and methamphetamine manufacture, and the same is true of Schutt's account.(RT.pp 399.)

Just before his death, Land had become "strung out." Detective Bloemendaal told him he had to seek treatment for his obvious drug abuse, and Land was so desperate for even the $20 to $100 that he got once he got someone arrested, he was begging Bloemendaal for gas money. (RT. pp 444-464.) Land also bought $100 of drugs from Stacey Lucas, based on petitioner's word that he would pay. Then Land failed to pay the debt, and petitioner felt obliged to assume the debt, which he told Lucas he would repay in kind. But this was separate from the $500 to $600 deal with Lucas/ Bancroft, which Land told Bloemendaal would provide a "bust" on the morning of May 26, 1999. Land mentioned nothing of the $100 buy to Bloemendaal, and it appeared to be a separate private deal Land would be unlikely to report to his handler. (RT. pp 418-421; RT. pp 681-682.) Thus, the "drug ripoff" in the context of this case could well have been Land stiffing Lucas for drugs petitioner had to repay. But Lucas said she had no indication petitioner planned on manufacturing the drug to pay this $100 debt. (RT. pp 681-682.)

The prosecutor also sought to downplay evidence of a classic heat of passion; i.e., the personal insult of sexually harassing one's wife and friend and the besmirching of one's credit with drug-using friends by not paying personal drug debts. (See People v. Barton (1995) 12 Cal.4th 186, 201; People v. Fenenbrock (1946 46 Cal. App.4th 1688, 1704-1705.) To refute this as heat of passion evidence, the prosecutor resrted to a variety of evidence. This included planning activity and word; the manner of killing witnessed by Sarah Terry, per the Ranch and other witnesses; and a great deal of consciousness of guilt evidence, including petitioner enlisting the aid of people who avoided fingerprints by wearing socks on their hands, petitioner's wearing gloves, petitioner fleeing, petitioner telling people not to talk, and petitioner purportedly coercing witnesses (Steven Schutt, Robert Teal, Mark Teal, and Larry Kirkland), and petitioner hiding the bathtub. As discussed above, it was stipulated that Mark Teal and Larry Kirkland said petitioner never attempted to

coerce them into giving false testimony.(RT. pp 867-868.)

There are in any event several problems inherent in the use of this evidence to sustain the convictions. First, petitioner was a parolee who admitted killing someone, albeit by accident and/or in self-defense. He was at the Ranch in the course of a preplanned flight, not precisely to avoid a parole violation-which appeared inevitable-but to place his wife with family up north, and hope the prison would also let him discharge his remaining parole time there. Whatever the prosecution's quarrel with prtitioner's logic, the fact he was already absconding from parole before he ever knew Land might call him at the Ranch was well established. (RT. pp 521-531.)

His subsequent involvement in any form of homicide put paid to any chance he would not have his parole violated. Therefore, no consciousness of guilt could rationally be assumed to be a particularized consciousness of guilt of committing the crime charged.

In point of fact, many parolees at the Ranch initially lied to police simply to avoid involvement, and the prosecutor made no attempt to charge them as accomplices or accessories to the offense, based on their guilty-seeming conduct. Yet by the same token, the extreme moral turpitude of most of these witnesses, and their wide variety of conflicting and self-serving accounts, vitiated the intrinsic worth of their testimony. Even if no criminal charges were actually likely to be filed, the prosecution was avowedly aware of most of the Ranch witnesses' criminal liability, to the extent that the trial prosecutor offered in advance to immunize most of the Ranch denizens. (RT. pp 6.)

The prosecutor's open-ended offer of immunity to all but J.D. Fields (believed to have actively abetted the murder) was certainly not something common in murder cases, but it was amply justified by the record. As the trial court observed in sorting through a huge number of prior convictions to be used to impeach prosecution and defense witnesses alike, it was "no beauty contest," as far as which side had more convictions of moral turpitude. (RT. pp 9-28.) Consequently, the not particularly

consistent accounts of these witnesses tended to be visibly colored to favor the prosecution; limit the penal exposure of each witness; and protect J.D. Fields, who was at the least the son of a generous landlord who rented to parolees, and as to Sarah Terry and Bonnie Fields, a lover and son.

