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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

SEP 21 2016

Frank A. McGuire Clerk

Deputy

In re DAVID KEITH ROGERS,

Petitioner,

No. S084292
CAPITAL CASE

On Habeas Corpus.
_____/

PETITIONER'S EXCEPTIONS TO REFEREE'S REPORT AND FINDINGS

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DEATH PENALTY

PETITIONER'S EXCEPTIONS TO REFEREE'S REPORT AND FINDINGS

INTRODUCTION

In its reference order, dated July 15, 2009, the Court appointed the Hon. Louis P. Etcheverry to serve as referee and directed him to "take evidence and make findings of fact" in regard to fourteen enumerated questions, almost all of which contained several sub-questions. (The order set out some 52 separate inquiries in total). After conducting an evidentiary hearing that spanned several weeks, reviewing thousands of pages of exhibits and several hundred pages of post-hearing briefs, and hearing oral arguments that spanned almost two days, the Referee issued his "Report of Proceedings and Findings of Facts Pursuant to Appointment as Referee" (henceforth "Report and Findings" or "R&F") on July 21, 2015.

Counsel for Petitioner has reviewed the Report and Findings and can take very little exception to it. On the contrary, the vast majority of Referee's analyses and conclusions are sound, well-reasoned and firmly grounded in the evidence submitted.

Frankly, were this a different sort of proceeding, Petitioner would be tempted to forego exceptions entirely. Petitioner's counsel has been reminded, however, that death penalty cases are indeed different and that – if further proceedings are required in the federal courts – successor counsel will expect that every possible avenue of challenge has been exhausted. Accordingly, Petitioner tenders the following (very limited) exceptions.

Specifically, Petitioner takes significant exception to the Referee's findings regarding only parts of one of the fourteen enumerated questions – Reference Question #4, concerning what was known by law enforcement officers concerning the alternative perpetrator Michael

Ratzlaff. As will be discussed, Petitioner also disagrees with a few subsidiary findings made in regard to Reference Question #6 (also concerning the conduct of members of law enforcement) and with the conclusion – though not the underlying factual determinations – reached in regard to Reference Question #13 (whether "reasonably competent counsel" would have requested CALJIC No. 2.92). These will be addressed in turn.

EXCEPTIONS

Reference Question Four

The full text of the Court's Reference Question 4 is as follows:

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

(RQ 4; 1 Exhs. 44-45).

1. What Law Enforcement Knew About Michael Ratzlaff Prior to June, 1988

There is an obvious inaccuracy in the Referee's findings in regard to this Reference Question. The second paragraph of the pertinent discussion contains the following conclusion: "The Court finds the evidence fails to show that any police officers had any information until June 8, 1988 regarding Michael Ratzlaff's attacks on prostitutes other than

Tambri Butler." (R&F at 12:16-17). Yet in the immediately preceding paragraph, the Referee reported, accurately, that "on January 28, 1986 . . . the Kern County Sheriff's Department took a report from Dealia Winebrenner regarding the incident in which Mr. Ratzlaff choked her into unconsciousness," and that the vehicle used in the attack – "a white pickup" – was traced to Ratzlaff "who admitted picking up Ms. Winebrenner but denied hurting her. No further action was taken."[1] (*Id.* at 12:3-5).

Thus it is beyond dispute that the Kern County Sheriff's Department (the same agency that investigated the case against petitioner) did in fact know of at least one of Ratzlaff's "attacks on prostitutes other than Tambri Butler" – and knew that it was committed in a vehicle exactly like the one used in the Butler assault – well before petitioner's trial and Ratzlaff's eventual arrest for committing yet another such attack.

In addition, the R&F notes that, following the assault she suffered in March, 1988, Jeannie Shain (another of Ratzlaff's victims) "was interviewed in the hospital by police officers who showed her pictures of Ratzlaff and suggested they thought he was the assailant in her case and those of other prostitutes in the area." (*Id.* at 12:7-10). The Referee found, however, that there was "no credible evidence" that the information regarding the attack on Ms. Shain was shared with the Sheriff's detectives involved in prosecuting petitioner. (*Id.* at 12:18-24). Petitioner submits that this conclusion is incorrect, as there was a quantity of evidence adduced from those same detectives at the reference hearing, showing that they met

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[1]The R&F incorrectly states that the vehicle's license plate was traced by the Bakersfield Police Department. In fact, that task was performed by the Kern Sheriff's Department. (Pet. Exh. 5).

regularly with their fellow detectives, both in the Sheriff's Department and working for the Bakersfield Police Department, to review all such cases – in large measure to look for patterns and similarities. (9 RHRT 1663-64, 1668, 1686, 10 RHRT 1993). Although the detectives perforce denied that they had been aware of Mr. Ratzlaff or his other crimes,[2] petitioner submits that the reasonable inference to be drawn from these facts is that Ratzlaff was an established suspect, well known to local law enforcement, regarding his crimes against prostitutes well before petitioner was accused of the attack on Tambri Butler.

