sadistic assault on Tambri Butler, introduced in aggravation during the penalty phase, was the crucial factor for the jury in reaching its death verdict and for the trial judge denying the automatic modification motion and imposing the

death sentence.[1] The man who assaulted Ms. Butler – she said at trial it was the Petitioner – not only raped her and robbed her, but forced her to perform fellatio after he had forcibly penetrated her anus, tortured her with a taser device (leaving a permanent scar on her throat), fired a gun balanced on the bridge of her nose, and tried to run her over with his truck. (RT 5778-5795; Pet. Exh. 16). As the trial judge himself summarized, at the automatic modification hearing:

> "Well, of course, both of these murders involve the use of force or violence. But I think that his actions with Tambri Butler shocked me almost more than any other case I have ever heard.
>
> "The use of a cattle prod or the taser or whatever you call it, and the firing of the shot across the bridge of her nose, and requiring her to engage in all of these various and sundry sexual activities, that probably influenced the jury, in my view, and the court more than any other because not only has it happened once with Janine Benintende, twice with Tracie Johann Clark; we know that it happened with Angela 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).[2]

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[1]Although the victim of that assault has since married, and is now Tambri Butler de Harpport (see Pet. Exh. 16), she will be referred to simply as Tambri Butler.

[2]Throughout this Traverse, the abbreviation "RT" refers to the Reporter's Transcript on appeal, "CT" refers to the Clerk's Transcript, and "CTS" refers to the Supplemental

The Petition and supporting exhibits detail a wealth of evidence – most of it known to local law enforcement authorities, but neither disclosed to nor obtained by the defense – demonstrating that Petitioner did *not* commit those horrible crimes against Ms. Butler; they were instead the work of a convicted rapist named Michael Ratzlaff, who perpetrated similar assaults on several other prostitutes in the same area during the same time period. In myriad details, some large and some small and extremely specific, the Tambri Butler's description of her attacker misses Petitioner and falls squarely on Ratzlaff:

- The attacker drove a white or beige truck, with no camper shell on it. (RT 5794; Exh. 16, ¶ 4; Exh. 21, ¶ 3; Exh. 39 at p. 6). Michael Ratzlaff owned such a truck, and used it to pick up and stage assaults on women. (Exh. 20, ¶ 8 & attached photos; Exh. 44, at pp. 3 & 8). Petitioner did not own such a truck at the time Ms. Butler was attacked; it was not until a year later that he purchased a light-colored truck, on which he always kept a camper shell. (RT 4667-68; 4674-75; Exh. 3, ¶ 10).

- Inside the cab of truck was an oversize silver thermos, a large flashlight and a huge set of keys. (Exh. 16, ¶ 4; Exh. 39, at p. 6). Those were all things that Ratzlaff commonly carried, according to his then-wife, as well as other of his victims. (Exh. 19, ¶ 5; Exh. 20, ¶¶ 5 & 9; Exh. 44, ¶ 9). None of those items were found in Petitioner's vehicle

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Clerk's Transcript in *People v. Rogers*, No. S005502. "AOB," "Supp. AOB," "RB" and "ARB," refer respectively to Appellant's Opening Brief, Appellant's Supplemental Opening Brief, Respondent's Brief, and Appellant's Reply Brief in the aforementioned direct appeal. "Pet" refers to the Petition for Writ of Habeas Corpus, and "Exh." refers to a specified exhibit to that Petition.

when he was arrested, nor is there any evidence that he possessed them. (*See,* RT 4819-22; 4624; Trial Exhs. 64-68.)

- Ms. Butler's assailant had a taser, or "stun gun," and injured her with it. (RT 5784). Michael Ratzlaff had used precisely such a weapon in his other, proven assaults on prostitutes, and had one in his glove compartment when he was arrested. (Ex. 18 ¶3; Exh. 19, ¶5; Exh. 43 at pp. 2-3; Exh. 44, pp. 4, 5 & 7). There is no evidence that Petitioner ever owned or used a taser or "stun gun," and none was found in his truck when *he* was arrested. However, other weapons, including the gun used to kill Tracie Clark, were found in Petitioner's truck, along with other items (such as a collection of women's panties) that make it clear Petitioner had not attempted to get rid of incriminating evidence. (*See,* RT 4819-22; 4624; Trial Exhs. 64-68.)

- The attacker definitely had a bushy mustache (RT 5797-99; Exh. 16, ¶ 4) – something Ratzlaff always sported (Exh. 18, ¶ 3; Exh. 19, ¶¶ 3 &4; Ex. 20 ¶2 & photos 2-3; Exh. 22, ¶ 1), but that Petitioner had *never* worn before the time of his arrest. (RT 5909-10; see also, Pet., ¶ 427 & evidence discussed therein).

- Tambri Butler vividly recalled her assailant's hairy torso. (Exh. 39 at p. 5). Petitioner has little or no body hair in that area (Exh. 3 ¶¶8, 9 & photos 1-4; Ex. 4 ¶7 & photos 6 & 9; Exh. 48) – but Ratzlaff definitely did. (Exh. 20, ¶3).

- Petitioner has and had a prominent tattoo on his right bicep. (Exh. 3 ¶¶8, 9 & photos 1-4; Ex. 4 ¶7 & photos 6 & 9; Exh. 48). Ms. Butler (who carefully examined her attacker's body – including his shirtless torso) did not see a tattoo and would have noticed

one if she had. (Exh. 17; Exh. 39 at p. 5). Ratzlaff had no tattoo. (Exh. 20).

- The attacker wore boxer shorts. (Exh. 39, at p. 3). Petitioner did not own a pair. (Exh. 3, ¶ 12).

- Ms. Butler's attacker was initially friendly and garrulous, and described having a wife and two children, a boy and a girl, as well as a dog. (Exh. 16, ¶ 4; Exh. 39 at p. 3). When Tambri Butler was assaulted, Ratzlaff had a young boy and girl, and a dog. (Exh. 20, ¶ 10). Petitioner had no dog, and his two children – both sons – were grown. (Exh. 3, ¶ 14).

- The man who raped Tambri Butler demanded and forcibly obtained anal sex (RT 5785-88) – something Ratzlaff professed a fondness for, and that was a hallmark of Ratzlaff's other attacks on women. (Exh. 18, ¶ 4; Exh. 19, ¶¶ 1-3; Exh. 44 at pp. 4-5). There is no evidence that Petitioner had any such predilection, even in his other proven contacts with prostitutes.

In these and other details, Michael Ratzlaff's attacks on other Bakersfield prostitutes, such as Lavonda Imperatrice, Jeannie Shain, Dealia Winebrenner and Deborah Casteneda, followed the same pattern as the brutalization of Tambri Butler so closely as to suggest a *modus operandi*. The only reasonable inference to be drawn from this stack of compelling evidence is that the disgusting crimes against Tambri Butler were committed by Michael Ratzlaff, and not Petitioner David Rogers. That in turn establishes Petitioner's claims based on "newly discovered evidence;" on the fact that "false evidence" was used to obtain the death judgment against him; on the prosecution's failure to disclose exculpatory evidence, and on ineffective assistance of counsel.

The Government has not submitted a shred of contrary evidence, nor has it tendered any specific allegations that would rebut Petitioner's showing even if there was proof to support them.[3] Nor does it even acknowledge – much lest attempt to reconcile – most of the facts reiterated above; facts that collectively demonstrate Petitioner's sentence was based, in significant measure, on crimes he did *not* commit.[4]

Instead, the Government does as much as it can with the one fact that cuts in its favor: that Tambri Butler described her attacker as 5' 6" to 5' 8" tall, and weighing about 170 pounds. This was slightly smaller than Petitioner (at 5' 9") and a good deal smaller than Michael Ratzlaff, said to be 6' 3" tall and weighing about 200 pounds. The persuasive significance of this disparity is largely undercut by the fact that (according to what Ms.

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[3]As will be discussed in the next section of the Traverse, the Government's failure in this regard is itself sufficient to warrant a remedy on habeas corpus, for the Court has already considered the implications of the allegations and evidence submitted, and determined that they merit relief. *In re Lewallen,* 23 Cal.3d 274, 278 (1979) [" the issuance of an order to show cause reflects the issuing court's determination that the petition states facts which, if true, entitle the petitioner to relief . . . ."]. We nonetheless address the Government's arguments on their own terms, for the Return fails there as well.

[4]To the extent it deigns to address them, the Government pretends that the pertinent dissimilarities between Petitioner and Ms. Butler's tormentor were limited to only three of those listed above: the white or beige truck, the mustache, and the taser or stun gun. Although the Government concedes the evidence "tends to show" that Petitioner had none of these things when Ms. Butler was attacked, it counters with the ridiculous suggestion that Petitioner had put on a fake mustache and borrowed the truck and taser especially for the occasion. (Ret. at 93-94; 110). As will be discussed more fully in the text, *post*, the Government has not a speck of evidence to support this little detour and frolic, and the evidence which *does* exist clearly undermines it – including the fact that Ms. Butler saw the same man with the same truck on several later occasions, and the fact that Petitioner used his own vehicle when he killed Tracie Clark, and made absolutely no attempt to disguise it, or himself, or to cover its tracks or his own.

