

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

SEP 21 2016

In re DAVID KEITH ROGERS,

Frank A. McGuire Clerk

Petitioner,

No. S084292

Deputy

CAPITAL CASE

On Habeas Corpus.

PETITIONER'S OPENING BRIEF FOLLOWING REFERENCE HEARING

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INTRODUCTION

Tambri Butler was the principal witness for the prosecution in the penalty phase of Petitioner's trial. Ms. Butler testified to having been picked up by a man in a white pickup truck while working as a prostitute on Union Avenue in Bakersfield. She described for the jury how the man took her to a remote area south of town where he beat her, raped her, sodomized her, tortured her with a "taser," fired a gun in front of her face, robbed her, and finally tried to run her over after he threw her out of his truck. Ms. Butler identified petitioner David Rogers as the beast who had done these things to her – an identification the jury could readily accept, as it had already convicted petitioner of murdering two other Union Avenue prostitutes – one of whom petitioner had admitted shooting in his beige pickup truck, and both of whom were found, dead, in remote areas south of town.

Shocking in itself, Ms. Butler's testimony left the jurors to infer that Petitioner had inflicted similar cruelties on the other two women before killing them. According to the trial court, it was Ms. Butler's testimony that ensured petitioner would be sentenced to death. As the judge explained when he refused to modify the jury's death sentence:

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 Tambri Butler.

[¶] How many more times did it happen?

(RT 5995).¹

¹Citations will be as adopted by the Referee in his "Report of Proceedings: Finding of Facts Pursuant to Appointment as Referee" (henceforth "Report and Findings" or "R&F") at pp. 5-6, n.1, with these additions: The "Clerk's Record of Reference Proceedings" will be cited as "RHCT" and the Reporter's Transcript and Clerk's Transcript on Appeal in *People v. Michael Ratzlaff* will be cited, respectively, as "RTR" and "RCT."

It is now clear that, as this Court's Referee concluded, **"Tambri Butler testified falsely when she identified the petitioner as her assailant in the trial."** (R&F at 5). As the Referee further found, the evidence firmly **"support[s] the fact that another assailant other than the petitioner committed the assault on Ms. Butler."**² (R&F at 11).

That evidence includes the detailed description of the attacker that Ms. Butler gave law enforcement: The perpetrator had a thick, bushy mustache, thick hair, a big, hairy chest; exceptionally large, rough hands ("you notice these things" she said), and no markings on his body other than a line of moles across his lower back. His white pickup truck had weathered sideboards on the rear; the interior was cluttered and "strewn with litter;" he had a "big, crowded key chain," a tool chest and "large silver thermos" – and, of course, the stun gun he used to torture Ms. Butler. During their friendly conversation, before things turned ugly, he confided that he had two children – a boy and a girl – a wife and a dog.

Not one of these telling details fit petitioner David Rogers: He never had a mustache, his chest is hairless and sunken, his hands are exceptionally *small*, and he has a quite visible tattoo – but no moles. At the time of the attack on Ms. Butler, he had two grown sons, no daughter, no dog. And at the time the attack occurred he did *not* own a light-colored truck. The truck in which he picked up Tracie Clark was purchased nearly a year after Ms. Butler was attacked; it had a camper and no sideboards and he always kept it neat. Although several guns (and much other incriminating or otherwise embarrassing evidence) was seized from petitioner after his arrest, there was no stun gun and no evidence he ever owned one. (See R&F at 5-6, 21).

But Ms. Butler's description did closely fit another man, named Michael Ratzlaff, who sported a thick, bushy mustache and drove a cluttered white pickup with weathered sideboards. Ratzlaff also corresponded to nearly all of the other specific descriptors given

²In this introduction, the Referee's findings are set out in bold; in the balance of the brief they will be italicized.

by Ms. Butler: The large hairy chest, the exceptionally large hands, the thermos and tool chest, the family with a young girl, boy and dog – and he had a history of savage attacks on Union Avenue prostitutes, notably including the use of a stun gun and a pistol to torture and terrify his victims, and an obsession with anal sex. Just weeks after petitioner was sentenced to death, Ratzlaff was arrested for (and eventually convicted of) committing nearly identical crimes against yet another young woman working on Union Avenue. (See R&F at 10-11).

The fact that Ms. Butler nonetheless falsely identified Petitioner can be ascribed to a confluence of circumstances including the fact that – the night before she picked out his photograph – she had seen Petitioner on television described as the accused killer of other prostitutes; the improper photographic lineup used by the police; Ms. Butler’s strong interest in currying favor with the authorities given her status as an inmate (both when she met with the police and when she testified) and a felon anticipating further charges; and the encouragement to do so she received from other inmates. (See R&F at 7, 8, 9).

