

SUPREME COURT COPY

In the Supreme Court of the State of California

In re

DAVID KEITH ROGERS,

Petitioner.

CAPITAL CASE

Case No. S084292

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

EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS

SUPREME COURT
FILED

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DEATH PENALTY

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SUMMARY OF THE CASE

In March 1988, a jury convicted petitioner David Keith Rogers of the first-degree murder of 15-year-old Tracie Clark and the second-degree murder of Janine Benintende, both with the use of a gun, and found a multiple-murder special circumstance true. Rogers was sentenced to death.

In 2006, on automatic direct appeal, this Court affirmed Rogers's convictions and sentences. (*People v. Rogers* (2006) 39 Cal.4th 826.) The Supreme Court of the United States denied certiorari. (*Rogers v. California* (2007) 550 U.S. 920.)

In December 1999, Rogers filed the instant Petition for Writ of Habeas Corpus (the "Petition") in this Court. In 2008, this Court ordered respondent to show cause why the relief prayed for should not be granted on some of the grounds alleged in the Petition, specifically:

- 1) newly discovered evidence and the use of false evidence, as alleged in claim III;
- 2) the prosecution's failure to disclose exculpatory evidence, as alleged in claim IV;
- 3) ineffective assistance of counsel, as alleged in subclaims (G), (K), (L), (M), (N), and (O) (to the extent Rogers alleges a failure to request CALJIC No. 2.92) of claim V;
- 4) cumulative penalty phase prejudice arising from facts alleged in claim V identified in paragraph 3) above, as alleged in subclaim (Q) of claim V; and
- 5) cumulative penalty phase prejudice arising from the facts alleged in claims and subclaims identified in paragraphs 1) through 4) above, as alleged in claim VI.

On November 13, 2008, the People filed its Return to the Order to Show Cause. On July 15, 2009, after considering the pleadings by the parties, this Court appointed a referee to take evidence and make findings of fact on the following questions regarding this case:

(1) Did Tambri Butler testify falsely (either inadvertently or otherwise) at the penalty phase of petitioner's trial regarding the identity of the person who assaulted her in January or February 1986?

(2) Did Tambri Butler testify falsely at the penalty phase of petitioner's trial regarding any other matter, including: 1) whether she had seen petitioner on television before she identified him as her attacker; and 2) whether she had been promised leniency for her testimony and/or was aware that would be released early after she testified?

(3) Is there newly discovered, credible evidence indicating that petitioner did not assault Tambri Butler in 1986, including evidence that another person committed the assault? If so, what is the evidence?

(4) 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?

(5) What crime was Tambri Butler serving time for at the time she testified at petitioner's trial? Did the prosecution disclose information about Tambri Butler's criminal history to the defense? If so, what information did it disclose?

(6) Was Tambri Butler's promised leniency in exchange for her testimony against petitioner? Did Tambri Butler request early release in exchange for her testimony? Was Tambri Butler aware at the time she testified that she would be released early in exchange for her testimony? Was Tambri Butler threatened by law enforcement agents or given false information about the killing of Tracie Clark before she testified? 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? If so, did it disclose such information to the defense?

(7) What actions did petitioner's trial counsel, Eugene Lorenz, take to investigate the 1986 assault on Tambri Butler, including: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What were the results of that investigation? Was that investigation conducted in manner to be expected of a reasonably competent attorney acting as a diligent advocate? If not, in what respects was it inadequate?

(8) If trial counsel's investigation was inadequate, what additional evidence would an adequate investigation have disclosed? How credible was that evidence? What investigative steps would have led to that additional evidence?

(9) After conducting an adequate investigation of the assault on Butler, would a reasonably competent attorney acting as a diligent advocate have introduced additional evidence regarding: 1) the identity of Butler's assailant; 2) whether Butler had seen petitioner on television before she identified him; 3) Butler's criminal history; and 4) whether petitioner had been involved in any prior arrests of Butler before she identified him as her assailant? What, if any, rebuttal evidence would have been available to the prosecution?

(10) Did trial counsel have tactical or other reasons for failing to challenge the admissibility of Butler's testimony? If so, what were those reasons? After conducting an adequate investigation into the 1986 assault, would reasonably competent counsel have moved to exclude Butler's testimony?