Butler told the authorities) the attack generally took place inside the cab of the truck, and that her attacker was thus either crouching, sitting down, or lying down (see Exh. 39, at – making it a good deal more difficult to estimate his size accurately. In any event, this single point does not begin to measure up to the detailed and overwhelming evidence demonstrating that the person who attacked Tambri Butler was in fact not the Petitioner.[5]

To pad its one favorable fact, the Government argues that the circumstances under which Ms. Butler identified Petitioner as her attacker "confirm[] the accuracy of her identification . . . ." (Return at 93; see also, *id.* at 98, 109-110). But exactly the opposite is true. Even if one ignores Ms. Butler's sworn declarations (as the Government insists on doing), the trial evidence regarding the circumstances of the identification does not suggest that great confidence in its accuracy is warranted. Under even that limited set of facts, it remains that Ms. Butler saw Petitioner at least twice while visiting her paramour in jail, very soon after her ordeal – when the memory of her attacker would presumably be fresh – but did not recognize him either time as the person who had brutalized her. (RT 5791). Nor did she see her assailant in Petitioner the third time she encountered him after the attack, when she herself was arrested and taken to jail some months later. Rather, she thought she knew Petitioner as an officer who arrested her, and asked him about that. (*Ibid.*). In fact, it is indisputable that Petitioner *had* been involved in a prior arrest of Ms. Butler, for he issued

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[5]At worst, taken in the context of the rest of Tambri Butler's description, it suggests that the person who attacked her was a smaller, scale model version of Michael Ratzlaff, who bizarrely also had a truck like his, furnished like his, and had the same depravities, the same *modus operdandus*, an identical family, and otherwise identical physical characteristics. It still does little or nothing to bolster her trial identification of Petitioner as that assailant.

the citation summoning her to court for prostitution-related offenses on April 24, 1985. (Exh. 2 ¶5 & ME 5). But his recollection (apparently incorrect) was that he had arrested her in the town of Arvin; because he was wrong about that detail – and only then – Ms. Butler began to think that she knew him from somewhere else. (RT 5792).

The Government argues that "[a]fter Tambri indicated to petitioner that she recognized him, he effectively confirmed her identification with his response." (Return at 93, citing RT 5792). But the testimony the Government is talking about consists in its entirety of the following:

Q:	What did you do?
[Ms. Butler]:	I just, I looked at him and said, you son-of-a-bitch.
Q:	Did he say anything?
A:	He told me I better turn around and keep my mouth shut.

(RT 5792). In short, Ms. Butler did *not* accuse Petitioner of having attacked her; she simply cursed at him. For his part, Petitioner – who was then on-duty as a deputy sheriff – responded in a strikingly measured, but otherwise predictable fashion for an officer being abused by a prisoner. While the Government would like to read sinister overtones into "turn around and keep your mouth shut,"[6] it is not obvious that any other deputy would have said

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[6]The Government makes special note of the fact that Petitioner reported using the same formulation – "keep your mouth shut" – when he was trying to get Tracie Clark to stop screaming at him. (Ret. at 73, n. 37, citing RT 5868). But this undercuts the implication, urged by the Government, that Petitioner's meaning with Ms. Butler was that she should keep secret something that had happened. Plainly, in both instances, he was just telling someone who was shouting abuse at him to be quiet.

anything different in those circumstances – unless it was to say or do something more forceful. The exchange, in short, proves absolutely nothing.

The fact remains that Ms. Butler did not actually identify Petitioner as her assailant to anyone else until after *he* had been arrested, amidst a great deal of publicity, for killing another prostitute. Moreover, the people to whom she first identified him were the detectives working on his murder case, who interviewed her specifically with the object of seeing if she *would* identify Petitioner. And all of this is aside from the fact that, during all of these encounters, Tambri Butler was on heroin – which could not have had a beneficial effect on her cognitive and rational faculties – and was in police custody, which gave her excellent reason to "remember" whatever her interlocutors seemed to want to hear.

We submit that, contrary to what the Government argues, these are not facts that inspire great confidence in Ms. Butler's ultimate identification of Petitioner at trial. They get even worse when one examines Ms. Butler's uncontroverted, sworn statement concerning the identification process. As she recounts there, Ms. Butler decided that Petitioner "might have been the man who attacked me" when she saw a news report about his arrest for the murder of Tracie Clark on television, while she was in jail. (Exh. 16, ¶ 11). After that, the investigators on Petitioner's case came to see her and showed her a six-photo "lineup," and she "picked David Rogers, who I had just seen on television the day before, as the man who had attacked me." (*Id.* at ¶ 12). And in a subsequent meeting with investigators, prior to Ms. Butler's testimony at Petitioner's trial (and while she was serving time), they told her a number of inflammatory and untrue things about Petitioner, and

"indicated a lot of things it would not be good to say on the stand." (*Id.* at ¶¶ 14, 16). Accordingly, when she took the stand, she falsely denied having seen Petitioner on television before picking him out of the photo line-up. (*Id* at ¶ 16).

In short, the fact that Michael Ratzlaff was larger than Tambri Butler estimate of the size of her attacker – either taken alone or in combination with the circumstances of her subsequent identification of Petitioner – does not begin to measure up against the against the overwhelming evidence that Petitioner was *not* the person who assaulted her.

That mass of uncontroverted evidence is in itself ample to warrant the issuance of the writ of habeas corpus, without further proceedings or further delay. A bow on top of the package (so to speak) is Tambri Butler's sworn statement that she has "often worried over the years that I might have testified against the right man," and that – at least as of November, 1999 – she was "more concerned than ever that I wrongly identified David Rogers as the man who attacked me." (*Id.* at ¶¶ 21, 23).

The Government – without providing any details or supporting evidence whatever – "denies that the former Tambri Butler . . . has recanted her trial identification of petitioner as her attacker," and goes on assert that "Tambri has recently reconfirmed her identification." (Return, ¶ 4). These assertions – which come as close as the Government gets to making an affirmative allegation of fact regarding the Butler assault – will be deconstructed in the next section of the Traverse. It is sufficient for now to observe that it is *indisputable* that "Tambri Butler recanted her trial definition of petitioner" – she did so, repeatedly, under penalty of perjury. (*See* Pet., Exh. 16). It may be, as the Government

suggests, that she has since recanted her recantation (though it would have been helpful for the Government to specify to whom, and under what circumstances – facts surely within its knowledge). In fact, the partial discovery provided to date by the Government suggests that Ms. Butler did indeed recant her recantation – and then recanted her recantation of her recantation, and *then* recanted her recantation of her recantation of her recantation. It remains to be seen whether she will ultimately recant her recantation of her recantation of her recantation of her recantation of her recantation of her trial testimony; the version she gives apparently depends on who is asking. The fact that this is the witness whose testimony – according to the trial judge – surely sealed the jury's and the judge's own decision to impose the death penalty on Petitioner should at least give this Court pause.

But the important point, which the Government tries to avoid, is that it does not much matter whether, at this point, Ms. Butler says that it was Petitioner, Michael Ratzlaff, or someone else who assaulted her. Again, her recantation is just the bow decorating the Petition for Writ of Habeas Corpus. What remains uncontroverted by the Government is the core content of the Petition, consisting of the mass of unassailable, detailed evidence that Petitioner was *not* the mustachioed man with prominent body hair (but no tattoo) and boxer shorts, who talked about his son, daughter and dog, and who drove a light-colored truck containing a large silver thermos, oversize set of keys and flashlight, and a taser in the glove compartment that he used to torture Tambri Butler. Because the Return does not even touch the central content of the Petition, the writ of habeas corpus should issue, and Petitioner should be given a new penalty trial.

II. THE GOVERNMENT'S DENIALS ARE INADEQUATE TO CONTROVERT THE TRUTH OF PETITIONER'S ALLEGATIONS; ACCORDINGLY THE WRIT OF HABEAS CORPUS SHOULD ISSUE

The Petition sets forth extremely detailed factual allegations, fully supported by the accompanying exhibits, demonstrating that there was extensive evidence (known to local law enforcement, but not to the defense) that Petitioner did *not* commit the assault on Tambri Butler which was the crucial factor in the penalty phase. It was on the basis of those allegations, and the evidence submitted in support of them, that this Court issued its Order to Show Cause.

The Government has not submitted a shred of contrary evidence in response, and it rests its Return on vague and general denials of Petitioner's specific and detailed allegations. As such, the Government has not met its burden.