2. The Failure to Disclose the Assault on Lavonda Imperatrice

Michael Ratzlaff was arrested for an assault on Lavonda Imperatrice in May, 1988 that – as the Referee accurately found – contained "striking parallel[s]" to the crime that petitioner had been accused of committing against Ms. Butler. (R&F 10:21-22). The Imperatrice assault was investigated by the Kern County Sheriff's Department and Ratzlaff was prosecuted (successfully) by the Kern County District Attorney – the same agencies responsible for prosecuting petitioner. (RTR 10-12, 22-24).

The Referee accurately finds that "law enforcement never informed petitioner or his counsel about [Ratzlaff's] other crimes . . . ." (R&F13:4-5). But to the extent the R&F can be read to suggest that those responsible for prosecuting petitioner were unaware of Ratzlaff and his crimes (at least until petitioner himself brought them to their attention), petitioner respectfully submits that any such conclusion is untenable.

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[2]To testify otherwise would have been to admit to a patently unlawful withholding of exculpatory information.

Specifically in this regard, the Referee describes Petitioner as arguing "that he asked Kern County District Attorney Tam Hodgson to investigate whether Ratzlaff had been the perpetrator of the Butler assault," and responds that, "[c]ontrary to the petitioner's argument, Mr. Hodgson traveled to San Quentin to interview the petitioner, and petitioner, on the advice of counsel, refused to talk with him." (R&F 12:25 -13:3 [record citations omitted]).

The record is quite clear that Petitioner did indeed send a letter to Tam Hodgson – who was the District Attorney's investigator, but not himself a district attorney – saying that he (Petitioner) had learned about Ratzlaff's attack on Ms. Imperatrice from a press clipping, and asking Mr. Hodgson to investigate whether Ratzlaff was the perpetrator of the Butler assault. (RHRT 2333-2334; 2407-2408). And the Referee accurately recounts that Mr. Hodgson's response was to go San Quentin to interview Petitioner. (*Ibid.*) However, to the extent that the Referee may have been suggesting that this was an adequate, or even appropriate, response by Mr. Hodgson, Petitioner must take exception. As set forth the accompanying Opening Brief:

> Given that (as Petitioner had written in the letter) everything Petitioner knew about Ratzlaff he had learned from a newspaper clipping, Mr. Hodgson's attempt to interview Petitioner could not possibly have furthered such an investigation. If anything, it was a cynical and transparent effort to take advantage of that opening to obtain an uncounseled interview with the condemned defendant.

(Petitioner's Opening Brief at p. 195, n. 190).

Reference Question Six

This Reference Question contains several sub-questions; petitioner tenders exceptions to the Referee's findings regarding only two of them.

1. False Information Given To Tambri Butler By Law Enforcement

The Reference Question asks, in pertinent part: "Was Tambri Butler threatened by law enforcement agents or given false information about the killing of Tracie Clark before she testified?" Ms. Butler repeatedly stated – in her sworn declarations, in her testimony at the reference hearing, and in her recorded interviews with District Attorney Investigator Tam Hodgson – that law enforcement officials came to her before she testified and (falsely) led her to believe that petitioner had committed many additional homicides and had horribly mutilated one or both of the women whom he was convicted of killing. (*See, e.g.*, 1 Exh. 222 [averring that six men in suits, three of them D.A.s" came to see Ms. Butler her in jail, and told her that petitioner had "killed nine women they knew of, and probably more," and that Tracie Clark had been pregnant at the time she was killed, and her body mutilated. "When I asked if the baby had been cut out of her, one man said, 'Use your imagination.'"]; 3 Exh. 683 [confirming same in interview with Investigator Hodgson]; HRT 554-55, 1119-20).

The R&F nonetheless concludes that "Tambri Butler was not threatened or given false information about the killing of Tracie Clark before she testified." (R&F 15:4-5). The Referee does not expand upon this conclusion, and it may well simply reflect a view that Ms. Butler was generally not a credible witness – at least in terms of her more extreme accusations against either Petitioner or law enforcement. (*See*, R&F 7:9-18). Petitioner

submits, however, that this relatively consistent, reiterated thread in Ms. Butler's statements over the years renders it among the most believable of the things she said, and thus it should be credited.

