

SUPREME COURT
FILED

SEP 18 2019

Jorge Navarrete Clerk

S256069

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DERWIN LEE BUTLER, JR., on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]; *In re Clark* (1993) 5 Cal.4th 750, 767-769 [courts will not entertain habeas corpus claims that are successive].)

CANTIL-SAKAUYE

Chief Justice

APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff,)
) CASE NO. RIF151243
vs.)
) SEALED MARDEN HEARING
DERWIN LEE BUTLER, JR.,)
)
 Defendant.)
)
)

REPORTER'S TRANSCRIPT OF MARDEN HEARING

Honorable RONALD L. TAYLOR, Judge

Department 31

March 30, 2010

APPEARANCES:

For the Defendant:

OFFICE OF THE PUBLIC DEFENDER
BY: PARESH MAKAN, Deputy
4200 Orange Street
Riverside, California 92501

Reported by:

HELEN K. BOWDEN, CSR No. 5395

1 RIVERSIDE, CALIFORNIA - TUESDAY, MARCH 30, 2010

2 BEFORE THE HONORABLE RONALD L. TAYLOR - DEPT. 31

3 (Sealed proceedings - Outside the D.A.'s presence.)

4 THE COURT: Okay. The courtroom is now cleared
5 except for Mr. Makan and Mr. Butler. And Mr. Butler has asked
6 the Court to conduct a *Marsden* hearing, and he stated specific
7 grounds as to why he requesting a *Marsden* hearing.

8 So what I suggest is we just go through those one by
9 one, Mr. Butler. And if there's anything you want to add to
10 your request, then we can take it up at that time. Is that
11 okay?

12 THE DEFENDANT: Yes.

13 THE COURT: Okay. And so the first basis of your
14 *Marsden* hearing, you're alleging that Mr. Makan has not
15 provided competent representation to you in the context of the
16 *Marsden* hearing. And the first thing you said to me in your
17 letter, which is dated March 22nd, which I have reviewed, is
18 that Mr. Makan "is refusing to file a new trial motion under
19 Penal Code Section 1181 to raise statutory and nonstatutory
20 grounds to cover up errors he made in trial, and the fact he
21 was not prepared makes all his decisions erroneous as a matter
22 of the law."

23 And then you said in the *Marsden* hearing you're going
24 to raise the following:

25 Mr. Makan refused to put you "on the stand to testify
26 in my defense when I insisted to take the stand."

27 Number 2. Mr. Makan "refused to call Keyona West
28 after she gave counsel a statement establishing an alibi for

1 me."

2 3. "Counsel refused to call Michelle Nichols from
3 the Department of Justice to provide pictures and/or
4 actual" -- "the actual gun recovered from a Marcelles Oliver
5 as evidence, as well expert testimony that that gun recovered
6 was the gun that fired the shots in this case and the gun was
7 not black but silver in color."

8 4. "Counsel refused to call Deputy Hurian to provide
9 his testimony that on the night of June 10th, 2009, at
10 9:05 p.m. hours, he arrested Marcelles Oliver under the
11 influence of alcohol on Adrienne Avenue and recovered a
12 silver/chrome .25 caliber semiautomatic handgun that would
13 later be determined to be the gun used against Javier Duarte."

14 5. "Counsel refused to call Gensis Guérro (sic)
15 after she gave a statement that she knew that the person who
16 pointed the gun at Roberto Lareos but did" not "identify
17 anyone in the photo she was provided with."

18 And then you've got some issues that you've raised
19 about sentencing. And in particular, you are asking the
20 question why your attorney is not filing a sentencing brief to
21 address the Penal Code Section 654 and 1170.1(a) factors.

22 I should also indicate, I have a couple of
23 correspondence letters up here. One is from Donetta Rockmore.
24 And she's apparently Mr. Butler's mother. And she says she
25 wouldn't return -- Mr. Makan wouldn't return her calls about
26 putting Derwin on the witness stand and that the D.A.
27 threatened Keyona West if she testified on behalf of Derwin.

28 And then I also have a letter from Keyona West. And

1 she wanted to testify, but Mr. Makan would not return her
2 comments. And I have a letter from Keyona West March 12th,
3 2010, and a letter from the defendant's mother. And that's
4 dated March 22nd, 2010.

5 So therefore, Mr. Butler, is there anything that you
6 wanted to add to this list of grievances against Mr. Makan in
7 support of your motion that you don't think he's provided you
8 with adequate counsel?

9 THE DEFENDANT: Um, the fact that, like, I've --
10 before trial, I've made plenty of phone calls to be visited
11 to -- to talk about trial that was going to happen with the
12 strategy in trial, anything. Never -- never had visit. Like,
13 last visit I had was during trial. But before that was in, I
14 believe, like, August or September. So all between there,
15 I've written plenty of letters and called to have a meeting or
16 something to talk about the case.

17 And, um, other problems I have is with, um -- what
18 the D.A. did during trial and his closing argument.

19 THE COURT: Okay. Let's come back to that. Let's go
20 through your list here, and let's take up these items one by
21 one.

22 First of all, Mr. Makan, the defendant is claiming
23 that you are refusing to file for a new trial under Penal Code
24 Section 1181.1. And then he brings up the grounds that he
25 thinks would amount to grounds for a new trial. But let's
26 take up that issue first.

27 Do you intend to file a motion for a new trial under
28 Penal Code Section 1181.1 or not?

1 MR. MAKAN: I don't, Your Honor. I've reviewed 1181
2 prior to today's date. It's my opinion that there's not
3 sufficient basis for such a motion to be filed.

4 THE COURT: All right. Mr. Butler, under Penal Code
5 Section 1181.1, there are only certain well defined grounds
6 that would support a request for a motion for a new trial.
7 For example, there's newly discovered evidence that couldn't
8 have been discovered before trial. And so there's a number of
9 grounds that exist.