In a series of sworn declarations in the 1990’s, recanting her trial testimony, Ms. Butler admitted that portions of that testimony were false and that she was likely wrong when she named Petitioner as the person who had assaulted her. (See R&F at 6). Although Ms. Butler subsequently attempted to recant those recantations in several interviews with the district attorney’s investigator over the following two decades, and ultimately at the reference hearing itself, her subsequent statements each contradicted those that preceded it and each contained significant admissions reflecting on the falseness of her trial testimony. By the time of the reference hearing, Ms. Butler’s recollections had grown somewhat fantastical, all leading the Referee to conclude, bluntly:

“The Court finds Ms. Butler not credible.” (R&F at 7).

The facts, as found by the Referee and demonstrated by extensive record evidence, lead ineluctably to several legal conclusions, each of which is sufficient to establish that petitioner is entitled to a new penalty phase trial. First, there is far more than a “preponderance of the evidence” establishing that “[f]alse evidence . . . substantially material

or probative on the issue of guilt or punishment was introduced against [petitioner] at [the penalty phase] trial” (Pen. Code § 1473; see, *In re Richards* (2016) 63 Cal.4th 291, 307-09, 312 [*Richards II*]; *In re Hall* (1981) 30 Cal.3d 408, 424)). Indeed, the record is ample to satisfy the more demanding showing of “*newly discovered evidence*” . . . “that undermine[s] the entire prosecution case and point unerringly to innocence or reduced culpability.”” (*Richards II*, 63 Cal.4th at 307; quoting *In re Clark* (1993) 5 Cal.4th 750, 766.)

Second, even the evidence potentially available to the defense at the time of Petitioner’s trial would have been adequate to raise a reasonable doubt regarding the truth of Ms. Butler’s accusations, but the *ineffective assistance* of the attorney representing Petitioner ensured that the jury never had a fair opportunity to assess her truthfulness. As the Referee’s findings reflect, trial counsel did virtually nothing to investigate Ms. Butler or her story; did not use what information he did have to conduct an adequate cross-examination; did not adduce available evidence (including expert eyewitness identification testimony) that could have revealed the falsity of her supposed identification of Petitioner; did not request jury instructions that would have assisted the jury in evaluating Ms. Butler’s testimony; and incompetently failed even to address her testimony in closing argument. (See R&F at 16-24).

Finally, the penalty phase of petitioner’s trial was tainted by *prosecutorial misconduct*. The Referee specifically found that the prosecution failed to disclose the truth about Ms. Butler’s criminal history to the defense (R&F at 14) – even after Ms. Butler materially misrepresented those facts while on the witness stand. (See *United States v. Bagley* (1985) 473 U.S. 667, 683; *Napue v. Illinois* (1959) 360 U.S. 264, 265–272). The Referee’s analysis of that point also compels the conclusion that the prosecution never turned over the tape recording of the police interview in which Ms. Butler picked out petitioner’s photograph – a recording that both (partially) contradicted the written report of that interview and supplemented the content of the written report in respects favorable to the defense. And (although the Referee concluded otherwise) Petitioner submits that the law enforcement authorities had a constitutional obligation to disclose what they knew about the activities of Michael Ratzlaff – something they failed to do even after successfully prosecuting

Ratzlaff for crimes nearly identical to the assault on Tambri Butler. (*Brady v. Maryland* (1963) 373 U.S. 83, 87). For these reasons the judgment of death should be reversed.

STATEMENT OF FACTS

I. BACKGROUND

A. The Crimes of Conviction

On the afternoon of February 8, 1987, two hunters discovered the body of a woman floating in the Arvin-Edison irrigation canal. (RT 4525-29). The Kern County Sheriff's Office was notified, and Detective John Soliz was put in charge of the investigation.³ (RHRT 1707, 1731).

When the investigators arrived at the road next to the canal embankment, they found tire tracks, a puddle of blood, shoe tracks, marks indicating that someone had been dragged over to the canal, blood drops near the drag marks, and a condom and its wrapper.⁴ (RT 4559-70). The victim had been shot several times with either a 357 magnum or .38 caliber gun, and had bled to death from her wounds.⁵ (RT 4617-18; 4858; 4868).