(11) Did trial counsel have tactical or other reasons for failing to impeach or rebut Tambri Butler's testimony? If so, what was/were the reason(s)? What impeaching or rebuttal evidence was available to counsel upon reasonable investigation? Would a reasonably competent attorney acting as diligent advocate have impeached or rebutted Butler's testimony? If so, in what manner?

(12) Did trial counsel have tactical or other reasons for failing to present expert testimony on eyewitness identifications? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have presented

expert testimony on eyewitness identifications? What would such an expert witness have said?

(13) 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?

(14) Did trial counsel have tactical or other reasons for failing to address Butler's testimony in closing argument at the penalty phase? If so, what was/were the reason(s)? Would a reasonably competent attorney acting as a diligent advocate have addressed Butler's testimony in closing argument at the penalty phase? If so, in what manner?

In November and December 2009, the referee conducted an evidentiary hearing on the questions presented in the reference order. After the reference hearing, the parties submitted pleadings offering their respective proposed findings of facts as to the reference order questions. The referee submitted the Report of Proceedings: Findings of Facts Pursuant to Appointment As Referee (the "Report") to this Court on July 21, 2015. This Court subsequently invited the parties to submit exceptions to the Report's findings and to file simultaneous briefs on the merits. The People submit the following exceptions to the referee's findings and brief on the merits.¹

¹ The People will abbreviate the pertinent documents as follows:

"POBR" – "Petitioner's Opening Brief To Referee Following Reference Hearing"

"PRBR" – "Petitioner's Reply Brief To Referee Following Reference Hearing"

"RBR" – "Respondent's Brief Following Reference Hearing"

"RT" – reporter's transcript in the automatic appeal in petitioner's case

"CT" – clerk's transcript in the automatic appeal in petitioner's case

(continued...)

STATEMENT OF TRIAL FACTS²

Defendant, a Kern County Sheriff's deputy, murdered 20-year-old Janine Benintende in January 1986 and 15-year-old Tracie Clark on February 8, 1987. Both of the women had been working as prostitutes on Union Avenue in Bakersfield when they were killed. Both bodies were found in the Arvin-Edison Canal. Both had been shot multiple times with bullets from a .38-caliber weapon. Bullets recovered from the women's bodies, tire tracks and shoe prints at the scene of the Clark murder, and an eyewitness account connected defendant to the murders. Upon his arrest, and after waiving his rights to an attorney and to silence, defendant confessed to the Clark murder, but not the Benintende murder. At trial, the defense claimed defendant suffered from a mental illness resulting from extensive physical and sexual abuse as a child and, as a result, did not form the mental state or states required for the charged crimes.

(...continued)

“Pet.” – the habeas corpus petition

“Pet. Exhs. at p. ____” – exhibits to the habeas corpus petition (since the pages are not numbered, they will be cited by counting from the cover of the same volume, so that the page number cited will be the page number displayed when viewing a scan of the volume)

“RH RT” – reporter's transcript of the reference hearing

“RH Exhs.” – exhibits at the reference hearing

The reporter's transcripts of the conditional examinations of Dealia Winebrenner and Joyce “Jo” Rogers will be cited respectively, as “DW RT” and “JR RT.”

Citations to multivolume documents will be preceded by the volume number.

References to the “hearing” will be to the reference hearing unless the context dictates otherwise.

² The People adopt the factual statement from this Court's 2006 decision affirming the convictions and sentences on direct appeal. (*People v. Rogers* (2006) 39 Cal.4th 826.)

At the penalty phase, the prosecution presented evidence of two additional incidents involving defendant and prostitutes. The defense presented further evidence of defendant's background and mental state.

A. Guilt phase

1. The prosecution's case

a. The killing of Janine Benintende

In January 1986, 20-year-old Janine Benintende resided in Los Angeles. Benintende had been using heroin and working as a prostitute. That month, Benintende began associating with Frank Bybee. Around January 22, 1986, Benintende appeared nervous and told her mother she needed to leave Los Angeles for a few days. She left with Bybee and went to Bakersfield.

About 7:30 or 8:00 p.m. on the day of their arrival in Bakersfield, Benintende went to Union Avenue intending to work as a prostitute. She was wearing pants, boots, and a white rabbit fur jacket. Bybee never saw Benintende again.