10 And so what Mr. Makan is indicating to me is he
11 doesn't think any of the grounds under Penal Code Section 1181
12 exist to support a motion for a new trial.

13 So what do you want to tell me about that?

14 THE DEFENDANT: Is ineffective counsel under there.
15 I'm just -- just basically my motion's for if all these things
16 were covered, then I -- I would have had a better chance.
17 Actually, to me, I would have a fair trial.

18 I mean, there were people saying I did this and that,
19 but there was no one allowed to go on the stand in my behalf
20 to say I was not there. I mean, I asked plenty of times
21 before trial to testify. I was denied. I even asked during
22 trial.

23 THE COURT: Okay. Well, you know, let's take up that
24 issue, then.

25 Mr. Makan, Mr. Butler is claiming that you advised
26 him not to testify and, in fact, it was his true desire to
27 testify. Did you want to explain your strategy on that.

28 MR. MAKAN: Your Honor, with regards to my opinion on

1 whether he should testify, there are -- as Mr. Peterson
2 indicated in his pretrial brief, Mr. Butler does have some
3 prior offenses which would amount to moral turpitude and are
4 felonies.

5 But the main reason for my opinion that he not take
6 the stand was that there was gang testimony and gang
7 information which the prosecution sought to introduce which I
8 requested be excluded from the case-in-chief which would have
9 then become admissible as rebuttal and as part of
10 Mr. Peterson's rebuttal case.

11 THE COURT: And that was my ruling before trial.

12 Right.

13 MR. MAKAN: Right. And I thought the prejudicial
14 effect of that was so substantial that it was not worth the
15 risk of him testifying, especially in light of the testimony
16 as we heard it during the trial.

17 The last time I specifically discussed his -- him
18 testifying was prior to trial. I did meet with Mr. Butler on
19 the Friday before closing statements when we were dark in
20 trial to discuss Miss West's testimony and whether or not I
21 was going to be putting Miss West on the stand.

22 At no time during the trial did Mr. Butler
23 specifically indicate to me that he wished to take the stand.
24 That is not something we had discussed at the last visit
25 during trial, but he did not request at that time to take the
26 stand in his own defense.

27 THE COURT: All right. You understand, Mr. Butler,
28 that if you would have taken the stand to testify, you would

1 have been impeached with some of your prior convictions before
2 the jury. You understand that?

3 THE DEFENDANT: Yes. I was -- I was aware of that.

4 THE COURT: Right. And that if you would have taken
5 the witness stand, I excluded certain evidence with regard to
6 criminal street gangs. And I'll have to check the record, but
7 my recollection is that it couldn't be used by the People in
8 their case-in-chief. But it could be used as rebuttal
9 evidence if you took the witness stand to testify.

10 * And when you bring up criminal street gang
11 affiliations and/or testimony before a jury, that can have a
12 very harmful effect to the defendant. *

13 But in any event, let's talk about Keyona West. I've
14 got the letter from her. *

15 Mr. Makan, why didn't you call Miss Keyona West to
16 the witness stand?

17 MR. MAKAN: Your Honor, there are a number of
18 reasons. She was on the witness list I provided to the Court.
19 I did provide her statement to Mr. Peterson. She was also
20 subpoenaed and on call for trial.

21 * The specific reason I did not call her and the
22 reasons I discussed with Mr. Butler when I went to visit him
23 during trial was that given the state of the testimony, I
24 thought it was the stronger argument to go after the
25 inconsistencies and the inconsistent identifications and
26 inconsistent versions of events that the witnesses were
27 testifying to, especially with regard to identification. This
28 being after a juror was identified as the suspect. *

1 I also thought that it would open up the door to
2 statements that Mr. Butler made to Detective Colmer and
3 Detective Crawford indicating he was homeless at the time of
4 the incident.♦

5 Miss West -- her testimony would have been that
6 Mr. Butler was living with her. This would have allowed the
7 prosecution to say that Mr. Butler, in fact, lied to the
8 police when he had the opportunity to say, I live with
9 someone. Go talk to her.

10 THE DEFENDANT: I didn't say I was homeless the night
11 of the incident. The day I was arrested I said I was
12 homeless. Because I was talking to -- you could ask the
13 police officer. I already went over all this with him. I
14 don't know why it's still a problem.

15 Like she kept -- I kept arguing with him. No, I want
16 her to get on the stand. She kept calling him and leaving him
17 messages. He never answered her call whatsoever.

18 THE COURT: And I'm asking him the legal reasons why
19 he didn't call her to the witness stand. And one of them that
20 he just said is because of the fact that apparently you said
21 to the officers on the day of the incident when they asked you
22 where you lived, you said you were a homeless person.♦

23 THE DEFENDANT: Okay. That has -- I understand that.
24 I've already told him that. I told him when I first met him,
25 I said I was homeless. And I told him why. And that has
26 nothing to do with her statement. Because I gave him a rental
27 agreement or a lease to our apartment that proves that she is
28 telling the truth that we lived together.

1 THE COURT: Then why did you tell the police officers
2 that you were homeless?

3 THE DEFENDANT: First, because I have a girlfriend
4 and my daughter at this house. I know how this officer is.
5 He -- I've never been arrested by this officer, but for some
6 reason, I keep coming in contact with him. When I see him, he
7 harasses people. So I don't want my girlfriend and my
8 daughter to go through that and I'm not there.

