

No. S034725

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ANDRE BURTON,

On Habeas Corpus

PETITIONER'S BRIEF ON THE MERITS
AND
EXCEPTIONS TO THE REFEREE'S REPORT

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PETITIONER’S BRIEF ON THE MERITS

INTRODUCTION

In *People v. Frierson* (1985) 39 Cal.3d 803¹, this Court acknowledged the fundamental nature of a criminal defendant’s right to present a defense by holding that defense counsel may not override his client’s openly expressed desire to defend in the guilt phase of a capital case, as long as there is some credible evidence to support the desired defense.

In 1997, this Court in petitioner’s case issued an order to show cause why relief should not be granted on the grounds that he was denied the right to present a defense at the guilt phase of his capital trial. By doing so, this Court recognized that petitioner had made a prima facie showing that his trial attorney, Ronald Slick, had ignored his request to call witnesses to prove his innocence of the crimes charged, including a robbery-homicide which occurred in Long Beach on February 25, 1983. In 2000, this Court issued a reference order consisting of eleven detailed questions relating to the *Frierson* claim.

Los Angeles Superior Court Judge William Fahey was appointed to sit as a referee in this matter.² After taking evidence, the Referee made numerous findings and ultimately concluded that petitioner had not openly expressed his desire to present a defense and that the evidence petitioner could have presented was not sufficiently credible or probative. As petitioner shows in his Exceptions to the Referee’s Report, the bulk of the Referee’s findings are not supported by substantial evidence. Moreover, the

¹ Hereinafter cited as “*People v. Frierson*” or “*Frierson*.”

² Judge Fahey will hereinafter be referred to as “the Referee.”

Referee denied petitioner of his constitutional and statutory rights to a full and fair hearing in myriad ways, the most egregious of which are summarized below.

First, although the Referee severely limited the scope of the reference hearing, he nonetheless made broad findings which implicated evidence petitioner was not permitted to contest. Prior to the start of the hearing, the Referee declared that the proceeding would be very narrow in scope, involve few witnesses, and would not be a “mini-trial.” The Referee limited the parties to responding to Reference Questions 1-10, postponing the presentation of any evidence specific to Reference Question 11, which in essence asked whether petitioner was entitled to relief under *Frierson*. The Referee also limited the scope of the hearing in other ways. For example, the Referee stated that only evidence actually known to Slick prior to petitioner’s trial was relevant. Thus, petitioner was not able to present potential defense evidence unknown but reasonably available to Slick prior to trial. The Referee also indicated that he would not give weight to statements made by the fact witnesses after trial, since those statements were obviously not available to Slick at the time of trial. The Referee further prevented petitioner from presenting evidence which tended to discredit the prosecution’s case against him because the Referee concluded it was irrelevant.

After substantially restricting the breadth of evidence presented at the hearing, the Referee issued broad findings in ruling against petitioner. After telling the parties they could not offer evidence responsive to Reference Question 11, the Referee nonetheless purported to find against petitioner on this ultimate question. The Referee also repeatedly relied on what he viewed to be the prosecution’s strong case against petitioner,

although petitioner was denied an opportunity to show that this evidence was in fact quite weak. The Referee used post-trial statements by witnesses to find that they would not have been credible at trial, although he previously indicated the statements were not relevant. The Referee determined that the evidence supporting petitioner's desired defense was not sufficiently credible and probative, although petitioner was not permitted to adduce the full range of that evidence.

Second, the Referee denied petitioner a full and fair hearing by repeatedly focusing on Slick's strategic decision-making at petitioner's trial. *People v. Frierson* makes clear that an attorney's strategic choices are irrelevant in assessing whether a defendant has been denied of his right to defend. Because Slick's tactical choices are not relevant to a *Frierson* claim or to this Court's reference questions, the Referee erred in considering them. Moreover, because petitioner could not have known during the hearing that the Referee would pass on the soundness of Slick's strategic decisions during trial, he did not have a fair opportunity to show that they were actually unreasonable.

Third, the Referee applied incorrect legal standards in determining whether petitioner openly expressed his desire to defend and in evaluating whether there was some credible evidence to support his desired defenses. The Referee erroneously reads *People v. Frierson, supra*, 39 Cal.3d 803, as requiring petitioner to articulate with lawyer-like precision the legal defenses he wanted his attorney to present, as well as to name each and every witness to be called, although it was not petitioner's prerogative to determine who would testify on his behalf.

The Referee also misapplied *Frierson* when he assessed whether there was some credible evidence to support a defense by weighing the

evidence Slick could have presented against the prosecution's evidence. Under *Frierson*, a defendant need not show that he was prejudiced by the denial of his right to defend. The Referee therefore erred in considering whether the testimony that the potential defense witnesses could have given was credible and probative by comparing it to the evidence against petitioner. The Referee also incorrectly applied *Frierson* in passing on the credibility of the potential defense witnesses. The Referee stated more than once before the hearing began that he would not be independently assessing the credibility of the potential defense witnesses. He acknowledged that the appropriate question under *Frierson* was whether there was some credible evidence from which a reasonable juror could have concluded that petitioner did not commit the charged crimes. Yet the Referee's findings included the credibility assessments he said he would not make, and they were based upon his subjective opinion instead of upon what a reasonable juror could have found.

Fourth, the Referee unfairly applied disparate standards when evaluating the testimony presented at the hearing. The Referee repeatedly discounted witnesses who gave testimony helpful to petitioner, finding them biased in his favor and their memory lacking. Yet the Referee did not address any of the substantial evidence that Slick was biased against petitioner. Nor did he acknowledge that Slick's recollection of relevant events was extraordinarily poor, often impeached, and rarely refreshed by documents from the trial file, his prior declarations or the trial transcripts.

Fifth, the Referee inappropriately relied on exhibits not admitted into evidence.

Petitioner will also demonstrate that although his opportunity to prove that he is entitled to relief was severely curtailed, he nonetheless has

presented significant, substantial and mutually corroborating evidence which was more than sufficient to meet his burden under *Frierson*. He has shown that he 1) openly expressed his desire to defend, and 2) that at least some credible evidence existed to support his desired defense. This is all that *Frierson* requires.

By a preponderance of evidence, petitioner has shown that he openly expressed his desire to defend. Petitioner presented a wealth of both documentary and testimonial evidence which evinced his desire to prove his innocence. Prior to and during trial, petitioner asked the trial court four times to remove Slick as his attorney and for self-representation. The transcripts of these hearings incontrovertibly demonstrate that petitioner told the trial court he was innocent of the charged crimes and had an alibi, that Slick had not adequately communicated with him about the case, that he wanted the investigation into his innocence completed before trial began, that the police had fabricated his supposed confession, and that his alleged co-perpetrator, Otis Clements, had falsely accused him. Petitioner said the same to Slick and defense investigator Kristina Kleinbauer. Petitioner provided the names of persons who could confirm that he was with them at the relevant times. He also indicated that he had been misidentified by the state's witnesses. Petitioner told Slick and Kleinbauer that he wanted to defend against the guilt charges. Petitioner wanted Slick to call alibi witnesses. After petitioner learned that there was at least one witness who described the perpetrator very differently from the way he looked, petitioner asked that that witness be called as well.

Although Slick claimed at the reference hearing that he had advised petitioner he would present no defense witnesses in order to save his credibility with the jury for the penalty phase, and that petitioner did not

object to this “strategy,” Slick could not say when this conversation occurred or recall any details of it. Slick failed to produce any notes or contemporaneous documentation showing that he informed petitioner that he would not defend. In fact, there was no corroboration of any kind of Slick’s testimony on this point. Although Slick testified that petitioner *never* expressed a desire to defend, this testimony was simply unbelievable in the face of so much evidence to the contrary.

Petitioner also demonstrated by a preponderance that there was some credible evidence to support alibi and mistaken identification defenses. There were at least five persons who could have given mutually corroborating testimony that they had seen petitioner at times that precluded him from committing the charged crimes. There were eyewitnesses to the homicide who described the perpetrator in a way which varied dramatically from petitioner’s appearance. Slick could have supported testimony from these witnesses by effectively cross-examining the state’s witnesses so as to undermine the reliability of the evidence against petitioner.

Because petitioner has met his burden under *People v. Frierson* of showing that he was denied the right to present a defense at the guilt phase of his capital trial, he respectfully requests this Court to grant him relief and reverse his convictions and death sentence. Alternatively, petitioner requests this Court to order further evidentiary proceedings so that he may fully present all of the evidence relevant to his *Frierson* claim.

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STATEMENT OF THE CASE

A. Introduction.

The crimes of which petitioner was convicted arose from two incidents, both of which occurred in Long Beach on February 25, 1983. The first was the armed robbery of Lisa Searcy and Margie Heimann in the parking lot of a K-Mart store. The capital crime, a robbery-homicide, occurred about an hour later. Anwar Khwaja, a convenience store owner, was sitting in his parked car on East Pleasant Street, waiting for his mother, Gulshakar Khwaja, and sister, Zarina Khwaja.³ He was shot by a man who then took a bank bag Mr. Khwaja had in the back seat of his vehicle. Gulshakar Khwaja, who apparently saw the shooting of her son, ran after the gunman and was also shot. Mr. Khwaja survived, but his mother died.

B. Pre-Trial and Trial.

Petitioner Andre Burton was arrested by Long Beach police on February 26, 1983. (CT 57.)⁴ His alleged co-perpetrator, Otis Clements, had been arrested the previous day, shortly after the Khwaja shooting. (Exh. K at p. 26.)⁵ A complaint was filed against petitioner and Clements

³ The police reports and information refer to Anwar Khwaja's sister as Zarina Khwaja. (CT 70; exh. K at p. 4.) At the time of petitioner's preliminary hearing, Zarina indicated that her last name was Peerwani and that her maiden name was Khwaja. (RT 12.) At the time of petitioner's evidentiary hearing, Zarina's last name was Asrani. (HT 1593.) Because this Court's reference order refers to her as Zarina Khwaja, petitioner will do the same.

⁴ "CT" and "RT" refer to the clerk's and reporter's transcripts of petitioner's trial, respectively. "HT" refers to the reporter's transcripts of the hearing before the Referee.

⁵ "Exh." or "exhibit" refers to the exhibits marked during the habeas corpus evidentiary proceedings.

on March 15, 1983 (CT 59-64), and a preliminary hearing was held on March 25th, at which attorney Ronald Slick represented petitioner.

Petitioner was held to answer on all charges. (CT 1-55.)

An information was filed in the Los Angeles Superior Court on March 28, 1983. (CT 65-70.)⁶ Petitioner was arraigned that day, and Slick was again appointed to represent him. (RT 1A; CT 71.) On May 9, 1983, petitioner's case was severed from that of Otis Clements. (RT 6A; CT 103.)⁷ On July 26, 1983, Slick announced ready for trial. (RT 8A; CT 105.)

After Slick announced ready for trial, petitioner's case was trailed several times, although he was not in court on these dates.⁸ Petitioner was next in court on August 10, 1983, when his case was assigned for trial. (CT

⁶ The information charged that petitioner and Clements committed the following crimes: Count I, robbery of Margie Heimann (Pen. Code, § 211); Count II, robbery of Lisa Searcy (§ 211); Count III, murder of Gulshakar Khwaja (§ 187); Count IV robbery of Anwar Khwaja (§ 211); Count V, attempted murder of Anwar Khwaja (§ 664/187); Count VI attempted murder of Zarina Khwaja (§ 664/187). All counts alleged as enhancements personal use of a firearm (§§ 12022.5 and 1203.06(a)(1)), and being a principal armed with a firearm (§ 12022 (a)). In addition, Count IV alleged intentional infliction of great bodily injury on Anwar Khwaja (§ 12022.7) as an enhancement, and Count III alleged the special circumstance of murder in the commission of a robbery (§ 190.2(a)(17)). (CT 65-70.)

⁷ The record does not show why a severance was ordered. (See RT 5A-6A; CT 103.)

⁸ On July 26, 1983, petitioner's case was trailed to August 2, 1983. (RT 9A; CT 105.) Petitioner was not in court on August 2nd, when the case was trailed to August 3rd. (RT 10A-11A; CT 106.) On August 3rd, the case was trailed to August 9th. ((RT 12A; CT 106.) On August 9th, the case was trailed to August 10th. (CT 106.)