The dead woman was identified as Tracie Clark, who had last been seen working as a prostitute on Union Avenue in nearby Bakersfield. (4594-96; 4643-47). Another woman, Connie Zambrano, testified that she was working on Union Avenue during the early morning hours of February 8, 1987 when she saw Ms. Clark get into a beige pickup truck with a brown camper shell and dark bubble window, which headed out of town. (RT 4643, 4647).

³ Detective Soliz was joined in the investigation by Detective Mike Lage, who had led (then-dormant) investigation into the killing of Janine Benintende. (RHRT 1731-32).

⁴ Petitioner returned to the scene the following day, but did not attempt to cover up his tire tracks or other evidence. (RT 4698-99).

⁵ A forensic pathologist testified that the victim had been shot twice in the front of her chest (4609-11); a third shot had grazed that same area (4611); a fourth shot entered on the right side of her chest, passed through several organs and eventually lodged below the skin on her left side (4611-12, 4615); a fifth shot grazed her abdomen (RT 4612); and the sixth and final shot entered through the victim's back (RT 4613).

Ms. Zambrano recognized both the truck and its driver, whom she had seen on Union Avenue.⁶ (RT 4640-42). At trial, Ms. Zambrano identified the driver of the truck as the petitioner, David Keith Rogers. (RT 4640).

The investigators went to Petitioner's house and compared the tires on his truck with impressions found at the crime scene. (RT 4625-26). Satisfied that there was a similarity, the investigators drove Ms. Zambrano over to see if she could identify the vehicle she had seen Tracie Clark enter. She picked out the truck parked in front of Petitioner's house – a 1966 beige Ford pickup with a camper shell. (RT 4627-28; RHRT 2390).

Detective Lage composed a photographic lineup, consisting of a picture of Petitioner and pictures of five other Sheriff's deputies whom he believed looked similar to Petitioner. (RHRT 1852-55).⁷ Ms. Zambrano was shown the photo lineup and picked Petitioner. (RT 4629-30). (The same lineup was later shown to the other witnesses asked to identify a perpetrator in the case. (RHRT 1855; see also, RHRT 1745)).

A check with the Department of Motor Vehicles showed that the beige truck identified by Ms. Zambrano was actually registered to one Toby Coffey, at an address across the street from Petitioner's house.⁸ When subsequently interviewed, Mr. Coffey told investigators that he had sold the truck to Petitioner approximately two months earlier – *i.e.*, around the

⁶ In fact, Ms. Zambrano had once had a "date" with the driver; he had paid her \$20 and they had gone to her motel where he masturbated while she lay nude on the bed. (RT 4641; 4654-57). After that, he had stopped and talked to her on the street on a number of occasions, once giving her some oranges as a present. (RT 4658; 4660-61). She did not know he was a Sheriff's deputy until after she had identified him. (RT 4652).

⁷ The pictures were taken from the 1985 edition of "Behind the Badge," an annual compendium of photographs and information regarding Kern County Sheriff's Department personnel. (*Ibid.*; see 5 RH Exhs. 1368; 1372-83; RT 4629-30).

⁸ In addition to the beige truck, Petitioner and his wife owned a green Datsun pickup (with camper shell) and a Jeep. (RHRT 2390).

beginning of December, 1986.⁹ (RHRT 2391-92).

In part because the suspect was a deputy Sheriff, a decision was made to bring in someone from outside the department, and District Attorney's Investigator Tam Hodgson was assigned to the case. (RHRT 2111-12). Mr. Hodgson prepared warrants for Petitioner's arrest and for the searches of his house, vehicles and work locker. (RHRT 2112).

Petitioner's house was staked out. On February 13, 1987, Petitioner and his wife got into their Jeep and started to drive away but were stopped, and Petitioner was arrested. Searching the beige truck, the investigators found three weapons: A .22 caliber handgun, a .25 Excam automatic pistol and the .38 Colt special that fired the shots that killed Tracie Clark. (RHRT 1780, 2119). They also found a bag of used women's panties, some lingerie and a bra in the truck, and in Petitioner's house and outbuildings they uncovered a large cache of pornographic videos and other material.¹⁰ (*Ibid.*)

Following his arrest, Petitioner was interrogated repeatedly, over a number of days, by Detective Soliz and Investigator Hodgson.¹¹ (RT 4672-73; RHRT 2124). He immediately admitted killing Ms. Clark (RT 4673), and his statements to the investigators formed the crux of the prosecution's case regarding the Clark killing.¹²

⁹ Called as a witness for the prosecution, Mr. Coffey so testified during the guilt phase of Petitioner's trial. (RT 4666-67). As will be discussed, the critical significance of Mr. Coffey's testimony – which established that Petitioner did not own the truck at the time of the assault on Tambri Butler – was apparently lost on trial counsel. In any event, he made no effort to make that connection for the jury in the penalty phase.