9 MR. MAKAN: Your Honor --

10 THE DEFENDANT: She complained about it in the phone
11 calls, being harassed.

12 THE COURT: Okay.

13 MR. MAKAN: And there was one more reason why, was
14 given the calls that were heard, the possibility of her being
15 impeached based on items that I asked to be excluded from the
16 calls, such as whether or not there's any basis to it, her
17 potential involvement in transporting marijuana, providing
18 marijuana to other people. And some based on the quality and
19 the content of the jail calls, her impeachment -- the
20 impeachment evidence against her in terms of bias and motive
21 was very strong, in my opinion, and that was the other reason
22 I did not call her to testify.

23 THE COURT: Okay. And what about Mr. Butler's claim
24 that you "refused to call Michelle Nichols from the Department
25 of Justice to provide pictures and/or the actual gun recovered
26 from a Marcellles Oliver as evidence, as well expert testimony
27 that that gun recovered was the gun that fired the shots in
28 this case and the gun was not black but silver in color"?

1 MR. MAKAN: Your Honor, I did have Miss Nichols
2 subpoenaed. She was on call. I also had Deputy Hurian
3 subpoenaed. He was also on call. And that was in the
4 circumstance that Mr. Peterson did not agree to the
5 stipulation, which he did agree to, which was to have
6 Detective Holland testify to those facts, which was that the
7 gun was silver or chrome in color. It fired -- and I believe
8 the detective's testimony was every round, every casing, came
9 from that silver gun and that that gun was recovered from
10 someone other than--

11 THE DEFENDANT: And it was objected to.

12 MR. MAKAN: -- Mr. Butler.

13 THE DEFENDANT: And the jury was instructed not to
14 listen to it.

15 MR. MAKAN: The question that was objected to I
16 asked, this was someone that was not involved in this case.
17 That was not covered by the stipulation.

18 THE COURT: Correct.

19 MR. MAKAN: And that's a question that was objected
20 to. But with reference to the gun, the casings, the bullets,
21 that it was not found in Mr. Butler's possession, that's all
22 the information I was going to request or elicit from those
23 two witnesses, which was agreed to via stipulation. And the
24 jury heard that testimony.

25 THE COURT: Right. And that was uncontested. So it
26 was uncontested that the weapon that fired the shots that are
27 the basis of charges in this case was silver in color and that
28 it was retrieved from someone else, not --

1 THE DEFENDANT: I told him --

2 THE COURT: -- not from you.

3 THE DEFENDANT: I wanted that person, not the
4 detective. That's not even for me anyway. He's on the D.A.'s
5 side. So why would I want him to present it? I wanted that
6 person specifically because she could show pictures or the gun
7 so they could actually see the gun, not just him saying it.
8 He brought up that gun for a second, and that was it. It was
9 not heard of any more.

10 THE COURT: We gave the jury a stipulation and then I
11 read them a jury instruction that says, You must accept these
12 facts as true that the gun was silver and that the gun was
13 located on another person on a different day, okay.

14 THE DEFENDANT: But then the other person that had
15 the gun, the same street as these witnesses or victims live
16 on. That's why I wanted it to be heard too.,

17 THE COURT: Okay. That was on Adrienne Avenue.

18 THE DEFENDANT: Yeah. But that -- they weren't told
19 that. They were just saying it was someone else recovered
20 with it.

21 He was worried about all this gang stuff. I've never
22 been convicted of a gang member, never admitted to it, or
23 anything like that. So I don't understand why that's a
24 problem. The D.A. can bring it up, but there's no -- there's
25 no proof of that. I honestly was prepared, whatever he said
26 about gangs, just so all this stuff could be hear -- heard.

27 MR. MAKAN: Your Honor, that was --

28 THE DEFENDANT: All --

1 MR. MAKAN: I don't mean to interrupt. That was
2 something Mr. Peterson brought up, which was his intention to
3 call as rebuttal experts to talk about the concept of the gang
4 gun. That just because a gun is found on someone else does
5 not necessarily mean that that gun is not connected --

6 THE DEFENDANT: But how is it a gang gun?

7 THE COURT: You know, Mr. Butler, you keep
8 interrupting Mr. Makan. See the court reporter? She can only
9 take down one person talking at a time.

10 THE DEFENDANT: Okay.

11 THE COURT: So why don't you let him finish what he
12 wants to say, and you tell me what you want to say, okay, and
13 not interrupt.

14 THE DEFENDANT: All right.

15 THE COURT: All right.

16 MR. MAKAN: And in this case, given that it would
17 come in as rebuttal impeachment, whatever the proposed
18 testimony was, whether using it as a basis for Mr. Butler's
19 gang membership or the idea of a gang gun, that's not
20 something that necessarily has to be turned over to me since
21 it is solely for the purpose of impeachment. That's the same
22 obligation or same rule that applies to defense. That I don't
23 have to turn over something that applies solely to
24 impeachment.

25 It was, in my opinion, opening a very large door, and
26 I don't really know what's behind it. And I thought the risk
27 of that was too great in this case.

28 THE COURT: What did you want to say, Mr. Butler?

1 THE DEFENDANT: Um, I don't understand how he would
2 say it's a gang gun if he doesn't even know the person was
3 arrested with it. He doesn't even know if I know the person
4 who had the gun. So him saying this was a gang gun, it's
5 being passed around through gang members, that's just
6 ridiculous for him to say it. It's just -- I felt like --

7 THE COURT: Well, he would -- your attorney wouldn't
8 say that. Mr. --

9 THE DEFENDANT: I know that.

10 THE COURT: Mr. Peterson would say it.

11 THE DEFENDANT: I know. And it seems like every --
12 it seems like every decision Peterson wanted, it's like he got
13 it, no matter what. All the things I asked for was just shot
14 down. I didn't get none of that.

15 THE COURT: Well, you got the stipulation that the
16 gun was not a black gun, that it was a silver gun, and that
17 you weren't in possession of it when it was seized.