108.) At that time, petitioner asked the trial judge for permission to represent himself and for a continuance, stating that Slick was not properly investigating his case or adequately communicating with him prior to trial. The motion was denied because petitioner was not ready to proceed at that time. (RT 1-3; CT 108.) The trial court then heard pre-trial motions. (CT 108; RT 5-7.)

The next day, on August 11th, petitioner again complained about Slick's representation and renewed his motions to represent himself and for a continuance. (CT 109; RT 8-10.) The deputy district attorney left the courtroom, saying that petitioner's statements required "some sort of *Marsden* hearing." (RT 10.) The court again denied petitioner's request for self-representation. (CT 109; RT 20.)

Jury selection occurred on August 11, 12, and 15, 1983. (CT 109-111.) On August 16th, the trial court heard Slick's motion to suppress a statement allegedly taken from petitioner by Long Beach police at the time of his arrest. The motion was denied. (CT 112; RT 312-335.)

The prosecution's opening statement and entire case were presented on that same day, August 16th. The prosecution rested that afternoon. (CT 112.) After the jury was excused for the day, petitioner again objected to being represented by Slick and moved "to resubmit the conflict of interest motion filed verbally on Mr. Slick" on August 11th. (CT 112; RT 390-391.) The motion was denied. (CT 112; RT 391-392.)

On the morning of the next day, August 17th, Slick advised the court that petitioner wished again to move for self-representation. Slick indicated that petitioner had asked him to file a written motion, which Slick declined to do. (CT 179; RT 393.) The court denied the motion because petitioner was not ready to proceed at that time. (RT 393.) After the jury was brought

into the courtroom, Slick rested without presenting any witnesses or evidence. (RT 394.)⁹ The prosecutor then argued his case to the jury. (RT 395-404.) After the court and counsel briefly conferred on jury instructions (RT 404-406), Mr. Slick presented his closing argument (RT 407-411). On that same day, after a little more than an hour of deliberations, the jury returned verdicts of guilty on all counts and found all allegations true. (CT 179-180.)

C. Penalty Phase.

The evidentiary portion of petitioner's penalty phase occurred on August 19, 1983. The People presented one witness and Mr. Slick called two witnesses. Both sides then argued to the jury. (CT 181.) Jury deliberations began on August 22nd. (CT 183.) After requesting a read back of the testimony of the police officer who claimed petitioner gave an oral, unrecorded confession and asking for additional explanation regarding Factor K, the jury returned a death verdict the next morning, on August 23, 1983. (CT 182-183, 201, 203; RT 554-55.)

D. Intent Retrial and Sentencing.

On January 11, 1984, petitioner requested that the trial court strike the sole special circumstance and set aside petitioner's death sentence because the jury had not been instructed on the intent-to-kill element of the felony-murder special circumstance as required by *Carlos v. Superior Court* (1983) 35 Cal.3d 131. (RT 560-OOO.) The trial court denied petitioner's motion and instead ordered a partial new trial limited to the issue of intent

⁹ Before the defense rested, the trial judge dismissed Counts V and VI of the information upon motion of the People. (CT 111.) Also dismissed were the section 12022(a) enhancements for the four remaining counts. (RT 393-394.)

to kill. (RT 560-OOO-560-PPP; CT 227.) The retrial was held in October, 1984. (CT 249, 276.) Again, Slick rested without putting on any evidence. (CT 276.) The jury found that petitioner did intend to kill Gulshakar Khwaja. (CT 276.)

On November 19, 1984, petitioner moved to relieve Ronald Slick as his counsel and substitute attorney Jeffrey Brodey. The motion was granted. (CT 279.) On May 20, 1985, petitioner's new attorney unsuccessfully moved for a new trial. (CT 349.) On June 4, 1985, the trial court sentenced petitioner to death. (CT 350-354.)

E. Post-Conviction Proceedings.

This Court affirmed petitioner's conviction and sentence. (*People v. Burton* (1989) 48 Cal.3d 843.) On October 29, 1987, while his automatic appeal was pending, petitioner filed a writ of habeas corpus in this Court (No. S002936). This Court denied the petition without opinion on June 30, 1988.¹⁰

On August 30, 1993, petitioner filed in this Court another petition for writ of habeas corpus, supported by points and authorities and 64 exhibits. Respondent filed an informal response to the petition on December 16, 1993. Petitioner filed a reply to the informal response on March 7, 1994.

F. Order To Show Cause and Reference Order.

On October 29, 1997, this Court ordered the Director of Corrections to show cause why petitioner should not be granted relief on the ground that he was denied the right to present a defense at the guilt phase of trial. The

¹⁰ The petition was filed prior to this Court announcing that appellate counsel had a duty to investigate and present habeas corpus claims.

return to the order to show cause was filed on October 8, 1998, after this Court granted respondent relief from default.

By confidential order, this Court granted a small portion of the money requested in petitioner's confidential application for investigative funds. After completing the authorized investigation, petitioner filed a traverse on May 17, 2000, with thirteen additional exhibits attached in support.

On October 25, 2000, this Court ordered a reference hearing, directing the Presiding Judge of the Los Angeles Superior Court to select a judge of that court to sit as a referee to take evidence and make findings on eleven questions.¹¹ On April 11, 2001, this Court appointed the Honorable

¹¹ The reference questions are as follows:

1. Did petitioner give Attorney Ron Slick or his investigator the names of witnesses he believed should be interviewed and tell Slick that those witnesses could support a guilt phase defense or defenses? If so, when did petitioner do so, who are those witnesses, and what theory or theories of defense did petitioner tell Slick those witnesses would support? In particular, did petitioner tell Slick that he wanted Slick to present an alibi defense and/or defend on the ground that the eyewitness identification was mistaken or could be undermined by other eyewitnesses?

2. Did petitioner tell Slick that petitioner's purported confession had been falsified? If so, when did he do so, and did Slick have any reason to believe that the officer or officers who reportedly took the confession were not credible?

3. If petitioner gave Slick the names of potential guilt phase defense witnesses, did Slick or his investigator interview those witnesses, when did they do so, what information did they obtain from the witnesses, and of what potential prosecution rebuttal or impeachment evidence was Slick aware when he developed his trial strategy? Did Slick have reason to believe that those witnesses would not be credible?

4. Did Slick keep petitioner informed of Slick's trial plans and/or discuss trial strategy with petitioner and, in particular, did he tell petitioner that Slick did not intend to call witnesses or put on a guilt phase defense because Slick believed that a guilt phase defense likely would be unsuccessful and would make the penalty phase less credible? If so, when and in what circumstances did Slick advise petitioner of this? If not, did Slick discuss his planned guilt phase defense with petitioner, when did he do so, and what did he tell petitioner?

5. If Slick discussed a planned guilt phase strategy of presenting no defense with petitioner, did petitioner then or thereafter object (other than in open court during or before trial) and tell Slick that, notwithstanding Slick's conclusion about presenting a guilt phase defense, petitioner wanted a guilt phase defense presented? If so, when did petitioner do so and what was Slick's response?

6. Did Slick have reason to believe that petitioner's in court requests to represent himself were made for the purpose of delaying trial, rather than dissatisfaction with Slick's trial strategy?

7. Was Slick aware of potential witnesses Elizabeth Black, Ora Trimble, Gloria Burton, Michael Stewart, Susan Camacho and Zarina Khwaja, and, as to each, if so did Slick have reason to believe the testimony of each would be incredible or insufficiently probative to justify presenting them at the guilt phase?

8. Did petitioner tell or make clear to Slick's investigator that he wanted to put on a guilt phase defense? If so, when did he do so and did the investigator relay that information to Slick?

9. Would the potential witnesses, if any, identified by petitioner, have been credible, would they have enabled Slick to put on a credible defense, and did Slick have reason to believe that any would commit perjury if they testified as suggested by petitioner?

10. In particular:

a. Did Detective William Collette tell Slick that Elizabeth

William Fahey, Judge of the Los Angeles Superior Court, as the Referee in this case.

Petitioner filed several confidential requests for investigative and expert funding prior to the start of the hearing in this Court, which were granted in part. Petitioner also filed several prehearing motions in the superior court, including, inter alia, motions for discovery, a motion to clarify the scope of the hearing, a request for a protective order for trial counsel's files, and a *Pitchess* motion.¹²

By letter dated May 21, 2002, Referee Fahey sought to have this Court relieve petitioner's lead counsel Marcia Morrissey in light of her

Black told him that she did not know petitioner's whereabouts at the time and on the day of the charged homicide?

b. Did Black tell Collette that she did not know petitioner's whereabouts at the time and on the day of the charged homicide?

c. Did Collette tell Slick that Ora Trimble told him that petitioner had asked her to provide him with a false alibi for the charged homicide?

d. Did Ora Trimble tell Collette that petitioner had asked her to provide him with a false alibi for the charged homicide?

11. In sum, did Slick override a clearly expressed desire of petitioner to put on a guilt phase defense, and, if so, would that defense have been credible? (*People v. Frierson* (1985) 39 Cal.3d 803, 814-815.)

¹² See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. These motions will be discussed later in this pleading to the extent they are relevant to the reference questions, and issues concerning the fairness of the procedures employed for the reference hearing as well as the reliability of the Referee's findings.

involvement in a lengthy capital trial. This Court declined to relieve petitioner's counsel, however.

G. Reference Hearing.

Testimony was taken on January 13, 14, 15, 16, 17, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 2003. Proceedings concerning the admissibility of exhibits were held on February 3 and March 7, 2003. Additional proceedings regarding exhibit 63, a box of documents that trial counsel Ronald Slick represented to be part of his original file in the case which he had delivered to the Referee on April 21, 2003, were held on April 23rd and May 16th. After briefing and oral argument, Judge Fahey issued his Referee's Report on October 2, 2003. After additional briefing was submitted and the record corrected, Judge Fahey filed a Second Amended Referee's Report¹³ on January 6, 2005, in this Court.

This Court ordered briefing on the merits.

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¹³ Hereinafter cited as "Referee's Report" or "Report."

STATEMENT OF FACTS

A. The Trial Proceedings.

1. The *Faretta* Hearings.

On August 10, 1983, the first day petitioner appeared in court after his attorney Ronald Slick announced ready for trial,¹⁴ petitioner asked the court for permission to represent himself. Petitioner told the court that Slick had shown a lack of interest in his case, had failed to investigate adequately and had not spent enough time with petitioner communicating about the case:

Your Honor, I would like to represent myself due to the circumstances of lack of interest as far as the investigation is concerned with my case. There isn't any that should have been taken care of. I haven't spent or had enough time to communicate with my lawyer because he haven't given me the time, because he feel that to me it is not worth it to him, but to me it is worth it, because it is my life that is involved and I don't want to take the fall for the real person in this crime.

And as far as the investigation is concerned, the investigator has been working with my case is willing to come forth to the court and can work with my – with my case.

(RT 1-2.) The trial court replied that Slick had filed several motions and was ready to go to trial. The court also asserted that Slick was “one of the most effective lawyers in criminal cases” in Long Beach. The judge assured petitioner he could not get better representation than that Slick would provide. (RT 2.)

The trial court then asked if petitioner was ready to proceed that day as his own attorney. When petitioner indicated he was not but still wanted

¹⁴ See Statement of Case, *ante*.

to represent himself, the trial court denied the request because petitioner was not prepared to begin trial immediately. (RT 2.) The judge also assured petitioner he was doing him a favor. (RT 2-3.) Petitioner persisted in his request for self-representation and indicated he was entitled to a continuance. (RT 3.) The trial court disagreed and again denied his request.

After an off-the-record conference at the bench prompted by the deputy district attorney, the trial court asked Slick whether he had investigated the case to the best of his ability. (RT 4.) Slick replied that he had. (*Ibid.*) After another unreported bench conference, the trial court again asked petitioner if he was ready to proceed at that time to trial as his own counsel. Petitioner was not, and his request for a continuance was denied. (RT 5.)

On the next day, August 11, 1983, petitioner asked to address the court again. He renewed his request for self-representation. He again asserted that Slick had shown a lack of interest in his case. Petitioner told the court that he wanted to prove his innocence: “I feel, if I represent myself, I can show to the people that I am not the person who should be taking the fall in this case. . . .” (RT 8; see also, RT 9, 10.)