2. Whether the Prosecution Was Aware of Butler's Expectation of Early Release

The next pertinent part of Reference Question 6 asks: "Was the prosecution aware, or should it have been aware, of any promises or threats made to Tambri Butler or Butler's request or expectation of early release?" The R&F answers this sub-question in the negative, concluding that Ms. Butler "was aware she may be released; however, no credible evidence to indicate prosecution [*sic*] could be aware of her expectations." (R&F 15:10-11).

Petitioner submits that this last conclusion is inconsistent with the Referee's earlier, well-supported finding (in response to Reference Question 2) that Ms. Butler "was aware that if she testified [against petitioner] she could be released early" (*id.* at 9:7), and that in fact "it is clear that she *knew* she would get out if she testified . . . ." (*Id.* at 9:19-20 [emphasis supplied]). The Referee based the latter finding on Ms. Butler's understanding, gained from her own long experience with the criminal justice system (confirmed by her fellow inmates), that she would *of course* receive such favorable treatment. It is frankly inconceivable that the prosecution, with its own extensive experience of the system, would be unaware that she harbored such expectations – even if the prosecutor was understandably very careful not to make any promises in that regard. (*See,* HRT 1565-66 [testimony of public defender that it was routine for criminal defendants to receive favorable treatment if they testified for the prosecution in other cases, even though no overt promises made]).

Reference Question Thirteen

The Court's thirteenth enumerated reference question was as follows:

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

(RQ 13; see R&F 22-23).

The Referee found that trial counsel did have a "tactical reason" for failing to request CALJIC No. 2.92 – namely that:

> "Mr. Lorenz had not developed the record in petitioner's case the evidence to support the factors [listed in CALJIC No. 2.92] favoring the petitioner; but as the record existed, most of the factors favoring the Butler identification exceed those for the petitioner, so the instruction would most likely have hurt rather than benefitted the petitioner's case."

(R&F 23:1-5). Accordingly, the Referee concluded that "[a] reasonably competent attorney acting as a diligent advocate would not have requested CALJIC No. 2.92." (R&F 23:8-9).

Petitioner submits that, in this instance, the Referee correctly found the facts but viewed them through the wrong lens. That is: It is certainly true that, *because* trial counsel had failed to develop the record showing the many defects in Ms. Butler's identification of Petitioner – most notably, the great "extent to which [Petitioner did] *not* fit the description of the perpetrator previously given by the witness" (CALJIC 2.92 [emphasis supplied]) – the instruction would not have benefitted Petitioner if given on the basis of the record as it was.

Petitioner respectfully submits, however, that the more appropriate way to assess counsel's performance in regard to his failure to request CALJIC 2.92 would be to start with

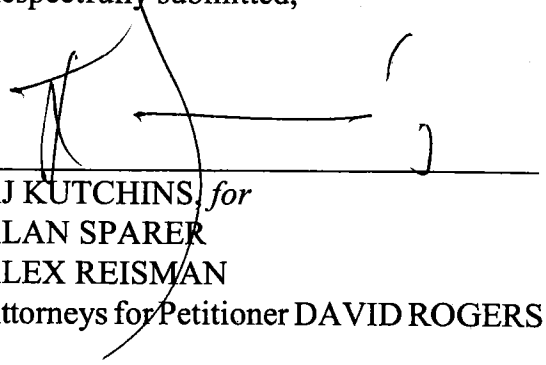
the assumption that he had *otherwise* performed in a competent fashion. As outlined in the Referee's findings in regard to Reference Questions 7, 8, 9, 10, 11, 12 and 14, a reasonably competent attorney would have completed an adequate investigation, properly impeached and rebutted Ms. Butler's testimony, presented expert eyewitness identification evidence, and would be prepared to make a competent argument.[3] Had trial counsel functioned adequately in these regards, then the factors set out in CALJIC 2.92 would have supported his argument that, while Ms. Butler's *description* of her perpetrator was likely accurate, her *identification* of Petitioner as being that perpetrator was probably mistaken. Thus, "a reasonably competent attorney acting as a diligent advocate" would have requested CALJIC No. 2.92.

CONCLUSION

Petitioner respectfully requests that, except to the very limited extent outlined above, the Court accept and adopt the Report and Findings issued by its Referee.

Dated: September 19, 2016

Respectfully submitted,



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[3]Indeed, in answering Reference Question 14 – regarding whether and in what fashion "a reasonably competent attorney acting as a diligent advocate [would] have addressed Butler's testimony in closing argument at the penalty phase" – the Referee starts from the assumption that a reasonably competent advocate would "have made an adequate investigation and presentation of evidence . . . ." (R&F 23:22 - 24:3). Petitioner respectfully submits that approach, rather than the one taken by the Referee in regard to Reference Question 13, is the appropriate one.