18 THE DEFENDANT: I understand that. But I wanted the
19 actual person to present that. I wanted that officer to get
20 on the stand and say that, not someone else.

21 But another problem was these phone conversations. I
22 told him he's -- he's -- he said I talked to him Friday and I
23 didn't say nothing about testifying. When these conversations
24 first got entered, I told him that I wanted to testify to
25 clear it up. Because how he's going to say that this gun --
26 the guy I was talking, Clinton Cabebe, was talking about that
27 gun on July 3rd when they recovered the gun on June 10th?

28 And why the D.A. was lying? I told him -- I asked

1 him, my lawyer, Why is he lying? The gun was recovered on
2 June 10th. Why is he saying that this gun is the gun that was
3 used? Well, that didn't get heard during trial. That's why I
4 wanted these specific people up there, so all that could be
5 cleared.

6 THE COURT: Mr. Makan?

7 MR. MAKAN: Your Honor, with regards to specific
8 dates and with regard to the argument, I think Mr. Butler is
9 referring to Mr. Peterson's closing argument. There was --
10 from my recollection, there's no testimony that anyone could
11 say whether or not the gun that was discussed on the tape is,
12 in fact, the gun that was used. I only heard reference to
13 that in Mr. Peterson's closing argument. And in the context
14 it was in, was inferences or reasonable -- what he believed
15 was reasonable connections that could be made based on the
16 calls. He says that must be the -- what other gun would they
17 be talking about? something to that effect. I don't recall
18 his exact wording. But I don't recall any witness
19 specifically saying the gun that they are -- that is being
20 discussed is, in fact, this gun that was recovered.

21 THE COURT: I don't recall that type of testimony
22 either.

23 THE DEFENDANT: It wasn't testimony. Peterson was
24 asking Detective Holland about asking these questions, and
25 he's just agreeing with it. So he's asking the questions like
26 this, and he's just saying, Yes, yes. You're right. Yes. So
27 that's basically Peterson saying that, regardless if it's
28 testimony or not. He's saying "Yes" to all the questions.

1 * The phone conversations -- the first copies we had
2 when you had them edited, all the talks about weed out,
3 those -- I read all those, so I knew exactly what was said.
4 But once they are editing, now there's words that was put in
5 it that wasn't even in the original copy. And I told him that
6 I did not say these things or my girlfriend did not say these
7 things. *

8 THE COURT: But they have the audiotape of your
9 telephone conversations from the jail.

10 THE DEFENDANT: Exactly. And it's not in -- when
11 they play the conversations, those words were not in there.

12 THE COURT: You mean the words that I had deleted
13 because I thought it would be too prejudicial to you?

14 THE DEFENDANT: No. I know what you mean by -- the
15 stuff you had deleted, yes. I know. Those weren't in there.
16 I'm saying now the stuff that were -- that you had deleted,
17 well, the rest of that stuff, there was some parts were -- it
18 was originally they couldn't understand what it was -- it was
19 said. So then later when they are edited, it's like there's
20 words there now. Now, all of a sudden, someone understands
21 what was said.

22 THE COURT: Okay. You know, I don't know if you
23 remember this or not, Mr. Butler, but I tell the jury that the
24 transcript of the audiotape, that's not evidence. It's up to
25 you to determine what is or is not said. So I specifically
26 tell the jury that the transcript is not evidence. It's the
27 words that you spoke -- that you determine what Mr. Butler
28 spoke. That's your job.

1 THE DEFENDANT: Okay. I understand that. But let's
2 just be honest. If you're reading something, if you don't
3 understand it or you didn't catch something and you're just
4 reading, you're going to take that as that being -- as those
5 words being said. That's just --

6 THE COURT: Well, then the jury would be ignoring my
7 admonishment to them that the transcript is not evidence. I
8 think you'll recall I mentioned that to them more than once.

9 THE DEFENDANT: Yes, I know you did.

10 THE COURT: Yeah. It's not evidence.

11 THE DEFENDANT: I'm -- I -- I told Makan that this is
12 not what's said.. Why is this in here? He's just agreeing
13 with the D.A. Well, it sounds like you said that. Sounds
14 like you said -- no, it does not sound like none of that
15 because they played the tape. I know. I remember every
16 conversation I had, what I said, what people said to me. That
17 was not said. What was written in those sentences is not even
18 how I talk or the people I talk to talk.

19 MR. MAKAN: Your Honor, I can clarify that.

20 THE COURT: Okay.

21 MR. MAKAN: After I received those transcripts, I did
22 listen to the calls and I did review the transcripts, at least
23 two versions of it. The first was the full version that we
24 received. After that was the first proposed redacted version.

25 In my opinion, based on listening to the tapes and
26 reading the transcription, there was nothing in there that
27 was, in my opinion, an exaggeration, I guess, is the best word
28 for it, or a substitution for what could be reasonably

1 understood on the tape. The transcriptions, in my opinion,
2 were fairly accurate. There were some staticy words which
3 could be interpreted as what it was on the -- as what was on
4 the transcripts.

5 And ultimately, with the Court's admonishment that
6 the transcripts themselves are not evidence as they were a
7 reasonable interpretation of what you hear on the tape, that
8 is why I did not object to the transcripts as they were
9 provided.⁶

10 THE COURT: Okay. And, Mr. Makan, according to this
11 letter from Mr. Butler, you refused to call a Genesis Guerrero
12 after she gave a statement that she knew the person who
13 pointed the gun at Roberto Lareos, but was not able to
14 identify anybody in the photos.

15 MR. MAKAN: Right. Your Honor, Miss Guerrero is the
16 daughter of Maria Alcalá and Roberto Lareos. She was not
17 present on the night of the incident. Her statement comes in
18 when Detective Holland was interviewing Miss Alcalá and
19 showing her the lineups.