As this Court has repeatedly cautioned the Government's counsel, over the course of several decades:

> "'We emphasize our disapproval of the practice of setting out in a return to an order to show cause mere general denials of a habeas corpus petition's allegations. Because the issuance of an order to show cause reflects the issuing court's determination that the petition states facts which, if true, entitle the petitioner to relief, *the respondent should recite the facts upon which the denial of petitioner's allegations is based, and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.*'"

In re Gay, 19 Cal.4th 771, 783 (1998) [emphasis by the Court]; quoting, *In re Lewallen*, 23 Cal.3d at 278, n. 2; accord, *People v. Duvall*, 9 Cal.4th 464, 476 (1995).

A review of the denials and operative allegations of the Return demonstrates that the Government consistently failed to meet the standard set by the Court. Beginning with the numbered paragraphs of the Return, Petitioner responds as follows:

Regarding Custody

¶ 1: Petitioner agrees that he is in the custody of the State pursuant to the judgment and order of the Superior Court of California as set forth in this paragraph of the Return. Petitioner denies that the judgment and order are "valid," for he asserts that said judgment and order are the result of proceedings offensive to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and correlative provisions of the California Constitution.

Regarding the Government's Improper General Denial

¶2: The Government's effort to assert a blanket denial of all specific factual allegations in the Petition not otherwise addressed, is clearly inappropriate under the established principles, set forth above, and should be given no effect.

Regarding Newly Discovered Evidence and False Evidence Presented at Trial

¶3: This paragraph is a legal conclusion which Petitioner disputes.

¶4. Given that the Government here admits Tambri Butler signed the sworn

declarations which comprise Exhs. 16 & 17, the Government's "denial" of the fact that she "has recanted her trial identification of petitioner as her attacker" is facially untenable. The Government's affirmative allegation that Ms. Butler "has recently reconfirmed her identification" should be stricken under the authorities cited above, because – despite ample opportunity to do so – the Government has failed to "provide . . . documentary evidence, affidavits, or other materials" to support it.

The Government next asserts that, "[b]ased on interviews with Tambri" it "has reason to doubt the accuracy of much of the contents of Exhibits 16 and 17 (declarations signed by Tambri), but has insufficient information on which to take a position as to each factual statement in the declarations . . . ." This formulation suffers the same vice as the preceding one (*i.e.*, the Government's failure to tender actual evidence regarding said interviews), and two of its own. That the Government thinks it "has reason to believe" something is not a meaningful allegation of any fact pertinent to this case. More important, for the Government to assert that it has "insufficient information on which to take a position" clearly fails to meet the Government's burden under the cited authorities. The Government has been aware of these factual issues for decades, including the nearly 8 years since it stipulated to the need for an evidentiary hearing regarding them. It has had

ample opportunity to investigate the pertinent facts, and it apparently *has* investigated them. The Government cannot now credibly refuse to respond to the statements contained in Ms. Butler's declarations on the excuse that it lacks "sufficient information on which to take a position," and its attempt to do so can only be regarded as an admission of the truth of those statements.

The balance of the cited paragraph is merely argument, and to whatever extent it may be deemed to contain factual allegations, it is specifically denied by Petitioner.

¶ 5: Is a blanket, "general denial" of the allegations of paragraphs 98-111, 132-34 and 184-199 of the Petition, and is accordingly inadequate under the cited authorities.

¶ 6: Responding to paragraphs 112-127 of the Petition, this paragraph of the Return either alleges nor denies anything.

¶ 7: Insofar as it purports to respond to paragraphs 128-31 of the Petition, this paragraph of the Return neither alleges nor denies anything. That the Government generally "disagrees with many of the characterizations of the contents" of certain of Petitioner's declarations is not a meaningful statement in the context of a Return. The only significant content of the cited paragraph is the Government's statement that it "expects that there will be an evidentiary hearing" on the matters put at issue by the Petition. This constitutes a clear

admission of the adequacy of the allegations set forth in the Petition.

¶ 8: Consists almost entirely of a recapitulation of evidence either submitted by Petitioner in the form of exhibits to the Petition, or (to a lesser extent) contained in the record on appeal. An extra-record allegation at the end of said paragraph is false, however, and is hereby denied: Contrary to what the Government alleges, Tambri Butler *did* "request early release" from jail. Ms. Butler was ordered released several months early at a hearing, held on May 2, 1988 – *within hours after the jury in Petitioner's case rendered its death verdict* – as a result of a "defendant's oral motion for modification of sentence." (Exh. 2, ¶ 15 & app. ME 117). As to the further allegation that Ms. Butler "was not informed at or before the time of her testimony of any intention by the prosecution to seek her early release," Petitioner notes that the *only* attorney in attendance at said hearing was the Deputy District Attorney who prosecuted Petitioner; Ms. Butler herself was unrepresented by counsel. Based on that fact, and the reality that Petitioner has lacked subpoena and other powers that would permit him access to the information that would allow him to otherwise confirm or dispute the Government's allegation, Petitioner denies that allegation.

¶ 9: Should be deemed as an admission by the Government of the facts set forth in paragraph 129 of the Petition. The one equivocation made by the

Government – that it "lacks sufficient information or belief to permit it to state" whether the official who advised Ms. Butler to leave the jurisdiction was in fact from the district attorney's office, as he claimed – is not credible.

¶ 10: Is an admission of the allegations of paragraphs 130 and 137.

¶ 11: Is a general denial of the extremely specific allegations set forth in paragraphs 131 - 136, 138 & 139 of the Petition, and – unlike those specific allegations – is unsupported by any "documentary evidence, affidavits, or other materials," despite the abundant time and opportunity the Government has enjoyed to gather such evidence and submit it to the Court. Said paragraph of the Return is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed admitted.

¶ 12: Admits that Michael Ratzlaff was convicted of attacking a prostitute "and may have committed attacks on others." It then goes on to deny the remaining allegations of Petition paragraphs 141 - 183, on the ground that the Government "lacks sufficient information or belief" to respond to the details of Mr. Ratzlaffs other, similar criminal acts. This denial is patently inadequate under the authorities cited above, as the Government, in its manifestation as local law enforcement, has long had possession of the bulk of that information, and could readily have obtained the balance during the many

years that this case has been pending. As such, the denial should be stricken, and the mentioned paragraphs of the Petition should be deemed admitted. The Government's closing assertion – that "Ratzlaff's height and weight exclude him as a possible suspect in the attack Tambri attributed to petitioner" – is an argument, not an allegation of fact, and is not true in any event.

¶ 13: Is a general denial of the allegations set forth in paragraphs 184 - 195 of the Petition, is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed admitted to the extent they set forth facts.

¶ 14: Is a general denial of the allegations set forth in paragraphs 196 - 199 of the Petition, is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed admitted to the extent they set forth facts.

Regarding the Prosecution's Failure to Disclose Exculpatory Evidence

¶ 15: This paragraph is a legal conclusion which Petitioner disputes.

¶ 16: Sets forth an argument, not an allegation of fact, and is not true in any event.

¶ 17: Sets forth arguments, not allegations of fact, and the content is not true in any event.

¶ 18: The Government's statement – that it "does not currently possess any indication that the defense in this case was provided with information about

crimes committed by Michael Ratzlaff" – must be deemed an admission of the fact that the defense in this case was *not* provided with such information. The Government's assertion – that "petitioner had access to information about attacks on prostitutes by Michael Ratzlaff" because (before he was ever charged with any crime) Petitioner had been assigned to, and frequented, the area where prostitutes worked and because he knew other police officers – is unsupported by a shred of actual evidence that Petitioner knew or should have known about Ratzlaff's other assaults. Indeed, the Government does not even tender specific allegation that any evidence exists that Petitioner knew anything about Michael Ratzlaff or Ratzlaff's crimes. The Government's allegation is, on its face, rank speculation, and as such should be stricken. The allegation should also be stricken on the independent basis that it is immaterial, for Petitioner's imagined access to said information, even if that access existed, would not have absolved the prosecution from disclosing the pertinent, exculpatory information.

¶ 19: Is essentially argument, and is wrong. The Government attempts to deny the allegation (in paragraph 215 of the Petition) that Tambri Butler falsely testified she was in custody for "simple possession." The Government cites as proof her record testimony that her offense was "possession of heroin." But "possession of heroin" *is* the specific statutory crime which is commonly

referred to as "simple possession." The Government apparently admits that Ms. Butler was in fact incarcerated for the crime of "possession for sale," but argues that the difference between the two crimes was "not material." This mistaken argument will be addressed, below, in Petitioner's own argument.

¶ 20: The Government asserts that it "has not been able to obtain information on the disclosure of Tambri's criminal history to the defense," but insists that the "general presumption that official duty is regularly performed" proves that the District Attorney in fact disclosed all pertinent information in that regard that the law required. It has been uniquely in the Government's power to establish that the material in fact *was* disclosed; its failure to do so constitutes an admission that the pertinent information was in fact *not* disclosed to the defense. The "presumption" on which the Government seeks to rely has – like all such presumptions – evaporated when Petitioner put forth evidence (see, Petition, paragragh 215 & Exh. 1, ¶ 7) sufficient to support the conclusion that the "official duty" was not performed in this instance.