On February 21, 1986, a farmer noticed a body floating in the Arvin-Edison Canal near Rock Pile Road. Kern County Sheriff's Homicide Detective Mike Lage was called to the scene. He searched the area for footprints or other evidence but found nothing significant. Three days later, Dr. John E. Holloway, a forensic pathologist for the Kern County Coroner's Office, examined the body, which by that time had undergone extensive decomposition. Among the items worn by the deceased were a white rabbit fur jacket and jeans. Dr. Holloway concluded the person had been shot once near the sternum and twice in the back. There was only one entry wound in the back, just below the left shoulder blade, where both bullets apparently had entered. The gunshot wounds were the cause of death. Two bullets were retrieved from the body. The body was identified as Benintende through fingerprint analysis.

Detective Lage contacted Benintende's relatives and friends as well as the Los Angeles Police Department, but was unable to come up with any suspects in her murder.

b. The killing of Tracie Clark

Connie Zambrano worked as a prostitute on Union Avenue in Bakersfield. In the early morning hours of February 8, 1987, Zambrano saw a girl, whom she had not seen before, enter a beige Ford pickup truck with a brown camper shell and dark bubble windows. The girl appeared to point to a motel, but the truck instead proceeded straight before stopping for a few minutes on a side street, then heading out of town. Zambrano recognized the truck and its driver, whom she had seen and spoken to many times on Union Avenue. Zambrano once had a "date" with him; he had paid her \$20 for sex. At trial, Zambrano identified the driver as defendant.

On the afternoon of February 8, 1987, two farmers were shooting squirrels when they saw a "half-naked" woman's body submerged in a few feet of water in the Arvin-Edison Canal a short distance from the Hermosa Road bridge. Summoned to the scene, sheriff's investigators saw the body facedown in the water about 50 feet south of the bridge. Searching the scene, the investigators found tire tracks and shoe prints in the dirt shoulder of the eastbound lane (on the south side) of Hermosa Road, east of the canal. A Lifestyle Contour condom and condom wrapper were on the ground in that area. There was a pool of blood in the center of the eastbound lane of the road east of the bridge. A bloody shoe print was in the road near the pool. Spots of blood led from that pool across the road to an area near a telephone pole in the dirt shoulder of the westbound lane (on the north side) of Hermosa Road. There was a "disturbance impression" in the dirt embankment east of the telephone pole. A trail of smeared blood led from the pool of blood west to the center of the bridge over the canal. There were blood spots on the bridge, on the cement curb of the canal, and on the rail of the canal.

A pathologist for the Kern County Coroner's Office examined the body and found a number of gunshot wounds. Two shots had entered the front of the chest near the right breast, penetrating the lungs. One bullet had passed through the body, while the second had lodged near the center of the back. A third shot had grazed the right side of the chest. A fourth shot, which had been fired at fairly close range, had entered the right side of the chest, passed through several organs, and lodged in the left

side of the body. A fifth shot had grazed the right side of the abdomen near the waistline without entering the body cavity. A sixth shot had entered the back near the midline and lodged near the right collarbone. There also were abrasions on the buttocks that were consistent with the body being dragged after death. The pathologist concluded the victim bled to death from the multiple gunshot wounds and probably died before her body was placed in the water.

c. The investigation and defendant's confession

In an attempt to identify the body found in the canal, detectives showed photographs of it to sheriff's deputies. Sheriff's Deputy Martin Williamson showed a photograph to defendant, who said he did not recognize the person.

The following day, Deputy Williamson and Detective John Soliz, the lead investigator on the case, went to Union Avenue to learn whether any of the prostitutes there could identify the body depicted in the photos. Connie Zambrano told Detective Soliz she recognized the victim as the girl she had seen entering the truck the night before. Another prostitute identified the victim as Tracie Clark.

That same day, criminalists compared the three bullets recovered from Clark's body with the two bullets recovered from Benintende's body the year before. The bullets matched: all were .38-caliber semi-copper-clad hollow-point bullets, all were of the same type as sheriff's-department-issue ammunition that was available to all deputies, and all had been fired from the same weapon. The ammunition also was sold commercially.

Detective Lage and Detective William Nikkel went to defendant's house that day and compared the tires on his truck with photos of the tire tracks found at the Clark murder scene. Finding the tires and tracks matched, the detectives drove Zambrano past defendant's house, where she identified defendant's truck as the truck she had seen Clark enter. She also picked defendant's photograph out of a photo lineup consisting of photos of six sheriff's deputies. At that time, she did not know defendant was a deputy sheriff.

Kern County District Attorney's Office investigator Tam Hodgson obtained warrants for defendant's arrest and the search