20 Ms. Guerrero states that, I've heard people talk
21 about this. I know who they are referring to. And she does
22 not identify anyone from the lineup. Her identification, lack
23 of identification, is based on hearsay. And ultimately, it
24 was my opinion that her lack of identification would not
25 surpass a foundational objection.

26 Seeing as how she was not a percipient witness, there
27 was no problem with the identification that she was
28 corroborating, and that's why I did not call her as a

1 witness.

2 THE COURT: Okay. Did you have anything else you
3 wanted to say in this area?

4 THE DEFENDANT: Um, yes.

5 THE COURT: Go ahead.

6 THE DEFENDANT: As far as her statement, I mean,
7 the -- Detective Holland was talking to her mother and
8 Roberto. And she came, um, willingly and said this, and
9 didn't identify me. So I felt like that was helpful, because
10 there's one person saying that I did this, and then there's
11 two people saying I didn't.

12 If -- if her statement wasn't relevant because she
13 wasn't there, then why was another witness's statement
14 relevant and he admits he wasn't there? That's my --

15 THE COURT: Who are you talking about?

16 MR. MAKAN: Your Honor, he's referring to --

17 THE DEFENDANT: Jorge Adame. He was not present the
18 night of the crime happened, but he was presented as a witness
19 against me. So I don't understand why some -- someone that
20 would be helpful to me is not presented as a witness. I just
21 don't understand that.

22 I've talked to him a zillion times about it. It's
23 every -- everything I've asked I felt would help me get a fair
24 trial was not granted. I mean, wasn't done. That's how I
25 feel.

26 THE COURT: Mr. Makan?

27 MR. MAKAN: Your Honor, with regards to Jorge Adame,
28 I believe I did object -- I don't recall my 402s off the top

1 of my head. I believe I may have objected to his introduction
2 as a witness. He was not a percipient witness.

3 However, even if I hadn't, the way the testimony
4 went, even though he was not present, he was present when
5 Mr. Duarte supposedly identified Mr. Butler a couple days
6 after the incident. His testimony would have -- or I think
7 did come in as a statement of prior identification.

8 Especially given the confusion that happened with
9 Mr. Duarte who had just finished testifying, his statement
10 would have been exempt or excluded from hearsay as it is a
11 statement of prior identification.

12 THE COURT: Okay. And Mr. Butler is asking why you
13 haven't filed a sentencing brief in this matter along with
14 raising some 654 issues.

15 And let me just say this, that you've raised Penal
16 Code Section 654. And essentially what that means,
17 Mr. Butler, is you can be convicted of more than one crime for
18 the same behavior, but you cannot be sentenced for more than
19 one crime if you had the same intent and if you had the same
20 objective. In other words, if it's part of the same course of
21 conduct.

22 And I can tell you, sir, you do have 654 issues in
23 your -- in your charges. And there are charges that are going
24 to be 654 to other charges. That's something as the Judge,
25 though, that I need to determine.

26 If Mr. Makan wishes to file a brief, he can -- he can
27 do so. But there are counts to which you'll be sentenced that
28 are going to be stayed pursuant to Penal Code Section 654

1 because, in fact, it's the same course of conduct. That is
2 going to happen.

3 But in any event, Mr. Makan, do you feel that it
4 would be beneficial to your client to file a sentencing brief
5 with the Court?

6 MR. MAKAN: Your Honor, my statements for sentencing
7 which I would make in a brief I was going to make orally on
8 the record, especially since I received Mr. Peterson's brief
9 yesterday. I know he does mention the 654 issues.

10 THE COURT: He does. He breaks that down.

11 MR. MAKAN: And that was something else we,
12 discussed.

13 THE COURT: And we also have it in the probation
14 officer's sentencing report.

15 MR. MAKAN: All the sentencing issues which I would
16 normally just type out in a brief, I was going to opt to make
17 those orally at the time of sentencing.

18 THE COURT: Okay. And let me just tell you this,
19 Mr. Butler. In your case, sir, you're ineligible for a grant
20 of probation. I don't have discretion when it comes time to
21 sentencing. I do have discretion in terms of whether to
22 impose low, mid, or upper term, and I do have discretion when
23 it comes to whether or not some of the counts should be run
24 concurrent, at the same time, or consecutive. I do have some
25 discretion there.

26 But under the law, because you used a firearm in the
27 commission of the crime, you are ineligible for a grant of
28 probation. So your sentence under the law has to be a

1 sentence to State prison.

2 THE DEFENDANT: Um, I already knew if I was to be
3 convicted there was no way to get probation.

4 THE COURT: Okay.

5 THE DEFENDANT: So I'm aware of that.

6 THE COURT: All right. Is there anything else,
7 Mr. Butler, you want to bring up with me or --

8 THE DEFENDANT: Another reason why I wanted to
9 testify, um, like, I've already admitted that I did lie, you
10 know. I had, like, as far as my opinion, a good reason why.
11 Even though that doesn't make it right that I lied about being
12 homeless when I talked to the officers.

13 But I wanted to testify because I kept asking for a
14 lie detector test. First it was offered. Then I continued
15 asking for it to show --

16 THE COURT: When it was offered, what was your
17 response? What did you say?

18 THE DEFENDANT: I said, yes, I wanted to take it. I
19 thought I was going to take it right then and there. But the
20 officer -- he said, No. We'll -- we're going to have to call
21 you in a few days. I said, Okay. All right. Call -- I had
22 my hand out to shake his hand, and I was ready and willing to
23 take the lie detector test. And I -- and I continued asking
24 during the whole time. Never happened.