Petitioner noted that he had just received paperwork relating to his case from Slick. (RT 8.) He said that the police report that he had confessed was not true. (RT 10; see also RT 16.) He claimed that his alleged co-perpetrator Otis Clements was trying to “frame” him. (RT 9.) He again complained about the lack of communication with Slick. (RT 10.)

The prosecutor left the courtroom so the trial court could engage in “some sort of a *Marsden* hearing.” (RT 10.) Outside the deputy district attorney’s presence, Slick assured the trial court he was prepared for trial

and had investigated the case. The court then asked whether Slick had investigated petitioner's claim that he was being framed by Clements. Slick replied that he had. (RT 11.) After the trial court inquired about Slick's experience, it again denied petitioner's motion for self-representation because petitioner was not ready to proceed immediately. (RT 12-13.) The court again informed petitioner that Slick would provide him with excellent representation, stating:

Mr. Slick, from my own personal observation of his performance in this court, not only in capital cases but in all cases, has always done an outstanding job. He has a reputation for being able to work wonders with cases such as this, so you are indeed fortunate, as I pointed out yesterday, to have a lawyer of his caliber assigned to your case. And I am confident that he will do a good job for you.

(RT 13.) Although petitioner had never been at all disruptive during the few proceedings which had occurred in his case thus far, and in fact had addressed the court respectfully, the trial judge warned him against being uncooperative and informed him there were procedures for removing him from trial if he behaved inappropriately. (RT 14.)

After petitioner raised his hand, the trial judge permitted him to speak again. Petitioner again took issue with the accuracy of the police reports and said that he was still working with the investigator, to whom he had recently provided contact information for additional potential witnesses. (RT 15.) He noted that the investigator's report was also inaccurate in part. (RT 16.) When he reiterated that the police report was incorrect, the trial court assured him that his trial attorney would address the inaccuracies during trial. (RT 15-16.)

Petitioner again insisted that he was not guilty and had not confessed and pointed out various weakness in the prosecutor's case against him:

. . . if I was to be guilty of this crime, saying that I have said all this, I am for sure I would have put it on tape, but I know this is not my crime.

When they come get me over my girlfriend's house, I have no heat around me, no weapons, no nothing, no fingerprints, whatever kind of truck they say involved, no nothing. They only have a – a – statements in which the police put together and then signed up under like I supposed to have signed it that I didn't want to put it on the recorder.

(RT 17.)

When the court asked whether he was claiming that he had not made statements to the police as alleged in the crime reports, petitioner explained that he did sign a waiver of rights and talked to the officers but told them he was not involved in the charged crimes. (RT 17-18.) The judge indicated that the trial would be petitioner's opportunity to prove that he, and not the police, was telling the truth. (RT 18.) Petitioner added that his investigator was aware of a similar case in which the police had alleged a defendant confessed but had refused to allow them to record it. Petitioner wanted his investigator to get more information about that case, but the trial court indicated it would be irrelevant to his case. (RT 18-19.) The judge then assured petitioner that Slick would "ferret out any fraud on the part of the police" (RT 19.)

Petitioner then complained that when Slick visited him in jail, he said, "I don't think you are going to win this case and there is nothing I can do about it." (RT 19.) Petitioner explained, "I don't need a lawyer like that." (*Ibid.*) The court informed petitioner he was fortunate to have a lawyer who would level with him, and said that the truth would come out during trial. (RT 20.) He again denied petitioner's motion for a

continuance and for self-representation because he was not ready to begin trial. (*Ibid.*)

After the prosecution presented its case on August 16, 1983, petitioner sought self-representation for a third time. The trial court denied the motion because petitioner was not ready to proceed. (RT 391.)

Petitioner's fourth effort to get Slick discharged came the following day, August 17th, at the very beginning of the day's proceedings. Slick informed the court that petitioner had asked him to prepare some written papers requesting self-representation on petitioner's behalf. Slick had declined to do so, and told petitioner he should address the court himself. The trial court again denied the request because petitioner was not prepared to proceed without a continuance. (RT 393.) The trial proceeded and Slick then rested the defense without presenting any witnesses. (RT 394.)

2. The Guilt Phase.

The guilt phase of petitioner's trial was astonishingly brief. Only five witnesses were called by the prosecution. Their combined testimony lasted two hours at most and filled less than 47 pages of transcript. (RT 342-389; see also, RT 523.)

Lisa Searcy testified that she and her friend Margie Heimann¹⁵ were robbed outside of a Long Beach K-Mart store on February 25, 1983, at about 1:00 p.m. They had just pulled up to the K-Mart parking lot in a truck. (RT 343.) Ms. Heimann was driving and Ms. Searcy was in the

¹⁵ There is some confusion concerning the spelling of Margie's last name. The prosecutor indicated that the information erroneously gave her name as Heimann and that it was actually Heimana. (RT 337.) Lisa Searcy indicated that her friend's last name was Heimann. (RT 343.) Petitioner believes that the correct spelling is Heimann and that her full first name is Margetta.

passenger seat. A man came up to the driver's side of the truck and told them he wanted all of their money. He had a handgun. (RT 344.) Both women gave him money. The man then threatened to kill them if they were hiding any money from him. He told Ms. Heimann to start the truck and leave, and to not look back. (RT 345.) The women left, drove to a nearby Burger King, and called police. (RT 346.) Ms. Searcy identified petitioner in court as the man who robbed her. (RT 344.)

Anwar Khwaja testified that he owned a 7-Eleven store in Long Beach. On February 25, 1983, before 1:00 p.m., he went to the Bank of America on Atlantic to deposit store money. On his way to the bank, he picked up his nine-year-old daughter from school. After making a deposit, he left the bank with \$190 in rolled coins to use as change in his store over the weekend. (RT 349.) He was carrying the coins, which were very heavy, in a white cloth bank bag. He was driving a blue Toyota Corolla. (RT 350.) He and his daughter drove to East Pleasant Street, where his sister Zarina and mother Gulshakar lived, to pick them up. He was planning on taking them to see an apartment in which his sister was interested. (RT 351.) Mr. Khwaja parked at the curb and stayed in the car while his daughter went to get his mother and sister. (RT 351-352.) A man suddenly appeared at the driver's side of his car window with a gun. (RT 352.) The man demanded money and shot Khwaja twice in the head. Mr. Khwaja lost his right eye as a result. (RT 353-354.) The man took the bank bag with coins from his car. (RT 356.) As the man ran off, Mr. Khwaja saw his mother approach. The man then shot her. (RT 355.) The episode lasted "a very short period." (RT 358.) In court, Mr. Khwaja identified the man who shot him as petitioner. (RT 352.) He testified that he was sure of his identification. (RT 356.)

Robert Cordova testified that on February 25, 1983, he was in his bedroom watching television with his brothers, Larry and Del Cordova. They lived on Pleasant Street. (RT 364.) Robert Cordova heard some gunshots and looked out the window. He saw a man running down Pleasant Street toward Atlantic, with what looked like a gun and a canvas bag. (RT 365.) The man was running a little faster than a jog. When Robert Cordova's brother yelled "hey," at the man, he looked at them and chuckled. (RT 366, 368.) The man then kept running. Robert Cordova saw the man for about five seconds. (RT 367.) Most of this time Cordova could not see the man's face since he was running away from where the Cordova brothers were. Robert only got a glance at his face when he stopped, turned and laughed. (RT 368-369.) Robert Cordova estimated that ten seconds passed between the time he heard gunshots and then saw the man. (RT 369.) There was a truck sticking out of the alley, which the man ran toward. (RT 365.) The truck left the alley. (RT 366.) Robert Cordova identified petitioner in court as the person he saw running down Pleasant Street. (RT 365.)

William Collette, a Long Beach homicide investigator, investigated the Khwaja case. (RT 371-372.) He searched 909 California (the home of petitioner's mother Gloria Burton) and 1991 Myrtle (the home of petitioner's girlfriend, Elizabeth "Penny" Black). He arrested petitioner at the latter address. (RT 372-373.) Collette and his partner John Miller spoke to petitioner at the Long Beach police station after petitioner's arrest. They did not tape record this interrogation. (RT 374.) After being advised of his rights, petitioner signed an advisement form. (RT 374, 376.) Initially petitioner denied his involvement in the crimes. Collette then arranged for petitioner to talk to Michael Pella at the police station. (RT 377.)

After petitioner spoke with Pella, Collette had a further unrecorded conversation with petitioner, who allegedly stated, "I will tell you what went down." Petitioner told Collette he went from the home of his girlfriend, Penny Black, to a motel where his friend Otis Clements was residing. He said to Clements, "I thought we were going to make some money today." Clements responded that he was on his way to petitioner's house. Petitioner went to his mother's home; Clements followed and arrived a few minutes later. Petitioner obtained dark blue shirts with Ford emblems for each to wear. They drove around, checking out banks but could not find anyone to rob. They then went to the K-Mart where they robbed two ladies in a truck of approximately fifteen dollars. (RT 378-379.)

According to Collette, petitioner said he and Clements then went to another bank, and finally to the Bank of America on Atlantic and Bixby in Long Beach. They saw a man and a girl in a little blue car. The man was carrying a money bag. Petitioner told Clements to follow them. The man turned off Atlantic onto a side street. Clements did also, and parked in an alley. Petitioner got out and approached the man in the car. He demanded the man's money. The man tried to snatch the gun from petitioner, so he shot him in the face. He grabbed the money and was running away, when a lady tried to snatch him from behind. He turned around and shot her. He ran to the truck Clements was driving, got in, and the two fled. They drove to Penny Black's house and counted the money. (RT 379.) It was approximately \$100 in change. Petitioner claimed he sold the gun and exchanged the coins for dollar bills. He said he spent the \$100 on marijuana and burned the bank bag in Signal Hill. (RT 380.)

After petitioner made this oral, unrecorded statement, Collette asked him if he wanted to make a taped or written statement. Petitioner did not.

Collette then wrote on the advisement sheet that petitioner declined to tape or write out a statement and had petitioner sign it. (RT 381-382.)

Collette spoke again with petitioner on Monday, February 28th. Petitioner again waived his rights. (RT 380.) When Collette sought to discuss the crimes, petitioner said, “What murder? What robbery?” Petitioner said that if he had told them anything about a murder and robbery it was to avoid being framed and that he had lied. He then asked to be returned to his cell. (RT 381.)

Collette testified that he also spoke to Clements, who made a recorded statement. Slick conducted no cross-examination of Collette. (RT 382.)

Dr. Terrence Allen, a medical examiner with the County of Los Angeles Coroner’s office, also testified. His colleague, Dr. Joan Shipley, had performed an autopsy on Gulshakar Khwaja. Dr. Allen reviewed the report created by Dr. Shipley. (RT 385-386.) Dr. Allen opined that Mrs. Khwaja died of a gunshot wound to the chest. (RT 387.) He described the wound as “rapidly fatal.” (RT 388.)

Petitioner’s attorney Ronald Slick made no opening statement. (RT 342.) Slick rested without calling any witnesses. (RT 394.) His argument to the jury consumed five pages of transcript. It largely consisted of a discussion of the meaning of reasonable doubt. He did not speak to the evidence in petitioner’s case or even urge the jury to find a reasonable doubt that his client was guilty of the charged crimes. (RT 407-411.) In closing, Slick urged the jury to take the time to understand the law, discuss the facts, and “do the right thing.” (RT 411.)

In response to this, the prosecutor stated: “Ladies and gentlemen, there is nothing to rebut in that and so therefore I won’t. By all means, take

Mr. Slick’s advice and search yourself and search this case and do the right thing.” (RT 412.)

3. The Prosecution’s Penalty Case¹⁶

The prosecution called one witness, Robert Fletcher, a commissioner in the superior court assigned to the juvenile section (RT 447). Fletcher had reviewed petitioner’s superior court file. (RT 448.) He testified about petitioner’s juvenile adjudications and his placements in a community-camp program and the California Youth Authority (CYA) (RT 499-455.)

Fletcher also testified about the rights a defendant enjoys in juvenile proceedings and emphasized to the jury that a superior court judge reviews the actions of juvenile court commissioners. (RT 450, 451, 456.) Fletcher claimed that the Los Angeles County camp program was heavily oriented toward education, directed by very competent teachers, and included some jobs skills programs as well. (RT 456-457.)