¹⁰ Significantly (as will be discussed) the investigators found no evidence that Petitioner owned or possessed a stun gun or false mustache, or that he had made any effort to disguise himself. (See, RHRT 1781, 2324, 2389).

¹¹ Detective Lage also participated in the first day of interrogation, at the end of which Petitioner indicated that he would not submit to more if Lage was present. (CT 181).

¹² On the last day of the interrogation (and four days after he was arrested), February 17, 1987, a series of photographs of Petitioner, wearing only jail-issue yellow boxer shorts, was taken at the request of Investigator Hodgson. (RHRT 2335-26; RH Exhs. 1384, 1580-87; see also RHRT 2123-24).

In those post-arrest statements, Petitioner said he had picked up a prostitute – Ms. Clark – on Union Avenue in the early morning hours of February 8, 1987. Petitioner was driving his (recently purchased) light-colored Ford pickup truck with a camper shell, and after they negotiated the price and terms of her sexual services, Petitioner drove Ms. Clark out into the countryside. (RT 4673-77). When they reached a spot where he thought they would not be seen, Ms. Clark partially undressed and began performing fellatio on Petitioner. (RT 4678-82).

Petitioner told the investigators that, during the sexual act, Ms. Clark stopped and demanded more money. (RT 4690). An argument ensued, and Ms. Clark physically attacked him, first with her hands, and then kicking him with her feet—all the while “yelling and hollering at [him].” (RT 4681-83; 4704). Petitioner reached under his seat and took out a gun that he kept there, thinking the sight of it would discourage Ms. Clark’s attacks. Instead, she just kept coming, and the gun went off accidentally, wounding her. (RT 4681-83, 4685, 4701).

Petitioner told them that he then started to drive back to town, trying to persuade Ms. Clark to calm down. She kept screaming at him, though, so he stopped the truck, opened the passenger side door, and literally kicked her out of the cab. (RT 4683). Petitioner also got out, and again tried to convince Ms. Clark that he would take her back to town and help her get to a hospital, but she was very agitated and still screaming at him. (RT 4684).

Ms. Clark promised to report him. (RT 4685). At that point – Petitioner told the investigators – he panicked and shot her again; then, realizing that he would surely go to jail, he emptied the gun into her. (RT 4686). After determining that Ms. Clark was dead, Petitioner threw her body into the adjacent agricultural canal. (RT 4688, 4705).

A police ballistics test indicated that the .38 found in Petitioner’s truck likely was also the weapon that killed Janine Benintende, and he was charged with her murder as well. (RT 4868). Ms. Benintende was another young woman who worked as a prostitute, and she had last been seen alive on Union Avenue, sometime in January or early February, 1986. (RT

4897-98; 4912-14). Her body was found floating in a different area of the Arvin-Edison irrigation canal on February 21, 1986. (RT 4733). She had died of penetrating gunshot wounds to her torso.¹³ (RT 4798). On the strength of the ballistics evidence, Petitioner was also charged with Ms. Benintende's murder. There was no other physical or eyewitness evidence linking Petitioner to that crime, and (unlike the Clark killing, to which he immediately confessed) Petitioner vigorously denied killing Ms. Benintende. (RT 4930).

B. The Trial

In an information filed on April 1, 1987, Petitioner was charged with the first degree murders of Tracie Clark (Count 1) and Janine Benintende (Count2) in violation of Penal Code, section 187.¹⁴ (CT 354). The information stated that Ms. Clark was murdered on or about February 8, 1987, and that Ms. Benintende was killed sometime between January 1 and February 21, 1986. It alleged that the multiple murders constituted a "special circumstance" rendering Petitioner eligible for the death penalty, pursuant to section 190.2(a)(3). (*Ibid.*)

Eugene Lorenz was appointed to represent Petitioner (CT 203, 356), and the prosecution was represented by Deputy District Attorney Sara Ryals. (CT 396). Presentation of evidence commenced on February 17, 1988. (CT 480).