25 So I wanted to get on the stand, and because it -- it
26 would show that even though Mr. Peterson would say that I'm
27 admitting guilt through these conversations, that at the
28 police station --

1 THE COURT: That's just his legal argument.

2 THE DEFENDANT: Yeah, I know. I'm just saying,
3 but -- but they heard it. So by me saying this, no, I
4 continued to asking for a lie detector test so I could prove
5 that I'm telling the truth would have been a lot helpful to
6 me.

7 THE COURT: But let me mention this to you,
8 Mr. Butler. The results from lie detector tests are not
9 admissible at trial.

10 THE DEFENDANT: Why do people offer it? That's what
11 I don't --

12 THE COURT: Usually it's offered before criminal
13 charges are ever filed, and it goes into a determination by
14 the District Attorney's Office as to whether to file charges
15 or not.

16 I think in your case -- I think Mr. Makan did a very
17 good job presenting the strongest case that he could for you
18 when you consider all these variables. I mean, he made a
19 strong argument in his closing argument about the fact that
20 there was not a positive identification of you as the shooter.
21 I mean, we know that certain crimes were committed against the
22 victims here. The real question was identity, who did it.
23 And I think Mr. Makan did a good job raising a question in the
24 minds of the jurors as to whether it was you or not. That was
25 the strongest case that he could have made for you. And it
26 seems like he did a good job, in my opinion, raising the
27 question in the minds of the jurors whether you're the person
28 that committed these crimes or not.

1 THE DEFENDANT: I know. That's not -- that's not my
2 problem. I'm not even talking about that. I'm talking about
3 all the stuff that didn't happen, as far as me testifying --

4 THE COURT: Yeah. But what I'm saying is, like
5 you're saying that, Oh, he should have called -- let's just
6 say Keyona West. That he should have called her to the
7 witness stand. But he just explained to me why he didn't,
8 because he felt that she would be impeached by Mr. Peterson.
9 And that rather than helping your case, it would hurt your
10 case because it would make it look like you're having her
11 testify on your behalf as -- as a witness and that her
12 testimony is not truthful.

13 What Mr. Makan is saying is, Look. That would have
14 hurt your credibility. It wouldn't have helped it. It would
15 have hurt it. And as it was, you had a strong case when it
16 came to identity, and that was your defense. You know,
17 somebody committed these crimes, but it wasn't Mr. Butler.

18 So he believes -- and he's the professional here.
19 He's the trial attorney. And he has to make strategic
20 decisions based on what he believes is the best way to present
21 the case to the jury.

22 So I understand why you think, Oh, maybe my case
23 would have been stronger if we would have put Keyona West on
24 the witness stand. But after I heard his explanation, I agree
25 with him. I think it had -- was more likely than not that it
26 would have hurt your case, 'cause she would have then been
27 impeached, and then we would have had the whole issue of
28 these jailhouse telephone calls and all the evidence that I

1 excluded during those calls being used by Mr. Peterson to
2 impeach her. *

3 So, I mean, I just -- I understand you're frustrated,
4 and I understand that you think maybe if she would have taken
5 the witness stand or if you would have taken the witness stand
6 on your own behalf that the result would have been different.
7 I don't think so. I think Mr. Makan did the strongest job he
8 could in presenting your case to the jury.

9 I don't expect you to agree with me, but I -- I
10 mean --

11 THE DEFENDANT: I -- I -- I understand what you're
12 saying. But then again, I mean, some of the jurors already
13 said that if -- I mean, if they would have heard what I had to
14 say, it would have been a lot more helpful, regardless. I'm
15 just sitting here listening to everything. All they hear is
16 everything bad against me. There's nothing that I did -- I'm
17 not saying that I didn't do it. There's no one else saying
18 that I didn't do it and wasn't there. Then the, uh --

19 THE COURT: Yeah. But the People have to prove you
20 did it. That's their burden of proof. You don't have to
21 prove you're not guilty. They have to prove that you're
22 guilty. If you would have got on the witness stand and
23 Mr. Peterson would have had a chance to cross-examine you and
24 to bring up your prior convictions and impeach you with those
25 prior convictions, I think that would have hurt your
26 credibility with the jury, because then they would have heard
27 that, Hey. He's been convicted in the past of these crimes.
28 And that would have been prejudicial to you, sir.

1 As you sit here today, the jury did not know that
2 you've been convicted of crime in the past. So it seems to me
3 that if you would have taken the witness stand -- yeah, on --
4 I agree with you. On direct examination when Mr. Makan was
5 doing direct examination of you, you would have had a chance
6 to explain to the jury your version of what happened or didn't
7 happen. But then Mr. Peterson would have been able to
8 cross-examine you. And that's one thing that has the
9 potential for a defendant to get ugly because then he's going
10 to bring up these prior convictions and he's going to ask you
11 about your version of what occurred. And that's when, you
12 know, you would have been -- your credibility would have been
13 in jeopardy before the jury.

14 THE DEFENDANT: I understand that. But I was already
15 prepared for my -- I know my criminal history. I know what I
16 done. So I was already prepared for that being brought up.

17 If you look at my interrogation tape, I -- I was not
18 told that the crime happened on a holiday. I sat there and
19 told them, I don't remember dates like this. It happened this
20 long ago. The only time I remember if I was there or
21 something happened, if it's something important happened that
22 day or it was a holiday. These officers did not say it was a
23 holiday. I found out later after I already went to jail that
24 this happened on Memorial Day. That's how I knew, okay. I
25 was home. That was my whole -- that's what I told Makan.

26 THE COURT: Well, only you know in your own mind,
27 sir, whether you committed these crimes or not. But twelve
28 objective, independent people from the community heard the

1 evidence against you, and they conclude based upon the
2 evidence that was presented here during the course of trial
3 that you were the person who committed these crimes.