Slick’s cross-examination of Robert Fletcher only added to the damage caused by the prosecutor’s direct exam. Petitioner’s attorney elicited testimony which created the impression that petitioner had repeatedly been placed in nice, non-punitive facilities where he was given educational, vocational and recreational opportunities, that his prior convictions were obviously well-founded in light of all the rights and

¹⁶ Although the reference questions posed by this Court concern the right to defend at the guilt phase of a capital trial, the state has asserted and Slick has testified that he made a tactical decision not to defend at the first phase of petitioner’s trial in order to preserve his credibility for the penalty phase. (See, e.g., Exceptions to the Referee’s Report, sec. B, Reference Question 7, *post* [hereinafter cited “Exceptions, Question 7”].) Because petitioner addresses that claim in this pleading, he includes herein a brief summary of the penalty phase evidence.

review afforded to juvenile defendants, and that petitioner was too dangerous to release during the pendency of his juvenile cases.

Slick elicited from Fletcher his opinion that accommodations in juvenile hall were “fairly nice,” with a gym, music room and a school. (RT 463.) Fletcher said wards were never punished in the juvenile system and that when a youth who misbehaved was placed in solitary confinement it was to teach him rather than to punish him. (RT 466-467.) Family visits were allowed at least weekly. (RT 464-465.) Fletcher admitted that some CYA facilities were much like prison but that others placed wards in apartments and sent them to college. Which facility a ward was sent to was based on his behavior. (RT 469.) Fletcher did not know to which facilities petitioner had been sent. (RT 470.)

On cross-examination, Fletcher reiterated that a judge must review a commissioner’s actions and added that a juvenile defendant had the right to request a rehearing of the commissioner’s rulings. (RT 472-473.) He did not know if petitioner exercised his right to rehearing in all of his cases but did note that at least one of petitioner’s juvenile convictions was reviewed by an appellate court. (RT 473.)

Slick also elicited that petitioner was apparently kept in custody in juvenile hall while his petitions were adjudicated rather than released on bail. (See RT 461-462, 467-468.) Fletcher explained that although there was no right to bail in a juvenile case, a juvenile defendant was entitled to a hearing as to whether he should remain in custody during the pendency of his case. If the court felt that the defendant was a danger to himself or others, he could be kept in custody. (RT 470-471.)

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4. The Defense Penalty Case

After giving a one-paragraph opening statement (RT 476-477), Slick called only two witnesses on petitioner's behalf. Their direct examination testimony consumed approximately 16 pages of reporter's transcript. (RT 478-488; 497-501.)

The first witness was petitioner's mother, Gloria Burton. From her, Slick elicited testimony that petitioner was born on March 14, 1963. Mrs. Burton had eight other children. (RT 478.) Petitioner's father was murdered when he was five years old. (RT 479.) Petitioner did well in school and caused no problems until he was 13. (RT 480-481.) From that age, petitioner began to get into fights. He was put into a camp and various other placements, and never spent much time living with his mother after that. (RT 482.) Some of petitioner's brothers had also been in trouble. (RT 483.) Mrs. Burton had a hard time providing for all of her children. (RT 486.) They did not often receive gifts at birthdays and Christmas. (RT 487-488.) Finally, petitioner's mother testified that she loved her son. (RT 488.)

The second witness was Anthony Campbell, who testified that he had been a deputy sheriff for six months, and had been assigned to the Los Angeles County Jail for the last four months. (RT 497.) Campbell described petitioner's jail cell and environment. (RT 498-501.) Campbell had known petitioner for about two months. (RT 497.) He could not recall any disciplinary incidents by petitioner during this time. (RT 501.)

Slick's argument to the jury for petitioner's life, although a bit longer than his guilt phase argument, was perfunctory. (See, generally, RT 523-

546.) After making some general arguments,¹⁷ Slick contended that the shooting of Mr. Khwaja was not a planned, calculated act (although he said nothing of the fatal shooting of Mrs. Khwaja), but rather a reaction to the victim grabbing for the gun. (RT 532-535.) He averred that petitioner's past conduct demonstrated it was not in his character to cold-bloodedly execute people. (RT 535.) Slick told the jury it should not sentence petitioner to death based on crimes committed as a juvenile and that petitioner's inability to stay out of trouble suggested that he suffered from a mental defect. (RT 535-539.) Slick asserted that petitioner's age of 19 was mitigating (RT 539-540), as was his childhood, which he briefly addressed (RT 541). He claimed there was no evidence that petitioner had received the rehabilitation services described by Commissioner Fletcher as a juvenile. (RT 541-542.)

5. The Limited Intent Retrial

Anwar Khwaja, Robert Cordova, William Collette, and Dr. Joan Shipley testified at the limited intent retrial. (RT 648-685.) The sole issue presented to a new jury was whether petitioner acted with intent to kill at the time of the homicide.

Slick made no opening statement. (RT 646.) He again rested without presenting any witnesses. (RT 686.) His very brief argument closely mirrored the argument he had made in the guilt phase, discussing

¹⁷ Slick spent a substantial portion of the argument addressing the individual responsibility of each juror. (See, e.g., RT 523-529, 544-546.) He tried to convince the jurors that although California had not executed anyone since 1967, they should believe that if they sentenced petitioner to death, the sentence would be carried out. (RT 528.) Slick referred to Cain and Abel as an analogy to show that life without possibility of parole was a "valid" punishment. (RT 529.)

the standard of reasonable doubt. (See RT 691-699.) In the intent retrial, Slick conceded that petitioner intended to shoot but asked the jury to decide whether he intended to kill. (RT 694-695.) He did at least ask the jury to find that the prosecutor had not proved petitioner's intent to kill beyond a reasonable doubt. (RT 698-699.)

B. The Evidentiary Hearing.

1. Petitioner's Case.

Petitioner called 13 witnesses at the evidentiary hearing. Several of these witnesses gave testimony relevant, inter alia, to whether petitioner had openly expressed a desire to present a defense to the guilt phase charges. These witnesses include trial investigator Kristina Kleinbauer, attorney Jeffrey Brodey, Lomax Marshall Smith (petitioner's former counsel in state post-conviction proceedings), Slick and petitioner.

Also called were witnesses who might have testified on petitioner's behalf at trial. Michael Stewart, Susana Camacho and Zarina Khwaja were all present on Pleasant Street at the time of the homicide. Elizabeth Black, her mother Ora Trimble, her sister Hope Black, and petitioner's sister Denise Burton all spoke to petitioner's whereabouts at the times of the charged crimes.¹⁸

¹⁸ Petitioner's mother Gloria Burton, who was also a potential alibi witness, died prior to the evidentiary hearing. (HT 1374.) At the hearing, petitioner sought to call his post-conviction investigator Lynda Larsen to testify to statements made by his mother before her death, as contained in a declaration Mrs. Burton signed on February 19, 2000, which was filed as an exhibit to petitioner's traverse. (See HT 1374-1376; Petitioner's Traverse, exh. 2.) The Referee ruled that Larsen's proffered testimony was inadmissible hearsay, however, and refused to hear from her. (HT 1372, 1376.)

Petitioner also called investigating officer William Collette, to testify concerning his pre-trial contacts with the alibi witnesses.¹⁹

a. Kristina Kleinbauer

Kristina Kleinbauer is a licensed private investigator and a teacher. (HT 219.) She earned a bachelor's degree from Stanford in 1963 and a master's degree from U.S.C. in 1971. (HT 220.) In 1983, Kleinbauer was working as an investigator under Charles Lawrence. (HT 221.) In the early 1980's, she worked on a number of cases for Ron Slick, through Lawrence's investigation agency. One was petitioner's case. (HT 222.) In petitioner's case, Slick directed Kleinbauer, in part, to take a statement from petitioner and determine his participation in the charged crimes. (HT 224-225.) She met with petitioner at the jail on June 15 and 17, 1983, and prepared a report for Slick of what petitioner had told her. (HT 226-227; Exh. 1.) Petitioner made it very clear that he was not involved in the offenses. (HT 227.) Petitioner told Kleinbauer where he was on the day of the crimes. Based on this information, Kleinbauer began to interview persons who had seen him that day. (HT 247.) She interviewed Elizabeth Black (HT 247), Ora Trimble (HT 313), Gloria Burton (HT 257) and Denise Burton (HT 260).

Kleinbauer memorialized the information provided by petitioner and these four witnesses in a report. (HT 246-247, 255, 314-315.) The report indicated that on February 24, 1983, the night before the charged crimes, petitioner stayed with Elizabeth Black at her apartment on Myrtle Street.

¹⁹ As petitioner demonstrates in section C. of his Exceptions to the Referee's Report, *post*, the Referee erroneously prevented him calling several other witnesses at the hearing. Moreover, the Referee limited the scope of the reference hearing to Reference Questions 1-10.

Ora Trimble and Hope Black also lived there. On February 25th, Elizabeth woke early and left for Trade Tech school, shortly before 7:00 a.m. She had woken petitioner up as well, and asked him to look after her young daughter for awhile. Petitioner and Elizabeth agreed that he would meet her at school at about 12:30 p.m. (Exh. 1.)

Later that morning, Ora Trimble and her daughter Hope left their apartment for M.L.K. Park to get some butter and cheese that were being given away. They arrived at the park at about 9:20 a.m. Hope was late for work, so she returned to Myrtle Street and dropped off her butter and cheese. Hope then went back to the park to give the apartment keys to her mother, who was still in line. Trimble returned to the apartment at about 10:45 a.m. Petitioner was there when she arrived, but he left a short while later on his bike. He came back almost immediately, however, because he had forgotten his job applications. As he left again, Trimble told him to tell his mother to come by for some cheese and butter. (Exh. 1.)

Petitioner then went to his mother's home, to tell her about the cheese and butter. Gloria Burton recalled that petitioner stayed at her house a short while and then left. Mrs. Burton took some people to the park for cheese and butter, and then went to Trimble's, arriving at about 12:15 or 12:30 p.m. (Exh. 1.)

Petitioner's sister Denise Burton attended Trade Tech with Elizabeth. Both Denise and Elizabeth saw petitioner at the school at about 12:30 p.m., after he arrived to meet Elizabeth. Petitioner had his bike with him. (Exh. 1.)

Petitioner and Elizabeth left Trade Tech, intending to return to the Myrtle Street apartment. However, one of petitioner's tires had a slow leak, so he separated from Elizabeth to take his bike to his mother's garage.

Elizabeth returned to her home, and arrived there before petitioner did. Gloria Burton recalled that Elizabeth arrived at Myrtle Street at about 12:45 or 1:00 p.m. Elizabeth thought she had arrived home at about 1:00 p.m. Ora Trimble estimated her daughter's arrival at 1:30 p.m. Petitioner arrived shortly after Elizabeth, the time variously estimated to be at about 1:15 (Elizabeth), 1:20 (petitioner), 1:30 (Gloria Burton), or 2:00 p.m. (Ora Trimble). Petitioner did not have his bicycle with him. He was acting in his normal manner and did not appear to be upset or disturbed. Petitioner went into the bedroom and began watching television with Elizabeth, Hope Black and Willie Davis, who was Elizabeth's cousin. Davis had arrived at Myrtle Street shortly after Elizabeth had, but before petitioner. Shirley Cavaness, another cousin of Elizabeth's, also saw petitioner at the Myrtle apartment that day. (Exh. 1.)

Mrs. Burton left Myrtle Street at about 2:00 or 2:30 p.m. to return to her home. Denise Burton came to the apartment shortly after her mother left, and joined petitioner and the others in the bedroom. Elizabeth and petitioner eventually left the apartment together that evening and were together until petitioner's arrest at the Myrtle Street apartment on the morning of February 26th. (Exh. 1.)

On July 15, 1983, Kleinbauer had a conference with Slick, at which she gave to him her report of the information she obtained from petitioner. (HT 266.) Kleinbauer is sure that she and Slick talked about the fact that petitioner had not given any details about the crime because he said he was not involved in it. (HT 266.)

Kleinbauer testified that petitioner was very open and willing to answer any question she asked him. (HT 264.) He insisted he had never confessed to the police. (HT 264, 346.) Petitioner maintained that he was

not at the crime scene, so if anyone identified him as a participant, it was a misidentification. (HT 265.) He said there had not been any lineup with him in it. (HT 265.) Petitioner told her that he wanted witnesses called in his defense. (HT 313.) He never told Kleinbauer that he agreed not to present a defense at the guilt phase. (RT 319-320, 436.)