¶ 21: Sets forth an argument, not an allegation of fact, and thus does not require affirmance or denial. The content of the paragraph is not true in any event.

¶ 22: Is a general denial of the specific allegations set forth in paragraphs 200 - 216 of the Petition, is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed

admitted to the extent they set forth facts.

Regarding the Ineffective Assistance Provided by Trial Counsel

¶¶ 23 through 27: Set forth arguments regarding the adequacy of trial counsel. They do not contain allegations of fact and thus do not require affirmance or denial. In any event, they are uniformly erroneous.

¶ 28: Is a general denial of the allegations set forth in paragraphs 389 - 393 of the Petition, is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed admitted to the extent they set forth facts.

¶ 29: The Government attempts a blanket general denial of all the detailed allegations of the Petition, paragraphs 394-400, 402-403, and 405-470 (except for a very few facts which it admits, and which will be discussed presently). The mentioned allegations concern the ineffectiveness of trial counsel, and to justify its blanket general denial, the Government represents that trial counsel has refused to discuss the case with the Government's agents, and thus it "lacks sufficient information and belief to answer" those allegations. This is the one instance in the Return in which the Government properly can assert a lack of sufficient information, for this is the only instance in which the information it claims to lack was not in fact already in its possession or readily available to it. The Government's justification, however, at best explains its

response to only a small fraction of the factual allegations set out in the 75 mentioned paragraphs of the Petition – specifically, it responds to the few allegations regarding the tactical reasons (or lack thereof) for trial counsel's various derelictions. As to the great bulk of the allegations, as to which an informed response does not depend on access to the personal knowledge of trial counsel, the Government's general denial of the aforementioned allegations is thus inadequate under the cited authorities, and should be stricken, and the mentioned allegations of the Petition should be deemed admitted to the extent they set forth facts.

¶ 30: Consists of an admission to some of the facts set forth in the Petition regarding the investigation conducted by Chuck Feer, prior to the preliminary hearing in Petitioner's case.

¶ 31: Consists of an admission to some of the facts set forth in the Petition regarding the investigation conducted by Susan Peninger, prior to the trial in Petitioner's case.

¶ 32: Affirmatively alleges that penalty witness (Kern County Sheriff's Deputy) Roberta Cowan, and the Deputy described in Petition, Exh. 34, as Alberta Dougherty, are the same person. Although that appears likely to be true (both are reported as having described themselves as Petitioner's partner during the incident involving Ellen Martinez), Petitioner does not have independent access to the information necessary to confirm that fact, and thus must

provisionally deny it.

¶ 33: Sets forth an argument, not an allegation of fact, and is not true in any event. It is inadequate to support the Government's general denial of the factual allegations set forth in paragraphs 471-475 of the Petition, and accordingly those allegations should be deemed admitted.

¶ 34: Sets forth an argument, not an allegation of fact, and is not true in any event. It is inadequate to support the Government's general denial of the factual allegations set forth in paragraphs 476-483 of the Petition, and accordingly those allegations should be deemed admitted.

¶ 35: Sets forth an argument, not an allegation of fact, and is not true in any event. It is inadequate to support the Government's general denial of the factual allegations set forth in paragraphs 484-489 of the Petition, and accordingly those allegations should be deemed admitted.

¶ 36: Sets forth an argument, not an allegation of fact, and is not true in any event. It is inadequate to support the Government's general denial of the factual allegations set forth in paragraphs 490-92 of the Petition, and accordingly those allegations should be deemed admitted.

¶ 37: Sets forth an argument, not an allegation of fact, and is not true in any event. It is inadequate to support the Government's general denial of the factual allegations set forth in paragraphs 496-506 of the Petition, and accordingly those allegations should be deemed admitted.

Regarding Cumulative Error

¶ 38: This paragraph is a legal conclusion which Petitioner disputes.

* * *

The most notable aspect of the Return is its dearth of specific factual allegations and complete lack of evidence submitted to controvert the specific facts and evidence set out in the Petition and accompanying exhibits. Almost the entire content of the Return consists of indiscriminate general denials and arguments regarding legal conclusions to be drawn from the established facts. Virtually the *only* factual allegation presented by the Government in response to the central issues in the case – involving the assault on Tambri Butler – consist of the Government's vague and generalized assertion to the effect that it has spoken with Ms. Butler and is confident that she will recant her recantation of her trial testimony. The Government's failure to make *specific* factual allegations to support that assertion, and its concomitant failure to submit any actual evidence to support it, renders even that solitary "allegation" inadequate to meet the Government's burden, as spelled out in this Court's precedent, including *In re Gay*, 19 Cal.4th at 783; *People v. Duvall*, 9 Cal.4th at 476; and, *In re Lewallen*, 23 Cal.3d at 278 & n. 2.

The Government appears to take it for granted that an evidentiary hearing will be held regarding the facts set forth in the Petition. This assumption on the Government's part is significant in so far as it necessarily concedes that Petitioner has made out a *prima facie* case of entitlement to relief. But the Government seems to have missed the point of the process,

for it has made no significant effort to rebut that *prima facie* case.[7]

As the Court's precedent makes clear, *this Court has already determined that Petitioner's allegations, unless successfully controverted, entitle Petitioner to relief as a matter of law.* Because the Government has not even made an adequate attempt to demonstrate a genuine dispute regarding the facts alleged and evidence submitted by Petitioner, there is no need to rehash the legal arguments which comprise the only meaningful content of the Government's Return. And there is no need for an evidentiary hearing: The writ of *habeas corpus* should issue, and Petitioner should be accorded a new, fair penalty phase trial.

III. THE GOVERNMENT'S LENGTHY AND TENDENTIOUS SUMMARY OF THE APPELLATE RECORD ADDS NOTHING USEFUL TO THE DETERMINATION OF THE ISSUES PENDING BEFORE THE COURT

More than two-thirds of the Return consists of the Government's exhaustive (if unbalanced) reiteration of the procedural history and trial evidence contained in the Reporter's and Clerk's Transcripts on Appeal. Given the very narrow range of claims pending in this *habeas* proceeding – none of which raise any issue about the guilt phase, which accounted for the great majority of the trial – it is unclear what purpose the Government hopes to serve by larding its pleading with that mass of detail.

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[7]Even if the Government had properly placed in dispute the question of whether Ms. Butler will ultimately recant or reiterate her trial testimony (the only factual issue it has even pretended to join) that in itself would be insufficient to defeat Petitioner's entitlement to relief. As explained in the first section of this Traverse, whatever Ms. Butler ultimately says, about whom she thinks attacked her, would not touch the overwhelming proof – the bulk of it suppressed and newly discovered – indicating that Petitioner was not that man.

To the extent that the Government is merely purporting to rehearse the appellate record, no response is required. The Court is already well acquainted with the trial evidence and the procedural history of the case; to the extent that either are actually pertinent to the issues before the Court, they will be discussed specifically and in context in the argument that follows. Beyond that, there is no point in exchanging allegations and denials about what the appellate record contains; it really does speak for itself. And to the extent that the Government is using its lengthy survey as an excuse to interject argumentative interpretations of the *significance* of bits of guilt-phase evidence (see, *e.g.*, Return at p. 58, n. 26; p. 59, n. 27; p. 60, n. 28; pp. 66-67, nn. 31 & 32; p. 69, n. 34; p. 70, n. 35; p. 73, n. 37; p. 78, n. 42; p. 80, n. 43; p. 81, n.44), Petitioner will resist the strong temptation to offer counter-arguments.[8]

IV. THE GOVERNMENT'S LEGAL ARGUMENTS FAIL ON THEIR MERITS

A. The Discovery of Newly Discovered Evidence, and the Concomitant Use of False Evidence to Obtain a Death Verdict, Require that the Writ Be Issued

The parties agree that Petitioner is entitled to a new penalty phase trial on the basis of newly discovered evidence if that evidence "so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome." *People v. Gonzalez*, 51 Cal. 3d 1179, 1246 (1990) [citation omitted]. There can be no serious doubt

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[8]These points were all argued back-and-forth in some detail in the briefing on appeal, when there was actually some purpose in assessing the relative strength of the guilt phase evidence, to determine whether the errors committed by the trial court warranted reversal. The Court's attention in this regard is respectfully directed to the AOB at 56-57, 64, & 89-91, and the Reply Brief at 3-4, n.2; 19, n. 13; 36, 37-38, which briefs are incorporated herein by this reference.

that the evidence introduced in the penalty phase, to the effect that Petitioner committed the horrendous and sadistic assault on Tambri Butler, had just that impact on the jury's death verdict and on the trial judge's subsequent refusal to modify that verdict. Indeed, the trial judge himself explicitly said so. (RT 5995). It follows that newly discovered evidence, certain to raise a reasonable doubt as to whether Petitioner was in fact the person who committed tortured and raped Ms. Butler, meets the standard set out in *Gonzalez*.