4 THE DEFENDANT: I don't know. I guess I'm just not
5 being understood or something, 'cause --

6 THE COURT: What do you think I'm not understanding?

7 THE DEFENDANT: I just -- like, I -- I don't know.
8 Like, if you're -- like, if I'm not explaining things right,
9 what I mean or something. But it's just -- I just feel like,
10 it's just -- I'm just talking just for nothing.

11 THE COURT: Okay. At this time, then, I'm going to
12 conclude that Mr. Makan has provided you with adequate
13 representation in this matter. So therefore, your motion to
14 relieve him as counsel on the basis that he hasn't provided
15 you with adequate counsel is hereby denied.

16 MR. MAKAN: Thank you, Your Honor.

17 THE COURT: Okay. That concludes the matter.

18 THE DEFENDANT: So the sentence is --

19 MR. MAKAN: Friday.

20 THE COURT: Friday, okay.

21 THE DEFENDANT: Um, also --

22 THE COURT: Yes, sir.

23 THE DEFENDANT: -- I've been asking for transcripts,
24 my trial transcript.

25 THE COURT: They are not ready yet. The trial
26 transcripts are not ready yet.

27 MR. MAKAN: I informed him that my office, since
28 we're not handling the appeal, will not receive transcripts.

1 But once we file the Notice of Appeal --

2 THE COURT: Are you going to file Notice of Appeal?

3 MR. MAKAN: After sentencing.

4 THE COURT: So file the Notice of Appeal on Friday.

5 MR. MAKAN: And after that, the appellate attorneys
6 will be provided copies of the transcript.

7 THE COURT: The Public Defender's Office doesn't
8 represent you on appeal.

9 THE DEFENDANT: I can't get them yet?

10 THE COURT: They are not ready yet. You can get them
11 when they are prepared and provided to your attorney on
12 appeal.

13 MR. MAKAN: I did speak with Mr. Butler's mother and
14 indicated she can get the transcript in advance and get them
15 from the reporter.

16 THE COURT: She could.

17 MR. MAKAN: It will cost whatever the reporter quotes
18 her.

19 THE COURT: Your mother can do that, yes. But they
20 will be prepared in your appeal. They are not prepared yet.
21 But when they are prepared, yes, if you or your mother wants
22 to purchase them from the reporter, you can do so directly.
23 Otherwise, they would be provided. If you're unable to afford
24 them, they would be provided to your appellate counsel, and
25 then your appellate counsel can give you a copy of it, okay.

26 THE DEFENDANT: All right.

27 (Proceedings adjourned.)

28

REPORTER'S CERTIFICATE

PEOPLE OF THE STATE OF CALIFORNIA,)
Plaintiff,)
vs.)
DERWIN LEE BUTLER, JR.,)
Defendant.)
CASE NO. RIF151243

I, HELEN K. BOWDEN, Certified Shorthand Reporter,
No. 5395, do hereby certify:

That on March 30, 2010, in the County of Riverside, State of California, I took in stenotype a true and correct report of the testimony given and proceedings had in the above-entitled case, Pages 530 through 557, (Pages 532 through 557 having been ordered sealed), and that the foregoing is a true and accurate transcription of my stenotype notes, taken as aforesaid, and is the whole thereof.

DATED: Riverside, California, May 13, 2010.

Helen K. Bowden

HELEN K. BOWDEN, CSR No. 5395

MV091610328

CONTINUATION SHEET

Page 2 of 4

1 EVIDENCE:

| 2 | 3 <u>ITEM:</u> | 4 <u>QTY:</u> | 5 <u>DESCRIPTION:</u> |
|----|----------------|---------------|---|
| 6 | 7 1.) | 8 1 | 9 25cal.Chrome semiautomatic handgun, Model-Raven, Ser.#3194445 |
| 10 | 11 2.) | 12 7 | 13 25 cal. bullets |
| 14 | 15 3.) | 16 1 | 17 Gun Magazine |
| 18 | 19 3.) | 20 .21 grams | 21 Green leafy substance, similar in size, shape, texture, 22 and color to marijuana, contained in a plastic baggie. |

23 I booked the above-evidence into Moreno Valley Police Station on 061009 at approximately
24 2350 hours.

16 ATTATCHMENTS:

17 1.) Photocopy of Case report # RIF149142
18
19 2.) Photocopy of Probation terms #SWF019149

20 ADDITIONAL CHARGE:

21 11357 (B) HS – Possession of less than 1 oz. of marijuana.

22 DETAILS:

23 On 061009, about 2058 hours I was dispatched to [REDACTED] in the city Moreno Valley,
24 reference a suspicious circumstance. I arrived in the alley behind [REDACTED] about 2105 hours.

25 I saw several subjects in the car port. A trash dumpster had been pushed into the alley. When they
26 saw my police unit the subjects walked into the court yard of the apartment complex. I followed the
27 subjects into the courtyard. All but one subject had left. I contacted a BMA, later identified as (SUS)
28 Marcelles Oliver. The apartment units in this building were being repaired and they were vacant. I
29 believed Oliver was possibly trespassing. I asked him if he had a reason to be in the apartment
30 complex and he told me "no." I could smell the odor of an alcoholic beverage emanating from his
31 person. His eyes were red and watery. His speech was slurred and he swayed in a circular motion.
32 Based on my training and experience, I believed him to be under the influence of an alcoholic
33 beverage.

34 To ensure my safety, I conducted a pat down search of Oliver for weapons. I found a 25 caliber,
35 chrome semi automatic hand gun in his right front pants pocket. The magazine contained 6 bullets

(APPENDIX C)

1 and there was a bullet in the chamber. I placed Oliver under arrest. During a search, incident to
2 arrest, I found a plastic baggie containing a green leafy substance consistent with the appearance,
3 smell, and texture of marijuana in his right sock. The substance later field-tested positive for
4 marijuana.