Kleinbauer continued looking for witnesses after her conference with Slick. (HT 267.) She interviewed eyewitnesses Michael Stewart and Susana Camacho. (HT 267.)

Kleinbauer interviewed Michael Stewart by telephone, as he was living in Oregon at the time. (HT 274, 432.) She prepared a report of the information she received from him. (HT 275; exh. 1.) Stewart told Kleinbauer that he lived on East Pleasant Street in February 1983. On the day of the shooting he saw a red truck back into an alley off Pleasant Street. The truck's passenger got out and started walking west. Later, the driver got out and walked toward some nearby bushes. Both the passenger and driver were black males. Stewart heard what sounded like a gunshot, and then another. He saw a lady enter the street and fall. The man in the bushes ran back to the truck. The passenger came running down Pleasant Street, towards Stewart. The man ran right past Stewart, who saw him carrying a money bag, but did not see a gun. (Exh. 1.)

Stewart told Kleinbauer that he saw the truck drive off. When police arrived, Stewart gave them the first three numbers of the truck's license plate. He was informed 10-15 minutes later that the truck had been stopped by police, with only the driver inside. The police told Stewart they had a suspect, and took him and three young Mexicans (the Cordova brothers) in a police car to a house two to three miles away. Stewart and the Cordovas stayed in the police car and identified the suspect who was standing outside

a police car. The police then had them get out of the car to identify the red truck. They returned to Pleasant Street. (Exh. 1.)

Approximately 30-45 minutes later, police asked Stewart and the Cordovas to return to the house because they thought they had the other suspect, who was the driver's brother. One of the Cordovas thought the second suspect was the shooter. Stewart felt that this suspect was too young, however. He told police the man he saw running past him looked older than the driver, in his late thirties, because he had gray in his beard. (Exh. 1.)

Stewart told Kleinbauer that he was returned to Pleasant Street and kept in a police car for a long time, as he went over his story four to six times with different investigators. He saw police take impressions of muddy footprints and photographs of the scene. (Exh. 1.)

Stewart told Kleinbauer that he never identified the gunman and did not think could, since he saw the man briefly. However, Stewart was definite that the man was older, with gray in his beard. (Exh. 1.)

Kleinbauer also prepared a report of her interview with Susana Camacho. (HT 267-268; exh. 1.) Camacho told Kleinbauer that she was in her apartment on the day of the shooting, folding diapers, when she heard two loud bangs. Camacho stood up, but did not see anything, so she sat back down. After a third bang, which sounded like a gunshot, Camacho stood up again. She saw a child in a woman's arms.²⁰ Camacho also saw someone running eastbound on Pleasant Street towards a red vehicle. Camacho told the police that she thought it was a white man. Camacho told

²⁰ This may have been Zarina Khwaja and her infant son, or perhaps Anwar Khwaja's nine-year-old daughter.

Kleinbauer that she had said the same thing the three times she was subpoenaed to court. When Camacho told police in court that the man was white, she was told that she would not have to worry about testifying. Camacho told Kleinbauer that she did not get a good look at the person running. (Exh. 1.)

Kleinbauer's time sheet reflects that she met with Slick in person on August 10, 1983. (HT 269.) She believes she gave Slick the report she wrote about her interview with Stewart at the meeting. She also believes she told Slick at the meeting that Stewart would be an important witnesses because it seemed like he could exclude petitioner as the shooter (HT 277) and because he had law enforcement experience (HT 380).

In fact, Kleinbauer found all of the witnesses she interviewed to be credible, in her view as an investigator. (HT 289-290.) Kleinbauer is sure that in her discussions with Slick, she told him that the persons she interviewed would be good witnesses, credible and helpful to the defense. (HT 366-367.) Kleinbauer was particularly impressed by the fact that Michael Stewart was very clear that he got a good look at the shooter, who ran right past him, and that the shooter had a beard with gray in it. (HT 275.)

At the time of Kleinbauer's meeting with Slick on August 10, 1983, she assumed the investigation was ongoing. (HT 277, 278.) She later learned that petitioner's trial had started, although not from Slick. Kleinbauer was surprised because she did not feel as though the investigation was complete. (HT 278.)

Prior to trial, petitioner expressed to the investigator his dissatisfaction with Slick. Petitioner told Kleinbauer that he had not seen very much of Slick, that his attorney had not been to visit him. Petitioner

felt the case was not ready to go to trial because the investigation was not complete. (HT 280, 317-318.) Kleinbauer spoke to another attorney, Jeffrey Brodey, to ask for advice about petitioner's situation. (HT 281.) She asked Brodey if petitioner had any recourse. She took notes of Brodey's advice. (HT 282; Exh. 10.) Brodey told her that petitioner could cite the *Faretta* decision, which entitled him to self-representation. (HT 284.) Kleinbauer related Brodey's advice to petitioner. (HT 284-285.) Kleinbauer thought that petitioner expressed his concern with Slick's representation of him every time she spoke with him. Petitioner had not asked her to contact another lawyer or about self-representation. (HT 356, 360.) Kleinbauer contacted Brodey because that was the only thing she could think of to do. (HT 356.)

Kleinbauer has a history of Alzheimer's disease in her family. About six months prior to her evidentiary hearing testimony, she received a preliminary diagnosis indicating some brain deterioration, and began taking medication. (HT 304.) Kleinbauer was not having any problems, however, when she prepared the investigative reports in 1983, or executed a declaration in 1993. (HT 304-307.) She also signed a declaration in 2000. At that time, the only effects of her condition were incidents such as misplacing her keys. (HT 305-307.) At the time of the evidentiary hearing, Kleinbauer was employed as a teacher. Her medical condition did not interfere with her ability to teach. (HT 306.) Despite her medical condition, Kleinbauer felt that she had a sound recollection of the events of petitioner's case, as refreshed by her investigation reports and other documents. (HT 307, 321.)

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b. Lomax Marshall Smith

Lomax Marshall Smith testified that he is an attorney who was admitted to the California Bar in 1973. He has been practicing law in Minnesota since 1990. (HT 27.) Smith worked with another attorney, Samuel Jackson, on petitioner's case. (HT 28-29.) They worked on petitioner's direct appeal and 1987 habeas corpus petition. (HT 33.) Smith moved to be relieved as petitioner's state court counsel in 1993 when a state exhaustion petition was filed by attorney Joel Baruch. (HT 164.) Although Smith is still second counsel in petitioner's federal case, the case has been inactive since state exhaustion proceedings began. (HT 71-72, 164, 179.)

In December, 1985, Smith and Jackson met with Slick about petitioner's case. (HT 33, 53.) The meeting lasted about an hour or less. (HT 34.) The purpose of the meeting was to get guidance from Slick in selecting issues for the appeal, and to get Slick's impressions about the case. (HT 34, 182.) During the meeting, Slick gave them a file folder, which he indicated was his case file. (HT 34.) It was approximately four inches thick. (HT 35.) It included copies of some motions that had been filed, some typed-up investigation reports by investigator Kristina Kleinbauer, police reports and some juvenile records. (HT 35.) No handwritten documents were included. (HT 36, 43.)

Slick told them that the case was a "slam dunk" as to petitioner's guilt and that it would have been pointless to call witnesses. (HT 48-49.) Slick said that he had spoken with the police officers who investigated the case and that they were reliable witnesses who would testify that petitioner had confessed. (HT 49.)

Slick said also he had met with petitioner at the jail and told him that it was a slam dunk as to guilt and that there would be no point in calling

witnesses. (HT 48, 53.) Slick spoke only of one jail visit; he did not mention any other meetings with petitioner. (HT 53-54.) Slick told Smith and Jackson that petitioner had told him (Slick) that he had not confessed, was not a participant in charged crimes, was not present when they were committed, and had witnesses who could attest to his whereabouts when the crimes occurred. (HT 54.) In the meeting with Smith and Jackson, Slick expressed impatience with petitioner's insistence that there were witnesses who could testify on his behalf. Slick said that he had the facility to work with clients such as petitioner, and did not need to talk to them to represent them. (HT 55.)

Slick told Smith and Jackson that petitioner had told Slick that he wanted to present his witnesses. (HT 60; exh. 3.) Slick admitted there were witnesses he could have called. (HT 60.) Petitioner also told Smith that he had told Slick from the beginning of the case that he wanted to put on a defense. (HT 126, 135.) Petitioner's request for a defense was also corroborated by investigator Kleinbauer, who told Smith that petitioner had told her that he had expressed to Slick his innocence and his desire to put on a defense. Although Smith was not sure if the term "alibi" was used, petitioner wanted Slick to call the witnesses who knew where he was when the charged crimes were committed. (HT 147-148.)

Prior to filing a state habeas corpus petition in 1987, Smith and Jackson sought to get a declaration from Slick concerning his representation of petitioner. They called Slick to ask him to prepare a declaration or work with them to prepare one, but they were not successful in gaining his cooperation. (HT 76.) As a "last resort," Smith drafted a declaration which reflected what Slick told them in their December, 1985 meeting. (HT 76, 55-59; exh. 3.) They sent it to Slick and asked him to sign the declaration,

correcting it if necessary, but he did not. (HT 76, 63.) They made a number of attempts to get Slick's cooperation in preparing a declaration but were unsuccessful. (HT 203.)

c. Jeffrey Brodey

Jeffrey Brodey is an attorney who has specialized in criminal defense work since he became an attorney in 1968. (HT 1182-1183.) In November, 1984, Brodey substituted for Ron Slick as petitioner's counsel of record. Brodey filed a motion for new trial, which was argued and denied in May, 1985. (HT 1164, 1167-1168.)

In preparing for the new trial motion, Brodey met with Slick in Slick's office. (HT 1165.) Slick said that he knew petitioner wanted to put on a defense, but Slick felt that it would not work. (HT 1173.)

Brodey also met with petitioner. They met several times, although Brodey could not recall how often. (HT 1184-1186.) Petitioner voiced complaints about Slick's representation. (HT 1165.) Petitioner felt that he was not properly represented by Slick. Slick had refused to call witnesses in his behalf at the guilt phase. Slick failed to visit him or prepare for trial. Slick expressed his opinion that petitioner was guilty and did not seem interested in the case. (HT 1169-1170.) Petitioner told Brodey that he had told Slick that he wanted a defense put on. Brodey recalled that petitioner had wanted an out-of-state witness called, as well as others. Slick would not listen to petitioner, however. (HT 1187-1188.) When petitioner told Brodey that Slick had refused to call witnesses on his behalf at the guilt phase, Brodey understood petitioner to be saying that he had asked Slick to present witnesses but that Slick did not. (HT 1214, 1225-1227.)

Based on what petitioner told him during these meetings, Brodey prepared a declaration for petitioner to be filed in support of the new trial

motion. (HT 1186, 1193, 1197-1198; exh. D.) In the new trial motion, Brodey did not address the issue of whether petitioner had insisted on presenting a defense at the guilt phase of his trial (HT 1215-1216), as *People v. Frierson* (1985) 39 Cal.3d 803, had not yet been decided and Brodey then believed that it was the attorney's decision whether to call witnesses. He focused on other issues, such as ineffective assistance of counsel and the trial court's denial of petitioner's motions for self-representation (HT 1223-1225). Thus, the declaration he prepared for petitioner did not directly address whether petitioner had expressed a desire to defend. (HT 1225-1226.)

Petitioner's declaration did, however, allude to his desire to present a defense, and also raised Slick's failure to communicate adequately with him. In the declaration, petitioner stated, inter alia, that he told Slick he did not commit the crime and did not confess. (HT 1205; exh. D.) Petitioner also stated, "I did know from our investigator that a witness had been located who gave a different description of the person who did the shooting of Mr. and Mrs. Khwaja, and I wanted to know why that witness had not been subpoenaed to come to court." (Exh. D.) Brodey understood petitioner to be claiming that he was misidentified and had wanted to contest the issue (HT 1211-1212) and that he had wanted witnesses called in his defense (HT 1194). Petitioner also complained in the declaration prepared by Brodey that Slick had only visited him once in jail, that Slick told petitioner he did not believe in petitioner's innocence, that petitioner did not know what was happening when trial started because Slick did not communicate with him, and that Slick expressed a total lack of interest in petitioner. (Exh. D.)

Brodey described petitioner as an excellent client, who was always cooperative, helpful and very friendly, which the attorney found surprising considering petitioner's situation. (HT 1170.) Even after Brodey advised petitioner that new trial motions were rarely granted, petitioner remained easygoing and friendly. Petitioner did not become uncooperative after the motion was denied by the trial court, nor did his demeanor toward Brodey change. (HT 1228-1229.)