Thus, while the prosecutor emphasized that these witnesses who handed the prosecutor petitioner's head were petitioner's friends, the operative word here is "were," because by trial these witnesses were mainly concerned with self-interest and the interests of those near and dear to them. The review of their testimony conducted below establishes their bias in favor of the prosecutor; the great extent as to which all were impeached on crucial and basic factual issues; and the fact that as many or more people depicted Land as carrying a knife, as attributed a knife to petitioner. Furthermore, none of the wildly varied statements of "planning" attributed to petitioner were taken as such by the jury, which did not agree there was a first degree murder. Thus, deference to the jury can only go so far in sustaining this verdict. In fact, the only rational inference from the whole record is that it cannot be clearly ascertained with any certainty what was said, and what occurred before, after, and during the killing. Therefore, there was no solid evidence petitioner committed any homicide which could not be legally justified or excused.

Sarah Terry said at trial that petitioner and his wife came to the Ranch and petitioner helped her paint her bathroom for most of the day of May 25,1999 (RT. pp 198-202, 205), thus at least in part confirming petitioner,s account with the painting, and explaining why some may have seen him with a knife he used to remove trim and open cans. (RT. pp 525-527.) Sarah Terry herself recalled only Land being known to carry a knife, possibly a folding knife. (RT. pp 222.) She described petitioner being angry (as he claimed at trial), for the passes Land made to Sarah Terry and to his wife. Terry offered no testimony of anger over drugs, or any indication of methamphetamine manufacture. She said that, toward evening, petitioner said Land was "fucking up" in his sexual misbehavior, and he was going to "kick his

ass" or give him a "knockout punch." (RT. pp 202-203, 206, 224.)

Per Terry, while they were painting, Dave Friese called petitioner to Bonnie Fields' phone, and petitioner talked to Land there, telling Land they could make money stealing the Fields' gun collection. Then petitioner told the others watching television that Land was coming. All could hear at least his side of the conversation. (RT. pp 203-205.) Then Terry, J.D. Fields, and petitioner waited outside the trailer for Land, and J.D. went and got a coat but not a gun. Petitioner sent Terry back to her own separate trailer nearby. Land drove up, and Terry looked out and saw them by moonlight and exterior light. They argued, with only Land's words audible. He said, "Fuck you. I haven't talked to anybody," and again, "Fuck you," then turned away, turned back, opened his coat, and petitioner (without lunging) moved his hand forward (perhaps with something in it). Land began to fall over. (RT. pp 203-204.)

This was the only eyewitness account offered by the prosecution, and it was unavoidably undermined by being impeached in almost every significant respect. It did nothing to confirm an informant killing/methamphetamine manufacturer scenario. While it did act to refute petitioner's self-defense claims, it did not do so in a ~~trust-~~ worthy manner. At the outset, the account was not initially offered to police, to whom Sarah Terry (consistent with defense expert testimony) said she saw nothing. Then police (at an unclear point) threatened to arrest Sarah Terry for lying, and Bonnie Fields-who was "really furious" that J.D. Fields could be in serious trouble-called police and handed the phone to a crying Sarah Terry. (RT. pp 218-219, 408.) This was after all the Ranch denizens had talked a great deal regarding the incidents (RT. pp 220), and J.D. and Bonnie told Terry that J.D. could be in a lot of trouble. (RT. pp 220-221.) Then for the first time Terry told Detective Ryzdynski she saw petitioner stab Barnes from her trailer. (RT. pp 220.) Yet her account to the detective, and at trial, was suspiciously lacking in anything ever possibly incriminating to J.D., whose whereabouts during the killing are extremely vague, in Terry's account.