The newly discovered evidence in this case, detailed in the Petition and in the first section of this Traverse, would preclude any reasonable juror from concluding, beyond a reasonable doubt (or likely by any other standard) that Petitioner was Tambri Butler's tormentor.

The Government responds by trying to interpolate an entirely different standard, arguing that the "petitioner fails to show it was impossible for him to have been the person who attacked Tambri." (Return at 93). *That*, of course, is not Petitioner's burden under any reading of the case law, nor would Due Process countenance such a standard. But the Government cannot prevail, even under that phony test, except by tendering the most astonishing propositions. The Government begins by *admitting* that the evidence "tends to show" that Petitioner did *not* have the attacker's hallmark bushy moustache, nor did he own the pickup truck used in the assault or the taser gun with which Ms. Butler was tortured. (*Id.* at 93-94). No problem – says the Government – for Petitioner "could have borrowed a white domestic pickup truck, put on a false mustache, and obtained a stun gun" – all especially for this occasion. *Id.* at 94.

The argument is risible. There is not a speck of evidence that Petitioner ever donned a false moustache in any of his other, chronicled encounters with prostitutes. There is no suggestion that he ever used a stun gun or taser in any other circumstance. Even more to the point: When he picked up (and killed) Tracie Clark, he did so in the vehicle that he owned – the truck he bought a year after Ms. Butler was attacked. And, on that occasion, he made no attempt to cover his tracks, either literally or figuratively: Although he returned to the scene, he did not try to erase the tire tracks he knew the police would find (and which they eventually used to determine that he was the killer); nor did he change those tires, or even bother to dispose of the gun or remove the spent shell casings from his truck.

In any event, the notion that Petitioner borrowed the truck and put on a disguise in order to attack Tambri Butler is thoroughly undermined by Ms. Butler's statement to the police, in which she described seeing the same assailant driving the same truck on several other, random occasions during the days and weeks following the attack. (Exh. 39 at 6-7).

More important yet: the Government's argument entirely ignores the many *other* significant differences between Petitioner and the man who attacked Ms. Butler. It is undisputed that Petitioner did not have the prominent body hair Ms. Butler recalled (although perhaps the Government will argue that he donned a special chest toupee for the occasion), and that he *did* have a obvious tattoo which Ms. Butler was certain she would have noticed. (*See,* Exh. 17). The assailant wore boxer shorts – but Petitioner did not own a pair. Petitioner did not have the young son and daughter, or the dog, lovingly described by the attacker before he turned hostile; nor did Petitioner have the huge thermos and

flashlight, and large, prominent set of keys that Ms. Butler recalled seeing.

Which leads us to the elephant in the room: Michael Ratzlaff. Mr. Ratzlaff *did* have a bushy moustache; he *did* own a pickup truck during that time period – which he used to abduct other local prostitutes – and *did* keep a taser gun in his glove compartment, which he used to torture them; he *did* have ample chest hair – but no tattoo; he *did* keep an oversized thermos in his truck, and wore a big set of keys on his belt; and he *did* like to tell the prostitutes about his little girl and boy. And, just like the man who assaulted Tambri Butler (and unlike any other description of Petitioner) Michael Ratzlaff had an established penchant for forced anal sex and sadistic torture.

In response to all of this, the Government has only the fact that Ratzlaff was larger than Ms. Butler's description of her attacker. As already discussed, this solitary discrepancy is most logically explained by the fact that, when Ms. Butler saw him, he was generally either crouching, sitting, or lying on top of her, making it harder to gauge his size. But even if we give the Government the best of its argument, and dismiss all the other remarkable similarities between Ms. Butler's attacker and Ratzlaff as mere coincidence, that would only provide some reason to question the otherwise obvious conclusion that the attacker was Michael Ratzlaff. It still would not explain why Petitioner – who was *dis*similar to the attacker in all those same ways – could be held, beyond a reasonable doubt, to be the man who perpetrated the attack on Tambri Butler.

The Government has no contrary argument, other than to insist that the circumstances

of Ms. Butler's identification of Petitioner were so compelling as to remove any possible doubt regarding its accuracy. (Return at 93). We have already demonstrated that precisely the opposite is true – that the circumstances under which Ms. Butler identified Petitioner raise far more doubts than they quell. We will not burden the Court by repeating that analysis.

In short, the "newly discovered evidence" impeaching Tambri Butler's testimony against Petitioner is ample to compel the issuance of the writ of habeas corpus, and a new penalty phase trial.

Finally, the Government argues that Ms. Butler was not promised early release or other consideration for her testimony against Petitioner, and therefore her testimony was not "false." (Return at 94). Apparently, the fact that Ms. Butler was abruptly released from custody on the same day Petitioner received his death verdict, and that she had no assistance of counsel in that regard (except the assistance of the prosecutor who had just prevailed in Petitioner's case) – all of that was just serendipity.

Even if the circumstances surrounding Ms. Butler's release did not in themselves demonstrate perjury or misconduct, the conclusion urged by the Prosecutor must fail. Petitioner's claim regarding "false evidence" – which is related to, but distinct from his newly discovered evidence claim – is not limited to Ms. Butler's testimony regarding the consideration she received from the prosecution. As set out in the Petition, "false evidence," such as would entitle Petitioner to relief on habeas corpus, includes any and all

evidence that is simply untrue, and "that is substantially material or probative on the issue of guilt or punishment was introduced at any hearing or trial relating to his incarceration." Penal Code, §1473(b)); *In re Hall*, 30 Cal. 3d 408, 424 (1981). It need not have been perjurious, nor is it necessary for relief to show that the prosecutor knew of its falsity. *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996); *In re Hall*, 30 Cal. 3d at 424.

Quite aside from whatever favors she may have received from the prosecution, there was a quantity of such "false evidence" in Tambri Butler's testimony. Some of it (like her statement that she had not seen Petitioner on television prior to identifying him in court) she knew to be false; other parts (like her assertion that Petitioner was the man who attacked her) she may have believed at the time, but were false as well. In either event, it was "substantially material or probative on the issue of punishment . . ." Accordingly, Petitioner is entitled to relief under (*inter alia*), the provisions of section 1473(b) of the Penal Code.

B. The Government's Failure to Disclose Material Exculpatory Evidence Deprived Petitioner of Due Process, a Fair Trial and a Reliable Verdict

The Government acknowledges that, under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the prosecution has a duty, both before *and after* trial, to disclose to the defense all "material" exculpatory evidence in its possession *and* in the possession of related law enforcement authorities.[9] (Return at 95-96, citing, *inter alia*, *In re Lawley*, 42 Cal.4th

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[9]The Government asserts that the prosecution's duty to disclose material exculpatory evidence known to law enforcement does not extend to "agencies which the prosecution would not be expected to employ in the case." (Return at 96, citing, *United States v. Young*, 20 F.3d 758, 764 (7th Cir. 1994)). Without conceding the somewhat cryptic distinction the

1231, 1246 (2008)). It correctly states that the test for whether evidence is "material" in this context is whether "there is a reasonable probability that, had it been disclosed to the defense, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome . . . ." (Return at 96, quoting, *In re Sassounian*, 9 Cal.4th 535, 544 (1995)). As the Government points out, evidence impeaching the testimony of a prosecution witness "has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime . . . or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case," but generally not "when the testimony of the witness is corroborated by other evidence." (Return at 96-97 [citations omitted]).

The evidence which the prosecution failed to disclose in the instant case meets the standard described by the Government in every respect. As we already have discussed – and as the trial judge himself observed – Tambri Butler's (uncorroborated) identification of Petitioner as her attacker was *the* decisive evidence that put Petitioner on death row. We also have shown that the undisclosed evidence, tending to prove that Petitioner was not Ms. Butler's attacker, and that her identification of him as such was unreliable, "more likely than not" would have altered the balance of aggravation and mitigation in the penalty phase of

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Government is attempting to make (or the persuasive authority of the *Young* case), it is sufficient for now to note that *all* of the information in question in *this* case – concerning Michael Ratzlaff's attacks on other women, and Tambri Butler's record and interactions with local law enforcement – was in the possession of precisely the "agencies which the prosecution *would* be expected to employ," chiefly, the Bakersfield Police Department, the Kern County Sheriff's Department, and the District Attorney's own investigative staff.

Petitioner's trial. It follows, *a fortiori*, that there is a "reasonable likelihood" (described in the case law as being something *less* than "more likely than not")[10] the undisclosed evidence would have made a difference in the penalty phase of the trial. Certainly, as the restatement of that standard puts it, there is a "likelihood sufficient to undermine confidence in the outcome" of the penalty phase.