Brodey recalled being contacted by investigator Kleinbauer about petitioner's case before petitioner was convicted, but could no longer remember the nature of the conversation. (HT 1175.)

d. Petitioner Andre Burton

Prior to trial, petitioner wrote a letter to Slick. (HT 1860.) Petitioner did not recall exactly when he wrote it, but indicated that it was after the preliminary hearing and before he moved for self-representation. (HT 1881-1883.) In the letter, petitioner said that he had not committed the charged crimes and denied telling police that he had. (Exh. 15.) He stated that he was home with his family and noted that when he was arrested no weapons were found in his possession. Petitioner emphasized that no live line up with him in it was conducted and challenged the strength of the state identification case. (*Ibid.*; HT 1920-1921.) Petitioner felt that he was being "framed" for crimes he had not committed (exh. 15) and hoped that Slick would come to the jail to discuss the case with him (*ibid.*; HT 1919).

Petitioner testified that Slick met only once with him in the county jail. Their other contacts were brief meetings when petitioner was brought to court. (HT 1857-1858.) Petitioner told Slick had he had not confessed. He told Slick where he was at the time the charged crimes occurred. (HT 1858-1859.) Petitioner told Slick that he wanted a defense presented at

trial, including alibi witnesses. (HT 1861, 1908, 1909, 1927.) Slick never told petitioner that he would not present a defense. (HT 1861.)

Petitioner also told investigator Kleinbauer where he was on the day of the crimes. (HT 1859, 1911.) Kleinbauer's report of what he told her was accurate except that it failed to note that petitioner told her that he went to his mother's house after he left Myrtle Street. (HT 1859-1860, 1913.)²¹ Petitioner told Kleinbauer that he wanted alibi witnesses called at trial. (HT 1927.)

Petitioner moved the trial court for self-representation because he felt that Slick had not completed the necessary investigation. Petitioner needed help and did not know what else to do. Someone had advised him to ask for self-representation. (HT 1938, 1862.) Petitioner did not know he could ask the court for a different lawyer. (HT 1948-1949.) He had never been involved in a jury trial before. (HT 1953.) Petitioner did not say more than he did during his four efforts to get Slick off his case because he felt that the trial judge was discouraging him from further challenging Slick's representation. Petitioner wanted to be respectful and not get into trouble. (HT 1937.) He felt powerless. (HT 1940.)

e. Ronald Slick

(1) Slick's Contacts With Petitioner

Ronald Slick was appointed to represent petitioner by the municipal court on March 1, 1983. (HT 509-510; see also, exh. 12.) Slick's billing records revealed that Slick visited petitioner in county jail only once prior to trial, on July 1, 1983. (HT 528; see also, exh. 13.) Slick had no

²¹ This testimony was consistent with Kleinbauer's testimony that she had made a handwritten note to this effect. (HT 272.)

recollection of making notes during this interview and did not know whether his file contained such notes. (HT 529.) Slick had little if any recall about his other contacts with petitioner. (See, e.g., HT 515, 516, 544.) Although his billing reflected a conference with petitioner on August 10, 1983, Slick could not say how long it lasted. His file did not contain any notes of this conference. (HT 544-546.) Apparently Slick had no notes regarding any of his contacts with petitioner. (See, e.g., HT 515, 516, 524, 524-525, 526-527, 541, 544.)²²

Slick acknowledged that petitioner told him he was not involved in the charged crimes and that he was not at the scene when they occurred. (HT 561.) Petitioner told his attorney that he had not confessed and that the police were “framing” him. (HT 561, 723, 727, 854-855.) Petitioner told Slick “early on” that the police had made up the confession attributed to him. (HT 728.)

Petitioner also informed Slick that he was not involved in the crimes via a letter he sent to his attorney. In the letter, petitioner asserted that Clements was trying to shift responsibility onto him for the crimes. (HT 560-562.)²³ Slick was sure that he did not answer petitioner in writing. He

²² None of the various trial files Slick produced contained any notes of Slick’s contacts with petitioner. (See exhs. I, 36 and 63.)

²³ A report prepared by Dr. Sharma also informed Slick that petitioner denied involvement in the charged crimes. Petitioner told Dr. Sharma that he had no direct knowledge of the charged crimes and claimed that Otis Clements probably was involved and trying to frame him. Petitioner denied being in the vicinity where crime occurred. (HT 549-551.) Despite this evidence, Slick claimed to a representative of the Attorney General’s Office that petitioner had never told him that Clements was trying to frame him. (HT 1082-1083.)

could not recall whether he responded to the issues raised in the letter during direct contact with petitioner. (HT 560.)

In his evidentiary hearing testimony, Slick stated that he gave petitioner his evaluation of the case. Slick told petitioner that he would lose. This occurred early on, although Slick could not say when. (HT 765-766.) Slick guessed that it was during the July 1st jail visit, although he could not say for sure. (HT 1099-1100, 1103.) Slick did not know whether he had information about the alibi witnesses or eyewitnesses Stewart or Camacho when he informed petitioner that he would lose the case. (HT 767.)

When Slick told petitioner that he would lose, petitioner did not like it. Slick claimed that petitioner then became evasive and uncooperative. (HT 766.) Slick asserted that they never had a good conversation after this point. (HT 765.) However, Slick later testified that he was not sure “uncooperative” was the right description. (HT 1098-1099.) Slick also said that he had no problem communicating with petitioner. (HT 1105-1107.) Slick also admitted that he could not recall whether petitioner had stopped talking to him. (HT 1105.) Slick could not remember whether petitioner’s reaction to hearing he would lose demonstrated that petitioner disagreed with Slick’s assessment of the case. (HT 767.)

Slick further claimed that he told petitioner what he intended to do at trial. (HT 763.) When asked whether he explained to petitioner that he did not intend to call witnesses or put on a guilt phase defense because it would likely be unsuccessful and damage his credibility in the penalty phase, Slick responded, “I believe somewhere in that I made that representation to him.” (HT 764.) Slick could not recall details of the discussion, however, or recall when it occurred. (HT 763-764.) He did not

know whether he informed petitioner of his strategy before or after he had received Kleinbauer's investigation reports. (HT 768.) Slick had no notes of this conversation with petitioner and could not say what petitioner's reaction was when Slick told him that he would present no defense. (HT 763-764.)

Slick claimed that petitioner's statements during the four *Faretta* hearings did not indicate to him that petitioner was dissatisfied with his trial strategy. (HT 790.)²⁴ When confronted with a transcript of the first *Faretta* hearing, however, Slick acknowledged that petitioner had expressed some dissatisfaction with his representation. (HT 564.)²⁵

When Slick was asked if he had reason to believe that petitioner repeatedly requested the trial court to dismiss him and grant self-representation in order to delay trial – rather than because of his dissatisfaction with Slick – Slick said that he could only say that petitioner told him he was not ready to go to trial. (HT 770-771.) Slick claimed that petitioner did not give a reason why he did not want to go to trial. (HT 771.) Slick admitted, however, that he had no notes memorializing this conversation. (HT 774.)

Slick stated that he did not believe that petitioner indicated by his actions and words that he disagreed with Slick's representation of him. (HT 771.) However, Slick admitted that petitioner stated at various times during

²⁴ Slick acknowledged that he could not say whether he thought at the time of trial that petitioner's remarks in the *Faretta* hearings evidenced his dissatisfaction with Slick's representation. (HT 790.)

²⁵ Earlier in his testimony, Slick asserted that he could not recall whether petitioner had expressed dissatisfaction with him during the August 10th *Faretta* hearing. (HT 546.)

the *Faretta* hearings that his attorney was not interested in him or his case. (HT 771-772.) Slick also admitted that the transcripts showed that petitioner complained that Slick had not adequately discussed the case with him. (HT 772.) Petitioner told the trial court that it was not fair for him to take the “fall” for the true perpetrator of the charged crimes. (HT 775.) Petitioner further complained on the record that Slick had not completed an adequate investigation and asserted that investigator Kleinbauer was willing to work with petitioner to finish the investigation. (HT 772, 775.)

When asked in direct examination whether petitioner told him that he wanted Slick to present an alibi defense, Slick responded, “Not that I remember.” (HT 721.) During cross-examination by respondent, however, Slick became far more certain and stated without qualification that petitioner had never asked him to put on an alibi defense. Petitioner never asked him to put on any specific defense. (HT 920.) When asked by the prosecutor how he could be so certain of this when his recollection of other events was so poor that it was not refreshed by documents from the trial file, Slick stated: “It’s a whole lot easier to remember specifically what didn’t happen than what did, and it’s just a human function, I think.” (HT 919-920.)

Slick also claimed that petitioner never requested a defense based on mistaken identity. (HT 933.) Slick did not view petitioner’s pre-trial letter to him as a demand for any specific defense or witness. (HT 934.) By the end of cross-examination, Slick had no doubt in his mind that petitioner had never asked for a specific defense and had never given a reason for not wanting to go to trial other than that he was not ready. (HT 1035.)

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**(2) Slick's Contact With Investigator
Kleinbauer**

Investigator Kristina Kleinbauer worked for Slick on petitioner's case. (HT 518-519.) Slick had prepared a memorandum for Kleinbauer which set out the investigative tasks he believed needed to be done. (HT 518-520.) The tasks included a background investigation on petitioner and on Otis Clements. (HT 520.) Slick also directed Kleinbauer to investigate petitioner's participation in the robberies and murder. (HT 522.) At the evidentiary hearing, Slick acknowledged that Kleinbauer had not completed all the tasks set out in the memorandum by the time he announced ready for trial. (HT 664-665.)

Slick had "no idea" what he told Kleinbauer about petitioner's case. (HT 523.) Slick's bill reflected a July 14, 1983, conference with Kleinbauer. (HT 530-531.) Slick had no notes or independent recollection of this conference. He could not recall anything they discussed at that time. (HT 531.) His bill showed another conference with Kleinbauer, on August 10, 1983. (HT 544.) Slick had no notes in his file of this conference and did not know how long it lasted. (HT 546.)

Slick admitted that he had received from Kleinbauer information which indicated that the witnesses named by petitioner could support a guilt phase defense. (HT 717.)²⁶ Slick recognized exhibit 1 as Kleinbauer's investigative reports. Slick did not recall when he received the reports, but thought that they had been in his file. (HT 532-534.)

²⁶ Despite this acknowledgment, an Attorney General's report of an interview with Slick indicated that Slick claimed petitioner had never told him that he had alibi witnesses. (HT 1126.)

Slick did not have a memory of Kleinbauer telling him that petitioner wanted to put on a guilt phase defense. (HT 811.) Slick did believe that Kleinbauer told him what she thought Slick should do. (HT 811.) She thought he should present witnesses. (HT 1026.) Slick admitted, however, that he could not recall the details of what Kleinbauer told him about what she thought Slick should do at trial. (HT 1022, 1026.) Slick vaguely recalled Kleinbauer saying something to him about her belief that Stewart was a key to the case. (HT 1023.) Slick could not recall whether Kleinbauer told him that she believed the four alibi witnesses she interviewed would provide probative, powerful and credible information and would have made good witnesses, although he conceded that she might have. (HT 1024-1025.)

(3) Alleged Co-Perpetrator Otis Clements

Slick testified that did not recall telling petitioner's trial judge that he had completed an investigation into whether Clements was framing petitioner. (HT 666.) He then acknowledged, however, that the transcript reflected that he had. (HT 667.) Despite this representation to the trial court, Slick admitted that the only information he had about Clements was that he had received from the police reports and the taped statement Clements made. (HT 667.) Slick had not talked to Clements and could not point to any independent investigation he conducted. (HT 667-669.)

Slick had listened to the Clements tape. (HT 669.) Although Slick testified that he had concluded Clements was a liar (HT 668), he admitted that he had previously stated in a declaration that he found Clements' confession to be credible (HT 669). Yet Slick then claimed that he did not remember if he had formed any opinions about the credibility of Clements from listening to the tape. (HT 669.) Slick had no memory of whether the

tape-recorded statement of Clements was inconsistent with his previous unrecorded confessions as summarized in the homicide book. (HT 1078, 1080.) Slick did not think that he had a transcript of the Clements tape, but he could have. (HT 1079.) He never bothered to make a copy of the tape for himself. (HT 1079.)