5 I transported Oliver to MVPD. I read Oliver his Miranda Rights per my department issued Miranda
6 Card. He said "yes" he understood his rights and "yes" he wanted to talk to me. The following is a
7 summary of his statements.
8

9 He had been drinking an unknown amount of "beer" and smoked an unknown amount of marijuana.
10 He told me he was carrying a loaded hand gun for "protection." He told me he had purchased the gun
11 tonight for \$160.00 from an unknown person. He refused to give me any further information about
12 the gun. He told me the "weed" in his sock was his.
13

14 Oliver is on probation (Case #SWF019149). He violated: condition #1 – Obey all laws, ordinances,
15 and court orders. Condition #2 – Not use or posses any controlled substances, unless prescribed by a
16 doctor. He is in violation of 1203.2 PC – Probation Violation.
17

18 Oliver is currently out on bail (Case #RIF149142). He, by illegally possessing a hand gun, violated
19 12022.1 PC – Possessing a hand gun while on bail.
20

21 I booked the gun, magazine and bullets into evidence and requested the weapon be sent to DOJ for
22 test firing and imaging into NIBIN.
23

24 I ran the gun thru Sheriff's Dispatch and was advised it was not listed as stolen. It registered to
25 Steven Castillo Jr. out of Rialto, Ca. I contacted Castillo and the following is a summary of his
26 statements; He is a Sheriff's Deputy working for the San Bernardino Sheriff's Office. He told me he
27 owns the gun I described to him, however, he had not seen it in years. He thought he had left it at his
28 parent's home and was not aware that it was not there. He told me he would check on his gun's
29 status and contact me at a later time. Any further information will be addressed in a supplemental
30 report.
31

32 Oliver was transported and booked into Robert Presley Detention Center.
33

34 I request this report be sent to the Riverside County District Attorney's office for prosecution for
35 12021 (a) (1) PC, 11357 (b) HS and the above listed charges.
36

37 This case will be closed by arrest.
38

39 **CASE STATUS:** ARR
40

41

D. Butler #A19987

REQUESTING AGENCY CASE NO.
MV091450394
MV09161328

CALIFORNIA DEPARTMENT OF JUSTICE
BUREAU OF FORENSIC SERVICES
RIVERSIDE LABORATORY
7425 Mission Blvd. Riverside, CA 92509
Phone No. (951) 361-5000 FAX No. (951) 361-5010

BFS CASE NUMBER
✓ RI-09-005101-0001
RI-09-005229-0001

ATTN: Detective Holland
Moreno Valley Police Department
22850 Calle San Juan De Los Lagos
Moreno Valley, CA 92553

COPIES: 1

PHYSICAL EVIDENCE EXAMINATION REPORT

SUSPECT: MARCELLES OLIVER

OFFENSE: PC 245; 12021(A)(1)

VICTIM: JAVIER DUARTE

OFFENSE DATE: MAY 25, 2009; JUNE 10, 2009

I, the undersigned, declare under penalty of perjury: (1) I am employed by the State of California, Department of Justice (DOJ), Bureau of Forensic Services; (2) I conducted an examination of the material described below in the ordinary course of my work as a qualified examiner, according to approved laboratory procedures that include creation of contemporaneous documentation and the technical review of my work; (3) The observable data is set forth in the associated laboratory case record; (4) Any opinions, interpretations, or conclusions in this report are based upon data in the associated laboratory case record and findings listed below. Note: This laboratory report has been prepared and retained by DOJ in the normal course of business according to DOJ's regular practices and procedures. The Department of Justice Laboratory is accredited by the American Society of Crime Laboratory Directors / Laboratory Accreditation Board (ASCLD/LAB).

SUMMARY/RESULTS

The Phoenix Arms pistol fired the bullet and cartridge case.

EVIDENCE

MV091450394/RI-09-005101

Ferguson of the Moreno Valley Police Department submitted the following items on June 9, 2009:

| Item | Description |
|---------|-------------------------|
| 1016532 | bullet |
| 1016535 | .25 Auto cartridge case |

MV09161328/RI-09-005229

Lamon of the Moreno Valley Police Department submitted the following items on June 15, 2009:

| | |
|---------|--|
| 1031479 | seven .25 Auto cartridges |
| 1031480 | empty magazine for pistol |
| 1031481 | Phoenix Arms model Raven, caliber .25 Auto semi-automatic pistol, SN 3194445 |

EXAMINATION

The Phoenix Arms pistol is rifled with six lands and grooves with a left twist. The safeties and disconnector are functioning. It has a single action trigger pull of 4 1/2-4 3/4 pounds, which is within the range of the several entries for this model in the Trigger Pull Data Search database. The magazine has a capacity of 6 cartridges. I test-fired the pistol using Laboratory ammunition and three cartridges submitted in item 1031479. It functioned properly. The test-fired cartridge cases have insufficient detail on their primers for entry into the National Integrated Ballistic Information Network (NIBIN) database.

(APPENDIX D)

The bullet is .25 caliber. It has six land and groove impressions with a left twist. I microscopically compared it to those test-fired from the Phoenix Arms pistol. I observed corresponding individualizing marks. The pistol fired the bullet.

I microscopically compared the cartridge case to those test-fired from the Phoenix Arms pistol. I observed corresponding breechface marks. The pistol fired the cartridge case.

DISPOSITION

The test-fires will be stored at the Laboratory for five years. All remaining items will be returned to the submitting agency.

EXAMINED BY:


MICHELE NICHOLS
Senior Criminalist

Date of Report: July 2, 2009

Technical review by: R7 Date: 7/3/9

Administrative review by: J. Williams Date: 7/20/09
MLN : mln