Moreover Tambri Butler's identification of Petitioner was indeed "the only evidence linking the defendant to the crime" introduced in aggravation, and was not corroborated by other evidence. *Compare*, *People v. Salazar*, 35 Cal.4th 1031, 1050 (2005). Nor can there be any serious question about the fact that evidence disproving that identification would have "undermined a critical element of the prosecution's case" in aggravation. *Ibid.* As such, the undisclosed evidence in this case was clearly "material." *Ibid.*

The Government responds that "Ratzlaff was reasonably excluded as Tambri's attacker" because of the difference in height and weight, and "by her positive identification of petitioner." (Return at 97-98). The Government maintains that those factors would have

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[10]In adopting the "reasonable likelihood" standard, which applies equally to claims of *Brady* error and claims of ineffective assistance of counsel (see, *Kyles v. Whitley*, 514 U.S. 419, 439-41 (1995)), the United States Supreme Court explicitly held that "[t]he question is *not* whether the defendant would more likely than not have received a different verdict . . ." (*Id.* at 434 [emphasis supplied]; quoted in *In re Brown*, 17 Cal.4th 879, 886 (1998). In doing so, the High Court considered and specifically rejected the "more likely than not" standard as an inappropriately strict alternative. *Strickland v. Washington*, 466 U.S. 608, 693-694 (1984); see also, *People v. Gonzalez,* 51 Cal. 3d at 1246 [citing the discussion in *Strickland* in explaining why this Court applies the "more likely than not" standard, rather than the laxer "reasonable likelihood" standard, to claims of "newly discovered evidence" that are not founded on Constitutional errors like those asserted here.]

led law enforcement authorities to reject out of hand any possibility that Michael Ratzlaff, rather than Petitioner, was responsible for the crimes against Ms. Butler. (*Id.* at 98). Thus (according to the Government) the evidence regarding Ratzlaff's crimes had "no exculpatory value to petitioner that would have been apparent to authorities." (*Ibid.*)

Petitioner submits that it is incredible that any even moderately competent police investigator would fail to notice the remarkable, very specific similarities between the attack on Tambri Butler and the assault on Lavonda Imperatrice, for which Ratzlaff was convicted and imprisoned. (See RT 5780-90[Butler testimony]; Pet., Exhs. 16 [Butler dec], 43 & 44 [police reports of Imperatrice attack]). In both cases, a man with a moustache, driving a white pick-up truck with a cluttered interior, picked up the victim (both were prostitutes) on Union Avenue in Bakersfield. In both cases, the attacker refused to go to the victim's motel rooms, and drove them to the countryside, where they performed fellatio on him, unsuccessfully. In both cases, the attacker then pulled – and fired – a handgun, *and* then stung the victims with a taser, or "stun gun." In both cases, the attacker forcibly somodized his victims,[11] and, when he was torturing them, made some attempt to kill them, or at least to make them believe he would kill them.[12]

Given the spate of evidence indicating a clear, common *modus operandi*, it is absurd

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[11]In Imperatrice's case, Ratzlaff inserted his fingers in her anus; in Butler's case, the attacker penetrated her anus with his penis. The police investigation into Ratzlaff's attacks on other prostitutes revealed that he had an obsession with anal sex. (Exh. 44, pp. 4-5).

[12]Butler testified that her attacker tried to run her over with his truck; when Ratzlaff was done with Imperatrice, he made her run and fired his gun at her.

to suggest that the police would have completely ruled out the possibility that Michael Ratzlaff – the convicted rapist of Lavonda Imperatrice – might have also committed the nearly identical crimes against Tambri Butler. The *only* distinction between the two attacks was in the description of the attacker's relative size; but even Ms. Imperatrice – who, unlike Ms. Butler had the advantage of seeing her assailant standing up, outside his truck – underestimated his height by several inches.[13] And Ms. Butler never communicated a "positive identification" of petitioner until the authorities showed her a picture of him – while she was in custody and after his image had been prominently displayed on television as someone who had killed prostitutes. They never showed her a picture of Michael Ratzlaff.

It is also disingenuous to suggest that the authorities in Bakersfield could not have considered Ratzlaff as a suspect in the assault in Ms. Butler. After he was apprehended for the Imperatrice attack, they looked into a number of other cases of attacks on local prostitutes and even explicitly suggested to Jeannie Shain that Michael Ratzlaff was the person who had beaten her unconscious – even though the Shain assault was not nearly as similar to the attack on Lavonda Imperatrice. (Exh. 19, ¶¶ 7-8; Exh. 44, at pp. 4-6).

Of course, the existence of *Brady* error does not turn on what was in the minds of the authorities when they failed to disclose the evidence – rather, "the suppression by the

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[13]Ms. Imperatrice told the police she thought her attacker was around 6 feet tall (Exh. 44, at p. 8), which was closer than Ms. Butler's estimate, but still did not accurately describe Ratzlaff's full height.

prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87. In this case, the prosecution's failure to disclose the evidence regarding Michael Ratzlaff's attacks on Lavonda Imperatrice, Delia Winebrenner, Deborah Castaneda, Jeannie Shain and other local prostitutes readily meets that standard.

Perhaps recognizing the poverty of its argument in this regard, the Government quickly moves to a related, but less momentous breach: Its failure to inform the defense that Tambri Butler was in fact in custody for the admitted crime of possessing heroin with the intent to sell it. The Government first suggests that Ms. Butler herself accurately revealed her offense of conviction when testified that she was in custody for "possession of heroin." As noted above, however, the Government is flatly wrong on this score. The crime of "possession of heroin" – or "simple possession" as it is known within the profession – is the not-terribly-serious offense proscribed by Health and Safety Code, section 11350. It is something clearly distinct from the much graver crime of "possession with intent to sell" narcotics (H & S Code, § 11351) of which Ms. Butler stood convicted.

The Government next argues that the suppression of this evidence was immaterial, because it would make no real difference to the jury whether she was convicted of selling narcotics, or (as she testified) had just used them for years while working as a prostitute. (Return at 98-99). Coming from the Government, the argument is a little surprising. The

well-established difference between "simple possession" of heroin and "possession for sale" is known in the law as "moral turpitude." (*E.g.*, *People v. Vera,* 69 Cal. App. 4th 1100, 1103 (1999) and cases cited therein). The Government itself has been reminding courts of this distinction for decades. Nor is the distinction in any sense insignificant; on the contrary, the courts have long held that,

> "'while simple possession' of heroin 'does not necessarily involve moral turpitude, possession' of heroin 'for sale does – though the trait involved is not dishonesty but, rather, the intent to corrupt others.' . . . '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.'"

People v. Standard 181 Cal. App. 3d 431, 435 (1986); quoting, *People v. Castro*, 38 Cal.3d 301, 317 (1985); and *United States ex rel. De Luca v. O'Rourke*, 213 F.2d 759, 762 (8th Cir. 1954); accord, *People v. Marks*, 31 Cal. 4th 197, 238 (2003) [Chin, J., concurring]; *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903-904 (9th Cir. 2007).

The Government downplays the significance of Ms. Butler's offense by claiming – as Ms. Butler did when she was arrested – that she was not really intending to sell the heroin, but merely was going to share it for free. (Return at 98). Petitioner notes, in passing, the breathtaking novelty of the Government's insistence that the Court must accept, as Gospel,

the self-serving statements made by a criminal defendant at the time of her arrest. More pertinent is that, when Ms. Butler pled guilty to the crime of possessing heroin with intent to sell, her "guilty plea constituted 'a judicial admission of every element of the offense charged'" (*People v. Trujillo*, 40 Cal. 4th 165, 176 (2006) [citation omitted]), including the central element of intent to sell. (See, Exh. 2, pp. ME 123-31 [transcript of plea hearing]). And even giving the Government's argument undeserved weight, it still fails, for – as noted in *People v. Standard* and the cases it cites – what makes the crime so despicable is that it involves "the intent to corrupt others," which would have been present even if Ms. Butler was as generous in her distribution of narcotics as she claimed to have been.

In short, the prosecution's failure to disclose the very serious crime of moral turpitude, of which Tambri Butler stood convicted, constituted a classic violation of Petitioner's right of Due Process. *Giglio v. United States*, 405 U.S. 150, 154 (1972)

Finally, the Government argues that "[t]he evidence of the sexual assault on Tambri was no more serious than the callous murders of prostitutes which were shown at the guilt phase. As a result, it is not reasonably probable that the jury would have imposed a sentence of life without parole even if it had concluded that petitioner had not attacked Tambri." (Return at 100).

The Government's argument ignores a number of things. First, it pointedly ignores the trial judge's statements to precisely the opposite effect, that Ms. Butler's testimony "influenced the jury, in my view, and the court more than any other [penalty phase

evidence]." (RT 5995). It also ignores the trial court's explanation as to *why* that was true: There was otherwise no evidence whatever of sadism or torture in regard to the killings committed by Petitioner. What was done to Tambri Butler was not only unimaginably disgusting and loathesome in itself – it planted in the minds of the jurors and the trial court the obvious inference that Petitioner had done similar things to Tracie Clark and Jeanine Benintende, and led them to wonder: "How many more times did it happen?" (RT 5995).