Slick could not recall how the case of Otis Clements came to be severed from that of petitioner's. (HT 1068-1070.)²⁷

(4) Alibi Witnesses

A billing entry indicated Slick interviewed petitioner's mother on May 16, 1983. (HT 527, 536.) Slick had no independent recollection of the content of this interview. (HT 528.) His file did not contain any notes memorializing it. (HT 805-806.) Slick believed he spoke to Ora Trimble personally, but there was no entry in his billings for such an interview and he had no notes of a conversation with her. (HT 804.)

His bill reflected that Slick had a conference with witnesses on August 8, 1983, while the case was trailing but he could not recall whom he conferred with on that date. He had no notes in his file to refresh his recollection on this point. (HT 542-543.)

When asked what potential rebuttal or impeachment evidence he was aware of regarding the alibi witnesses, Slick said he did not remember. (HT 737.) Slick claimed that he did, however, have reason to believe the witnesses would not be credible. (HT 737.) Slick explained that petitioner had waived his rights in writing, failed a lie detector test, initially denied involvement and then confessed in substantial detail, and said he would not

²⁷ The trial record does not disclose why the cases were ordered severed by the court. (See RT 5A-6A; CT 103.)

testify. (HT 738-739.) Slick concluded it was “ludicrous” that the homicide investigators would make up a confession and claimed that petitioner refused to testify. (HT 739.) Slick also pointed to the number of witnesses identifying petitioner and to the “funny” statements petitioner allegedly made to two jail officers.²⁸ (HT 740.)

Slick acknowledged, however, that his file did not contain any polygraph charts (HT 742) establishing that petitioner had failed a lie detector test. Slick also admitted that he had no notes of a conversation with petitioner in which petitioner refused to testify and Slick could not provide any details about such a conversation. (HT 745, 769.) Slick admitted he probably told petitioner they had no chance of winning even if petitioner testified at trial. (HT 769.) Slick also conceded that petitioner told him that he had not made any incriminatory statements to the jailers. (HT 740.) Slick characterized the alleged statements as “funny” because they were strange or “kind of weird.” They were factually inaccurate and did not match petitioner’s alleged unrecorded confession to homicide detectives. (HT 762-763.) Finally, although Slick averred that the prosecutor had two additional good eyewitnesses, he could not recall who these witnesses were. (HT 800, 802.)

Slick also claimed that the alibi witnesses were not consistent and two did not cover the relevant time period. (HT 740, 794.) Although Slick stated that Ora Trimble’s testimony would have been incredible or insufficiently probative because she did not cover the time span, he acknowledged that he did not recall what he thought about Trimble in 1983.

²⁸ The prosecutor did not call the jailers to testify at petitioner’s trial.

(HT 803.) Slick's decision not to call Gloria Burton was based on the same factors. (HT 804.) Slick admitted, though, that he did not know whether she adequately covered the relevant time. He nonetheless believed that the jury would not believe her because her son had confessed. (HT 805.) Slick also claimed that Denise Burton did not cover the times at which the crimes occurred. (HT 816.)

Slick asserted that only Elizabeth Black could provide petitioner with an alibi that accounted for petitioner's whereabouts at the times of the charged offenses. (HT 795.) But Slick claimed that he had reason to believe that Black's testimony would be incredible or insufficiently probative to justify presenting it at the guilt phase. (HT 792.) He asserted that a jury would not believe the defendant's girlfriend as compared to testimony from a police officer that the defendant has confessed. (HT 794-795.) Slick could not say when he made this determination but it was early on, before he received Kleinbauer's report. (HT 796.)

Slick could not recall when he had contact with Black. He did not recall whether he had any notes of having interviewed Black. (HT 796.) Slick agreed that his billing included no indication he had interviewed her. (HT 797.) He had, however, recently "stumbled over" a note in his file stating that Collette had given him information about Black. (HT 797, 819.) He did not have any recollection about what Collette told him until he found the note. (HT 797-798.) The note did not, however, refresh his recollection that Collette told him something about Black. (HT 798-799.) The note also included information Collette purportedly received from Ora Trimble that petitioner had asked her to provide him with a false alibi. (HT 818.)

Slick would have expected there to be a police report had Elizabeth Black or Ora Trimble given the police such information. In particular, the prosecution could have used petitioner's attempting to create a false alibi as evidence of consciousness of guilt. Slick was reasonably sure there were no such reports, however. (HT 846.)

Slick testified that the note in his file was troubling to him because he had no memory of it. (HT 817.) Slick was troubled because "For the first time – when I made that note, I never asked [Collette] about it, never asked anybody to confirm it, I don't believe." (HT 817-818.) Slick later learned that Collette denied giving him the information in the note. (HT 1131.) Slick was troubled and bothered by the fact Collette said he did not make the statements attributed to him. (HT 818.) Slick respected Collette enough that he did not believe Collette would lie by stating he did not make the statements to Slick. (HT 819, 847.) Slick felt "stupid" and said, "It's very, very troubling to me, and when I read that, it's bothered me since I read" that Collette denied making the statements in the note. (HT 819.)

Slick conceded that the alibi witnesses did not tell him they would lie for petitioner. (HT 815.) He did not feel ethically prohibited from calling them to testify because he did not have any "hard" evidence that they would commit perjury. (HT 815-816.) In fact, Slick denied that he had in mind the possibility the jury would find they were deliberately lying to save petitioner. (HT 921.)

(5) Homicide Eyewitnesses

Slick testified that he had no reason to believe that Michael Stewart's testimony would be incredible, but he did have reason to believe it would be insufficiently probative. (HT 806.) Slick characterized Stewart's potential testimony as "almost zero. . . . Not zero, but a tiny, tiny, tiny value." (HT

806.) Slick claimed that Stewart's description was fairly close to what petitioner looked like. (HT 701; see also, HT 752, 755.) He then admitted, however, that petitioner did not have a beard and did not have any gray in his hair. (HT 757-758.) Stewart also described the shooter as someone older than petitioner. (HT 700.) Slick could not recall if Stewart said the man he saw was heavier and taller than petitioner. (HT 700-701.) Although Slick eventually acknowledged that Stewart's description of the perpetrator was at odds with petitioner's appearance in 1983, Slick still asserted that Stewart had no value as a witness. (HT 948.)

In response to respondent's leading question, Slick testified that the fact that the police reports did not contain a description of a gray beard by Stewart would have made the witness' testimony subject to impeachment. (HT 937-938.) Slick then admitted, however, that he could not say whether this was part of his thinking in 1983. (HT 942-943; 1005.)

Slick claimed that he could not recall that Stewart reported that a second suspect who was not petitioner had been identified by one of the other eyewitnesses. (HT 701.) Slick asserted he did not recall receiving information that one of the Cordovas had identified the co-defendant's brother as the shooter. (HT 704.) He then acknowledged that he had made notes to this effect in preparation for cross-examining the brothers. (HT 702-704, 760-761, 1007-1013.) Slick denied that the notes refreshed his recollection, however. (HT 704.)

Slick testified that he knew about Kleinbauer's interview with Stewart when he announced ready for trial on July 26, 1983, but then conceded that her report showed that Kleinbauer had interviewed Stewart on August 8th. (HT 1107-1110.) There was a note in his file which led

Slick to believe that he spoke with Stewart by phone prior to trial, but he had no recollection of doing so. (HT 780-781.)

Slick testified that he also had reason to believe that Camacho's testimony would be incredible. His "now" analysis was that she had almost nothing to offer because he believed she could not eliminate petitioner. But Slick admitted that he could not recall his thinking about Camacho in 1983. (HT 807-808.) Slick stated that Zarina Khwaja's testimony would not have been probative at all because she did not get a good look at the shooter. (HT 809.)

Part of the reason Slick did not present the witnesses interviewed by his investigator was because he had concluded that the prosecution had an extremely strong case with respect to the identification of the murderer. (HT 683-684.) Slick could not recall, however, whether he had considered the suggestible circumstances under which the identifications by Robert Cordova and Anwar Khwaja of petitioner were made when he concluded that the prosecution's identification case was so strong. (HT 695.) Slick agreed that showing a single subject to an eyewitness for identification in the courtroom was a particularly suggestive procedure. (HT 690.) He could not recall whether the eyewitnesses in the case had made identifications of petitioner prior to court proceedings, however. (HT 690.)

Slick was not sure but did not believe that Robert Cordova was shown a live or photographic lineup prior to his in-court identification of petitioner at the preliminary hearing. (HT 692.) He thus agreed that the circumstances in which Cordova identified petitioner were suggestive. (HT 692-693, 749.) Slick also acknowledged that the police reports stated Cordova and his brothers had described the shooter as a black male, 6'1" tall, weighing 200-220 pounds, in his thirties, with pockmarks or scars on

his right cheek. (HT 781-782.) The booking report Slick received indicated that petitioner was 19 years old, 5'11" tall and weighed 160 pounds. (HT 782-783.) Although Slick could not recall whether Otis Clements had pockmarks or scars, he agreed that Clements' booking photo showed facial scarring. (HT 784-785.)

Slick could not recall whether Anwar Khwaja's first opportunity to identify the man who shot him came six months after the shooting. (HT 691, 747-748.) Slick agreed that it would be suggestive for Khwaja to first see petitioner in court during trial, although he could not recall his thought process on this subject in 1983. (HT 748-749.) Slick then admitted that he did not know before trial that Khwaja would identify petitioner at trial. (HT 788.) Slick thought about whether Khwaja's injury might have affected his ability to identify the perpetrator, but he did not subpoena any medical or paramedic records. (HT 788.) Slick testified that did not recall what Khwaja told police about the robbery-homicide prior to trial or Khwaja's trial testimony, so he could not say whether the two differed. (HT 787.) Slick later acknowledged, however, that although Khwaja told police he was going to the bank when he was robbed (HT 1062), he testified that he had already been to the bank when he was attacked (HT 1060).

Slick did not recall that the photographic lineup shown to K-Mart victims Lisa Searcy and Margie Heimann contained two pictures of petitioner. (HT 686.) Although Slick could not recall his thinking at the time of petitioner's trial, at the hearing he did not feel that such a lineup was suggestive. (HT 687.)

(6) Decision Not To Defend

Slick testified that he alone was responsible for deciding which witnesses to call. (HT 1027.) Slick claimed that he wrestled with the

question of whether to call witnesses in the guilt phase. (HT 921.) But he determined that the jury would not believe them. (HT 921.) He was concerned that if the jury concluded the defense witnesses were either mistaken or lying in the guilt phase, it would affect the penalty phase. (HT 922.) Slick stated that the “first and most important reason” he did not present a defense “is that it’s a death penalty case, and there’s going to be a phase two . . . [¶] Anything done in the guilt phase – anything done by me or any of the witnesses or any action I take during the guilt phase is gonna be there and can be used for whatever purpose during the penalty phase.” (HT 944.) Slick viewed petitioner’s alleged confession as the second problem. (*Ibid.*)

(7) Credibility of Long Beach Police Officers

Slick claimed that he had no reason to believe that the officers who allegedly took a confession from petitioner were not credible. (HT 728.) Slick testified that his opinion about William Collette’s credibility was based on his experience working with the detective. As an example of his good relationship with the officers, Slick explained that Collette once invited him to accompany the officer as he attempted to interview witnesses. Slick went with Collette to some bars, although he could not say whether they actually interviewed any witnesses. (HT 852-853.)

Slick acknowledged that when he represented Oscar Morris, he argued to the jury that the informant who testified to incriminating statements allegedly made by Morris either expected or had received a benefit for his testimony, despite testimony from either Collette or Miller in that case that no benefits had been given to the informant and that no promises of future benefits had been made. (HT 734-735.) However, the

circumstances of *Morris*²⁹ did not change his opinion of Collette and Miller. (HT 854.) Nor did learning that Collette had denied making statements to him about information allegedly provided about Elizabeth Black and Ora Trimble. (HT 847-848.)

(8) Slick's Contacts with Successor Counsel

Slick had no memory of talking to Jeff Brodey. (HT 821.) Yet Slick denied telling Brodey that petitioner had told him he wanted to present witnesses. (HT 823.)