A reasonable trier of fact could not have avoided doubt Terry felt she had to deliver petitioner to the police, to avert the danger to J.D. Fields, who was her lover and Bonnie Fields' son. In addition, while Terry explained that she could see what she claimed to see, because she knew the participants (RT. pp 222), in reality her precise testimony on this point was that she could distinguish Land and petitioner, because she knew them. That is not the same thing as saying she could see what they were doing. (RT. pp 222.) In other words, with all the after-the-fact discussions of events, plus pressure from J.D. and Bonnie Fields to provide persuasive prosecution evidence to the police (People v. MICKLE, 54 Cal. 3d at 169), Saran Terry went from seeing some sort of fight with two people she knew, to seeing in her mind the fight that the prosecution wanted. As of trial, the prosecutor still considered J.D. an uncharged participant in a murder (RT. pp 6), and thus as things were going their way, it behooved Terry to continue to pursue the tack which kept her boyfriend out of jail.

Terry initially said she saw nothing, then discussed events with others at length, realized her failure to see anything was detrimental to those nearest and dearest, then "saw" petitioner "stab" Land. The simplest and most logical explanation for this is that Terry told the truth as she saw it in many respects at all times, but her perception was altered by extraneous data after the fact, which (given her need to help J.D.) Terry was unable to separate from her actual perceptions.

While it is the layman's view that "seeing is believing," and that the mind records information much like a camera or videotape machine, eyewitness misisentification is commonplace. (United States v. Wade (1967) 388 U.S. 218, 224 [18 L.Ed.2d 1149, 87 S. Ct. 1926]["The identification of strangers is proverbially untrustworthy"].) While Sarah Terry believed her familiarity with the combatants made her more able to perceive at least their identities, in fact Dr. Fraser's testimony for the defense made it clear that even which person was which could not be perceived in the conditions prevailing at the time.

Rapid violent events in the dark are not readily perceived by stressed witnesses,

whose very stress enhances their susceptibility to suggestion. (People v. Maestas (1993) 20 Cal.App.4th 1482, 1498-1499; Loftus and Doyle, Eyewitness Identification (2d.Ed. 1992),sec.2.05,pp 17-18; United States v. Wade, supra, 388 U.S. at 228,235.) Common misperceptions of how human beings perceive things with their eyes lent a spurious aura of veracity to the prosecutor's argument that people can see plenty at night. Yet as Dr. Fraser noted below a certain level of illumination (well above the level the witnesses described to defense experts at the scene, recreating the events), the cones in the eyes which enable us to see colors and edges simply do not come into play. At that level of light, all that is activated are rods, which cannot as a matter of physiology do more than show blurred areas of light and dark.

Dr. Fraser was an experienced psychologist and neurophysiologist, whose testimony elucidated exactly how Sarah Terry could have sincerely thought she saw what she needed to see to help her lover. He delineated the following scientific consensus as to night vision at crime scenes. Below an illumination of 1 to 3 lux, nothing is visible except light and dark, with no edges or boundaries. The defense experts recreated the lighting and moonlight described by Terry and Friese, including a light they said could have been off during the fight. The illumination totaled a fraction of 1 lux. In such lighting, people fill in their perception and memory with what they expect, or learn elsewhere. Due to "source amnesia"-the phenomenon whereby the brain cannot distinguish what is seen from what is learned secondhand-the expected observation becomes a seemingly objective memory. (RT. pp 834-863.)

According to Sarah Terry, when Dr. Fraser and defense investigators recreated the killing, she had met the two investigators who simulated a fight; she could tell which was which from her trailer window vantage point; and she could see what each held in their hands, with one holding a one-liter soda bottle. (RT. pp 224-227.) Actually, she mistook the one investigator for the other; no one had a soda bottle; and one investigator held and waived a clipboard holding bright white paper. Also, Terry volunteered to the investigators that she could not see what petitioner and

-TO BE CONTINUED