Which brings us to the last, and most important point that the Government ignores, which is the entire purpose and logic of the penalty phase of a capital trial. The evidence which supported Petitioner's conviction for the first-degree murder of Tracie Clark and the second-degree murder of Janine Benintende was sufficient to establish the multiple-murder special circumstance, and thus to trigger the consideration of capital punishment. (Penal Code, §§ 190.1 & 190.2). But it did not, and could not in and of itself, answer the question posed for the jury by the statute – namely, whether the totality of evidence in aggravation outweighed that presented in mitigation. (Penal Code, § 190.3). Under the Government's theory, *every* multiple murder conviction would result in the death penalty[14] – even in a case, such as this, in which the defendant had undeniably done good in his life, including raising a family and winning a reputation as a police officer who could diffuse violent confrontations without anyone being harmed. (*See*, RT 5905-33; 5938-47).

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[14]Although the Government attaches the adjective "callous" to Petitioner's crimes, we respectfully submit that the evidence regarding the killing of Tracie Clark did not make out a crime demonstrably more shocking than other first-degree murders – which are by definition horrible – and the sparse evidence regarding the Benintende killing was not sufficient (according to the verdict below) even to constitute first degree murder.

In short, it is really undeniable that what made the difference in this case – what distinguished it from other multiple murders and led the jury and trial court to impose the death penalty – was the repulsive evidence regarding what was done to Tambri Butler, and the false but unrebutted testimony that Petitioner was responsible for that atrocity. The prosecution's failure to disclose evidence that would have undercut that testimony was surely "material" within the meaning of *Brady* and its progeny, and deprived Petitioner of due process and a fair and reliable death penalty trial.

C. Petitioner Did Not Receive the Effective Assistance of Counsel

The most obvious (and likely the most serious) instance of trial counsel's ineffectiveness in the penalty phase follows ineluctably from the preceding discussion of Petitioner's other claims. As we just described, Tambri Butler's testimony, to the effect that Petitioner has the person who had raped, sodomized and tortured her, was *the* decisive evidence introduced in aggravation. Although the prosecution did not disclose the wealth of evidence demonstrating that Petitioner was *not* in fact Ms. Butler's tormentor, the defense was indisputably aware of several key facts. Unlike Ms. Butler's assailant, Petitioner did not own a white pickup truck when she was attacked; nor did he have the bushy moustache she described; nor (despite the fact that Petitioner quite apparently had made no effort to dispose of incriminating evidence) was there any indication that he ever owned a taser or "stun gun" like the one used on Ms. Butler.

Yet trial counsel made no effort whatever to investigate the existence of an alternative perpetrator of the Butler assault. If he had, he would have discovered the many other,

extremely similar crimes that had been committed during the same period, *and* would have discovered that the police had a suspect – ultimately apprehended – in those crimes.

Similarly, trial counsel made no effort to investigate whether Ms. Butler had seen Petitioner on television or in the newspapers – something that was extremely likely, given the extensive publicity surrounding his trial – before she ultimately did identify him, first by photograph, and then in court. And, although he asked Ms. Butler whether she had talked to her cellmates about the case (something she denied at trial) trial counsel did not even attempt to interview any of those cellmates. If he had, there is a substantial likelihood that he would have discovered the truth, since admitted by Ms. Butler, that she *did* see Petitioner on television (where he was identified as the alleged killer of prostitutes), and that she *did* hear what the other incarcerated women had to say on the subject before making up her mind to testify against him. (See, Exh. 16, pp. 3-5).[15]

Suffice it to say that the easiest investigation trial counsel could have done regarding Tambri Butler was to find out what crime she was actually serving time for when she testified. But he did not do so, and so lost the opportunity to impeach her as a drug trafficker and as someone far more vulnerable to the authorities than her testimony suggested. More

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[15]For reasons Petitioner cannot apprehend, the Government insists that Ms. Butler's sworn statement – that she saw Petitioner on television and overheard jailhouse conversation about him *before* she actually identified him to the authorities and testified against him – is inadequate to prove that trial counsel could have uncovered that evidence if he had lifted a finger to do so. (Return at 108). Simple logic dictates that it would not have been difficult to establish that Petitioner's image was seen on the television set(s) that provided the major distraction to the bored inmates, or that there was a good deal of conversation about him – the accused, and then convicted, prostitute killer – among the incarcerated prostitutes.

important, had trial counsel dispatched an investigator to look over the public record regarding Ms. Butler's arrests, he would have discovered that - as Ms. Butler initially thought, when she recognized Petitioner in the jail - Petitioner *was* involved in one of her prior arrests. As noted, he had signed the summons issued to her in an arrest for prostitution offenses on April 24, 1985. (Exh. 2 ¶5 & ME 5). Knowledge of this fact could have undermined Ms. Butler's identification of Petitioner. According to Ms. Butler, that identification was not an event, but a process that began with her vague sense that she knew him from somewhere (likely an arrest), but then - when he incorrectly suggested that the arrest had been in Arvin - morphed quickly into a false certainty that he was the man who attacked her. It is likely that Ms. Butler, if confronted with this fact, may have rethought her identification testimony, just as she did a decade later. At a minimum, it would have given the jury good reason to suspect that (as the truth bears out) Ms. Butler was confused.[16]

As this Court has repeatedly emphasized, the constitutional right to the *effective* assistance of counsel "'means that before counsel undertakes to act, or not to act, counsel

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[16]The Government dismisses the evidence regarding the 1985 interaction between Petitioner and Ms. Butler as "inconsequential." (Return at 109). The Government explains that she also saw him a few times at the jail after the attack, but did not recognize him as her attacker; thus "[i]f Tambri's identification of petitioner as her attacker could be based on seeing him in uniform before the attack, it could equally have been based on seeing him in uniform after the attack." (*Ibid*). To the extent Petitioner is able to parse the logic of the Government's argument, it actually seems to support Petitioner's claim, for it admits the distinct likelihood that Ms. Butler's identification of Petitioner *was* indeed "based on seeing him in uniform before the attack . . . ." But the fact that she had also seen him afterward does not really explain her nagging sense of having *previously* known him from somewhere - while the fact that (as she immediately thought) he had been involved in her prior arrest does provide just such an explanation.

must make a rational and informed decision on strategy and tactics *founded upon adequate investigation and preparation.*'" *In re Gay,* 19 Cal. 4th 771, 789-90 (1998) [emphasis supplied], quoting, *In re Marquez*, 1 Cal. 4th 584, 602 (1992); see also, *People v. Ledesma,* 43 Cal. 3d 171, 215 (1987). Trial counsel's failure to investigate the Butler attack itself, and his concomitant failure to look into any of the many available avenues of impeaching her testimony, was inexcusable.

Despite trial counsel's dismaying failure to conduct a meaningful investigation, the jury nonetheless did learn facts that should at least have raised a concern as to the accuracy of Ms. Butler's identification of Petitioner – facts that included his lack of the hallmark moustache and pickup truck, as well Ms. Butler's failure to identify Petitioner to Deputy Lockhart, after seeing h is picture in the "Behind the Badge" book. (RT 5806, 5810). But trial counsel made no effort whatever to take advantage of these facts, and raise a reasonable doubt in the jurors' minds as to whether his client was the man who attacked Ms. Butler. Counsel's derelictions in that regard include his failure effectively to cross-examine Ms. Butler with the facts he possessed and his failure to adduce expert testimony regarding the unreliability of identification testimony like Ms. Butler's.[17] Even more obvious was counsel's failure to request standard jury instructions regarding the assessment of eyewitness

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[17]These points were set out fully in the Petition, Claim V. (M), and we reiterate them here, by this reference. The Government's response to the claim does not necessitate further discussion. Similarly, where we have not specifically responded in this Traverse regarding any other of the subclaims of Claim V., as to which the Court issued its order to show cause, it is because they are adequately set forth in the Petition (which has already been incorporated herein by reference), and the Government's arguments do not require a specific response.

identifications, such as CALJIC 2.91 & 2.92 (1984).[18]

However, the most inexplicable part of trial counsel's omission in this regard was his utter failure to argue any of these facts to the jury, or even to suggest that Tambri Butler had identified the wrong man. The enormity of this lapse is set out in the Petition (Claim V. (N), at pp. 179-81), and does not really require reiteration, for the Government has posed no significant response to it. The best the Government can do is to assert that counsel made a reasonable decision to steer clear of the Butler evidence, and focus his summation on urging the jury not to "kill the good part" of David Rogers. (Return at 112).