1. The Guilt Phase

The prosecution's case in the guilt phase consisted essentially of Petitioner's confession, the identification testimony of Connie Zambrano, and the physical evidence tying Petitioner to the killings, in particular his ownership of the beige truck (established through the testimony of Toby Coffey) and the .38 Colt found in that truck. The prosecution also presented evidence to the effect that the murder weapon – which Petitioner claimed to have purchased from a bartender – had in fact been stolen from a convenience store while

¹³ A pathologist testified that Ms. Benintende had been shot once in the front of her torso, and apparently had been shot twice in the back – although there was only one entry wound in the back through which both bullets had entered. (RT 4793-96).

¹⁴ All further statutory references will be to the Penal Code, unless otherwise indicated.

Petitioner was investigating an alleged robbery there. (See *People v. Rogers* (2006) 39 Cal.4th 826, 836-41.)

At the close of the prosecution's case in chief, trial counsel made a motion pursuant to Section 1118.1 for partial acquittal on Count 2 on the ground that the dearth of evidence regarding the events surrounding the death of Janine Benintende made it impossible to conclude that she was killed deliberately and with premeditation. (CT 502 *et seq.*) The trial court granted the motion and reduced that charge to second degree murder. (CT 584.)

The defense evidence consisted almost entirely of Petitioner's testimony and the expert evidence of three mental health professionals, who had examined or treated Petitioner in the year since his arrest.

Petitioner did not deny that he had killed Tracie Clark, although he gave an account somewhat different from his taped confession in regard to how and why that killing happened. (RT 5354-83). Specifically, his testimony tracked what he told the investigators, up to the point that the dispute broke out between Petitioner and Ms. Clark. What really happened then, Petitioner said, was that he was unable to sustain an erection. (RT 5358-59). Ms. Clark grew irritated and wanted more money. Petitioner, still unable to perform, felt "embarrassed, sort of crushed." (RT 5359-60). Ms. Clark became abusive, and accused him, in the most insulting terms, of being a homosexual. (RT 5364-67). At that point (*before* any shots were fired), Petitioner opened the passenger door and pushed or kicked her out of the truck. (RT 5381). Not wanting to leave her in the middle of nowhere, Petitioner got out of the truck as well, hoping to calm her down. (RT 5382). Instead, she kept coming at him, yelling, her finger pointed. (RT 5382-83). He pulled his gun out of the truck and pointed it at her, thinking she would stop, but she did not. (RT 5362-63). He was afraid of her, and (for reasons he did not understand) he felt threatened – and he shot her. (*Ibid.*, RT 5382-83). Ms. Clark backed up against the embankment and he shot her again, five more times, killing her. (RT 5367, 5375).

The mental health experts discussed in some detail the abuse Petitioner had suffered

at the hands of a succession of sadistic and perverted step-fathers and boyfriends brought into the house by Petitioner's alcoholic mother, and from his cruel and perverse stepmother. (RT 5464, *et seq.*). Based on his history, his account of the events surrounding the Clark killing, and their examinations of him, the mental health professionals concluded that Petitioner suffered from a "dissociative disorder, such that he was not in full control of his thoughts, feelings or behaviors." (RT 5255-57, 5500-01, 5520-21). They opined that he could not and did not plan the killing of Tracie Clark, and that he was simply unable at that point to premeditate or deliberate. (RT 5225, 5500-01, 5521-22, 5451). To the extent that Petitioner's confession suggested the contrary, it was (according to the treating psychiatrist) part of a calculated attempt on Petitioner's part to, in effect, commit suicide by admitting to capital murder. (RT 5250).

As for the Benintende killing, trial counsel did not present any evidence, nor did he advance any discernable theory of defense.

The prosecution's rebuttal case consisted almost entirely of evidence regarding events in 1983, when Petitioner was briefly removed from the Sheriff's department on the basis of accusations made by a prostitute named Ellen Martinez, but was reinstated following an appeal hearing.¹⁵ (RT 5555-57). The apparent purpose of that evidence was to show that Petitioner harbored some generalized animosity toward prostitutes. Thus Investigator Hodgson read a transcript of portions of Petitioner's post-arrest interrogation in which he asked Petitioner about "a complaint filed against you by some girl who was a known prostitute and a hearing, I guess a termination hearing, was started from that." (RT 5562-63). Petitioner responded that he had been "fired." (RT 5563). Mr. Hodgson said that his "understanding" was that "the hearing didn't go or that the hearing was dismissed because she never came to the hearing." (*Ibid.*). Petitioner replied that "[t]he hearing went;" he explained that Ms. Martinez did not show up, but all of her statements were admitted as

¹⁵The substance of Ellen Martinez's accusation is recounted, *post*, in the context of her testimony at the penalty phase of Petitioner's trial.