The Government's argument posits that it is "reasonable" to ask a penalty-phase jury simply to disregard the most violently persuasive proof tendered regarding penalty. As discussed above, the Butler testimony was *the* decisive evidence that put Petitioner on death row. If that testimony (and in particular Ms. Butler's identification of Petitioner as the beast

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[18]The significance of this dereliction is detailed in claim V (O) o f the Petition (at pp. 181-84), and we will not burden the Court with a lengthy reiteration of that discussion. The Government has no response with regard to the failure to request CALJIC 2.91, but argues, as to CALJIC 2.92, that "several factors in CALJIC 2.20 [*sic*] would have been detrimental to petitioner's defense . . . ." (Return at 111-112). But even the few factors cherry-picked by the Government do not particularly support its argument. For example: "The witness' capacity to make an identification" would have permitted counsel to point out that Ms. Butler was addicted to heroin, and presumably suffering either from its effects or from withdrawal at the pertinent times. And factors stressing whether she "was able to identify the alleged perpetrator in a photographic or physical lineup" and whether she was "either certain or uncertain of the identification" would have put into focus the fact that Ms. Butler repeatedly did *not* identify Petitioner when she saw him in person, and the fact that she told Deputy Lockhart that she did *not* see the perpetrator in the "Behind the Badge" book that contained Petitioner's photograph. (RT 5806). The factor asking "[w]hether the witness' identification is in fact the product of her own recollection" invited argument regarding the likelihood that Ms. Butler had seen Petitioner's face on television before she picked his photo out of the limited lineup shown her by the detectives during his trial.

who raped and tortured her) had indeed been airtight, perhaps counsel would have had no option but to work around it. But even without the material evidence that the prosecution should have disclosed – much of which should have been found by the defense in any event – there were ample bases to question the reliability of that identification. Ms. Butler was (as the Government frequently points out) a long-time heroin addict and prostitute who did not actually identify Petitioner to *anyone* until the detectives on Petitioner's case showed her his picture and asked for her help. At the time, she was serving time on a narcotics trafficking conviction. Also at that time, Petitioner's picture had been displayed with some regularity in the local media, which identified him as the culprit in the murders of two prostitutes. Before any of that occurred, Ms. Butler had seen Petitioner several times – including just a short time after the attack occurred – without forming any idea that he was or might be the person who attacked her. When Deputy Lockhart had asked her to pick the perpetrator's picture out of the "Behind the Badge" yearbook (which contained Petitioner's photograph), Ms. Butler said that she did *not* see the man there. And Petitioner in fact did *not* fit her description of her attacker in a number of key respects, including his lack of the prominent moustache she described, and the fact that he did not own either an older white pickup truck or a taser.

Even without bestirring himself to investigate the matter, trial counsel had persuasive grounds on which to argue to the jury that, although Ms. Butler was certainly the victim of a savage attack, she was wrong about identifying Petitioner as her attacker. As it was, however, counsel did absolutely nothing to prevent the jury from concluding that Petitioner

was the beast who tortured and raped Tambri Butler, and from inferring that he had committed similar atrocities against the two women he was convicted of killing. Counsel's failure to make any argument in this regard was not merely a missed opportunity – it was no doubt viewed by the jury as a tacit admission that Petitioner in fact *was* the monster described by Tambri Butler.

The Government nonetheless asserts that it was "reasonable" for trial counsel to ignore the defects in Ms. Butler's testimony because "[i]t permitted him to argue that if the jurors returned a verdict of death they would 'kill the good part of David Rogers.'" (Return at 112). The Government has it backwards. There would have been absolutely nothing inconsistent in arguing *both* that David Rogers had deviated from an "otherwise exemplary life" (*ibid.*) when he shot two young women *and* that Tambri Butler was mistaken in identifying him as the loathsome sadist who attacked her. But unless and until trial counsel did something to neutralize Ms. Butler's identification of Petitioner as the despicable animal who inflicted those outrages upon her, it was not going to be possible for the jury to recall any "good part of David Rogers" to spare.

D. These Many Errors, Taken Cumulatively, Were Manifestly Prejudicial

Although the foregoing discussion is perforce divided in terms of Petitioner's various constitutional and statutory claims, in their practical effect the errors described were all of a piece. As the trial judge emphasized, Tambri Butler's testimony, and her identification of Petitioner as the sadistic fiend who attacked her, was the determinative factor in the jury's and the trial court's own decision to impose the death penalty. Thus the trove of "new"

evidence undermining Ms. Butler's identification of Petitioner as her attacker – the bulk of which should have been disclosed by the prosecution, and would in any event have been discovered by the defense if it had undertaken an adequate investigation – would likely have made all of the difference in the penalty phase of Petitioner's case.

These points were argued at length in earlier portions of this Traverse and the Government's Return. However, the Government chose this final part of its Return to take its arguments to some new and startling lengths.

The Government repeats its argument that the facts surrounding the killings of Tracie Clark and Janine Benintende were enough to assure a death verdict, without regard to any further aggravating evidence. We have already demonstrated that those facts were certainly sufficient to make out first degree and second degree murder, respectively – and thus the "multiple murder" special circumstance – but were not so much more heinous than other murders as to erase any doubt about why the extraordinary sanction of the death penalty was appropriate in this particular case.)

But the Government goes further. It argues that the Butler evidence had no negative effect on the penalty phase, "and was, to some extent situational since it arose from a dispute over prostitution services, as petitioner said occurred with Tracie Clark. *As a result, it had some mitigating effect.*" (Return at 113 [emphasis supplied]).

The assertion that such evidence – establishing that a defendant has anally raped a woman, then forced her to perform fellatio, fired a gun across her face, burned her with a taser, robbed her and then tried to run her over with a truck – "had some mitigating effect"

on the penalty phase of a capital trial, should win some sort of prize for sheer temerity. It is otherwise unworthy of response.

The Government's companion argument is that there was (otherwise) no "compelling mitigating evidence." (*Ibid.*). If this argument merits an award, it may be for "Most Thorough Self-Contradiction Within Two Pages of Briefing." On the preceding page of the Return, the Government had just argued that trial counsel did a more than adequate job in closing argument by emphasizing how Petitioner had "otherwise lived an exemplary life." (Return at 112). As that earlier Government argument contemplates, there was in fact a quantity of compelling evidence in mitigation, including the testimony of other police officers regarding Petitioner's actions in quelling dangerous situations – including armed confrontations – without violence, and testimony regarding his conduct as a loving family man and friend, in spite of his own horrible early family experience and the demons that experience planted within him.

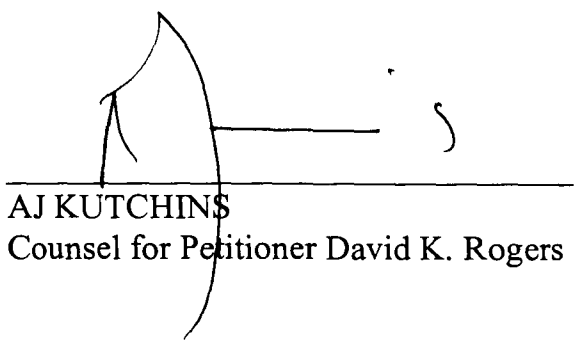
But no amount of mitigating evidence could have undone the shocking effect of Tambri Butler's testimony, and the cumulative effect of the errors that permitted her identification of Petitioner to go unchallenged was prejudicial under any cognizable standard.

CONCLUSION

For the reasons set forth above, the Court should, without further proceedings, vacate the judgment and sentence imposed upon Petitioner in the Superior Court of California, Kern County and order that his sentence be modified or that he receive a new, fair penalty trial.

Dated: April 23, 2009

Respectfully submitted,



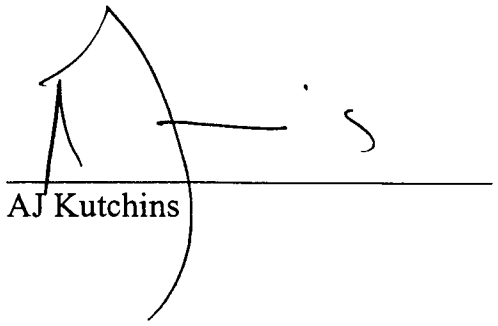
AJ KUTCHINS
Counsel for Petitioner David K. Rogers

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petitioner's Traverse is printed in a 13 point Times New Roman font and contains 13,652 words, as ascertained by the word-count function of the computer program (WordPerfect 8.0) used to prepare it.

Dated: April 24, 2009

Respectfully submitted,



AJ Kutchins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States. I am over the age of 18 and not a party to the within action; my business address is PO Box 5138, Berkeley, California 94705.

On April ___, 2009, I served the enclosed Traverse in the action entitled *In re David Keith Rogers on Habeas Corpus*, No. S084292 on the parties, by placing it in sealed envelopes with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April ___, 2009, at Berkeley, California.

_____
AJ Kutchins