Slick met with lawyers Smith and Jackson in December 1987, in Slick's office. (HT 576.) He did not recall how long the meeting lasted. (HT 577.) Slick's bill indicated that he charged four hours of preparation time for this meeting but he did not recall what kind of preparation he did. (HT 577.) Slick did not remember whether he gave a copy of his file to Smith and Jackson. (HT 821.) Slick claimed that he did not tell them that petitioner had told Slick he wanted to present witnesses. (HT 823.) In October 1987, Jackson and Smith sent Slick a proposed declaration with a cover letter asking him to sign it if it was accurate. Slick did not sign it because it was not accurate. (HT 824.)

(9) Slick's Bias

Slick admitted that he cancelled an appointment to meet with petitioner's counsel Marcia Morrissey which had been scheduled for January 10, 2003. (HT 1083.) He claimed that he decided not to meet with Morrissey because he did not trust her and because he was not prepared. Slick met with deputy district attorney Brian Kelberg on January 9th,

²⁹ *People v. Morris* (1988) 46 Cal.3d 1.

however. (HT 1150-1152.) Moreover, Slick admitted Morrissey had done nothing to make him distrust her. (HT 1152.)

Although Slick knew that a criminal defense attorney has an obligation to cooperate with successor counsel (HT 1084), he did not prepare a declaration for attorneys Jackson and Smith or participate with them in preparing one. (HT 1086.) Slick did, however, prepare a declaration to assist the state in responding to petitioner's first habeas corpus petition. (HT 1086.) Attached to the five-page document were materials from Slick's trial file which he had not disclosed to petitioner's counsel. (HT 1091-1092.) Slick filed a second declaration to assist the state in opposing petitioner's 1993 habeas corpus petition. (HT 1098.) Although Slick knew that a trial file belongs to the client rather than to counsel (HT 1084), he gave his original file to the Attorney General's Office (HT 994).

When asked how he viewed himself in the reference proceedings, Slick responded, "I view myself as the . . . defendant." (HT 1152.)

(10) Petitioner's Original Trial File

During the hearing, Slick produced a box he represented to be a copy of petitioner's trial file. (HT 994.) Slick had given his original file to the Attorney General's Office earlier in the proceedings and testified at petitioner's hearing that he had no idea where it was. (HT 994.) He had no list or inventory of its contents. (HT 1059-1060.) Slick asserted that the box he brought in during the hearing, which was marked as exhibit 36, contained copies of documents he had received from the District Attorney's Office with some new notes he had added. (HT 1057-1058, 1154-1156.)

After the close of the evidentiary portion of petitioner's hearing, Slick contacted deputy district attorney Kelberg to tell him that he had

found another file in the closet of his chambers at the Compton courthouse. (HT 2300.) The newly-located box of materials, which Slick described as part of his original file, was marked as exhibit 63. (HT 2299.) By stipulation it was recognized that exhibit 63 contained documents created both before and after the close of petitioner's trial. The same was true as to exhibit 36, the box Slick had previously represented to be the only case materials he had. (HT 2308-2309.) Slick acknowledged that he had not maintained the integrity of petitioner's file after trial ended but rather continued to add materials to it. (HT 2309.)

(11) Slick's Poor Memory

As recognized by both the Referee (HT 857-858, 892-893) and respondent (HT 919-920), Slick's memory of the case was extremely limited. Slick himself acknowledged that he was having a problem during his testimony reconstructing his thinking at the time of trial versus how he felt at the time of the hearing. (HT 904.)

In fact, Slick repeatedly testified that documents related to petitioner's case did not, or would not, refresh his recollection. For example, the memorandum he wrote to investigator Kleinbauer did not refresh his recollection of what he directed her to do. (HT 521.) Slick claimed that Kleinbauer's investigative reports would not refresh his recollection as to whether Kleinbauer informed him that petitioner said he was not at the scene of the crimes. (HT 722.) Slick testified that petitioner's letter to him would not refresh his recollection as to whether petitioner communicated to him that he wanted Slick to defend on the ground of mistaken identification. (HT 724.) In fact, reading petitioner's letter did not refresh Slick's recollection of having even received it. (HT 560.) The booking photograph of Otis Clements did not refresh Slick's

memory of what Clements looked like. (HT 784.) Looking at police reports would not help Slick recall how witnesses described the gun used in the K-Mart crime. (HT 785.) A declaration from Dr. Maloney did not refresh Slick's recollection of what the expert had told him in 1983. (HT 1018.) Reading the transcript of the August 11, 1983, *Faretta* hearing did not refresh Slick's recollection of giving petitioner the police reports in the case. (HT 714-715.)

f. Michael Stewart

Although his memory was understandably diminished after approximately 20 years, Michael Stewart essentially reiterated what he had told investigator Kleinbauer in 1983. Stewart was living on Pleasant Street in Long Beach in February, 1983. (HT 587-588.) He had previously been employed as a law enforcement officer in Oregon. (HT 588-589.) On February 25, 1983, he was cleaning out the back of his pickup truck, which was parked in front of his residence. He saw a vehicle back into the alley way. (HT 589.) He thought the vehicle was a red pickup, although he could no longer recall with certainty. (HT 590.) There were two black males in the vehicle. One got out and walked down the street. (HT 589.) The man walked toward the end of the street. Stewart was not paying any particular attention to him at that time. (HT 590.) A few minutes later, Stewart heard a popping sound, which sounded like two or three gunshots. Then he saw the black male walking hurriedly up the street. A woman came out from an apartment building across the street. Stewart heard another popping sound, and saw the lady fall. (HT 590-591.) The black male came back past Stewart, within a foot or two, and entered the passenger side of the vehicle in the alley. At that time, Stewart had an opportunity to look at the man. (HT 591.) After the man got into the

vehicle, Stewart had another opportunity to look at him, through the vehicle's front window. He also saw the driver. (HT 592.) Stewart described the gunman as about six feet tall, weighing 180-190 pounds. He looked like an older person, with graying in the side of his beard and in his hair. (HT 593.)

After the police arrived at the scene, Stewart told them what he had seen. He talked to several officers that day, and gave his description of the shooter to more than one of them. He was then taken by police, along with some others, to look at a suspect. Stewart believes that he identified the driver of the vehicle. (HT 593-596.) After Stewart was returned to Pleasant Street, the police told him they had a second suspect that they wanted him to look at. Stewart did not believe the second suspect he was shown was the shooter because the man he had seen on Pleasant Street looked older, with a graying beard. (HT 597.) To the best of his recollection, Stewart told the police in February 1983 that the man he saw had a beard with gray in it. (HT 646.) The police did not write down everything he said and did not ask him to review a report of what he told them. (HT 612, 647.)

Stewart believed that he would have been able to identify the shooter at the time of the incident. (HT 633.) At the hearing, Stewart indicated that petitioner does not look like the person he saw on February 25, 1983. (HT 650; see also, HT 1887, 1148.)

Stewart said that to his knowledge, he had never met Slick until Slick approached him in the bathroom during a break in the reference hearing proceedings earlier in the day. Slick introduced himself and told Stewart that they had spoken before, but Stewart had no recollection of such a conversation. (HT 658-659.)

g. Other Eyewitnesses

Susana Camacho was living on E. Pleasant Street on February 25, 1983. (HT 1379-1380.) She no longer recalled much about that day. (HT 1381.) A police report of an interview with her on that date helped her recall that she was in her living room when she heard something that may have been gunshots. (HT 1380-1384.) Camacho saw a woman lying in the street and a person running away from her. (HT 1385.) Camacho no longer recalled what that person looked like, nor could she recall how she described the person to police. (HT 1385-1387.) Camacho acknowledged telling an investigator that she thought the man was white (HT 1389-1390, 1392), but she could not at the hearing say with any certainty whether the man was white or black (HT 1397).

Zarina Khwaja testified that she remembered February 25, 1983 well. (HT 1593-1594.) Her brother Anwar Khwaja had come to pick up her and their mother Gulshakar Khwaja to go to the mosque. Anwar was sitting in his parked car, waiting for them. (HT 1595, 1597, 1610.) As Zarina went to open the door to her brother's car to get in, she heard shots. She saw a man with a gun in one hand and a bank bag in the other. Her brother was bleeding. (HT 1595.) She was shaking and nervous and did not see his face very well. (HT 1598.) Zarina Khwaja went to court in Long Beach, but was unable to identify the man she saw on Pleasant Street. (*Ibid*; HT 1604.)

h. The Alibi Witnesses

Ora Trimble, the mother of Elizabeth Black, testified consistently with the information she had provided to investigator Kleinbauer in 1983. Trimble was living at 1991 Myrtle Street in February 1983. (HT 1238-

1239.) Trimble knew petitioner in 1983; he was dating Elizabeth and spent time at the Myrtle apartment. (HT 1240.)

Trimble recalled the police search of her home on February 26, 1983. (HT 1242-1243.) The police came early in the morning and pounded on her door. She was sleeping in the living room on the sofa. The police broke the door before Trimble had a chance to open it. (HT 1242.) Petitioner there at the time and was arrested. (HT 1243.)

Trimble recognized officers John Miller and William Collette when they came to her home on February 26th. She had met them before, when her son had been in trouble. (HT 1243-1244.) Collette and Miller did not tell her why petitioner was being arrested or ask her where he was the day before. They did not tell her when the crimes he was later prosecuted for occurred. (HT 1246.) One of the officers told her that the newspaper would say petitioner was arrested at his mother's home, rather than hers. He told her that the system, rather than petitioner's mother, had raised him since he was eight years old. (HT 1245.)

Trimble remembered being interviewed by a white lady investigator. (HT 1246-1247.) After reviewing Kleinbauer's report of the interview, Trimble recalled that on February 25th, she and her youngest daughter Hope went to the park to get butter and cheese. (HT 1248-1249.) Petitioner was at her home when she left for the park. When Trimble returned home, petitioner was still there. (HT 1250.) Kleinbauer's report helped Trimble remember that she returned from the park at 10:45 p.m. (HT 1250-1251.) Petitioner was washing some dishes. He left not long after, on his bike, but returned shortly because he forgot something. Petitioner then left again. (HT 1251-1252.)

Kleinbauer's report helped Trimble recall that she told petitioner that she wanted to share some of the cheese and butter with his mother, Gloria Burton. Mrs. Burton came over later that day, and was there when Trimble's daughter Elizabeth came home. Kleinbauer's report helped Trimble recall that Elizabeth came home at about 1:30 p.m. (HT 1252-1254.) Trimble recalled that petitioner came over too, but she could no longer recall what time he arrived. The report helped her remember that she told Kleinbauer it was about 2:00 p.m. when petitioner returned to her home. (HT 1255-1256.) She did not see petitioner's bike. He went into the bedroom. (HT 1256-1257.) Trimble's nephew Willie Davis was also there (HT 1254), as was her niece Shirley Cavaness (HT 1255), her daughter Hope (HT 1295) and petitioner's sister Denise Burton (HT 1258).

At the hearing, Trimble had no problem remembering who came to her home on the afternoon of February 25th, but she could not remember exactly what time they came without using Kleinbauer's report. Gloria Burton was already with Trimble when Elizabeth arrived. Willie Davis arrived next, followed by Shirley and Hope. Petitioner came next, and Denise Burton arrived last. (HT 1289-1295.) Without using Kleinbauer's report to refresh her recollection, Trimble's recall of the exact times events of February 25th occurred was somewhat hazy. (HT 1261-1262.) Trimble's memory of events was much better when she talked to Kleinbauer on June 30, 1983. Trimble gave the investigator her best recollection of events. (HT 1262; see also, HT 1263-1268.)

Trimble had no communication with petitioner after his arrest, either by phone or in writing. (HT 1258.) Petitioner never asked her to lie for him about where he was on February 25, 1983. (HT 1259.) Trimble never told officer Collette that petitioner had asked her to lie for him. (HT 1260.)

Elizabeth Black also recalled events of February 25, 1983, as refreshed by Kristina Kleinbauer's report. She woke up early that day and got ready for school. Her three-year-old daughter was sick that morning, so she asked petitioner to watch her. Elizabeth left for school shortly before 7:00, and saw petitioner when her classes let out at about 12:30 p.m. Petitioner's sister Denise was also there. (HT 1306-1311.) Elizabeth and petitioner started walking toward her home, but separated so that petitioner could attend to his bike which had a flat or leaking tire. (HT 1312-1313.) Elizabeth continued walking home, and arrived there at about 1:00 p.m. Her mother and petitioner's mother were there when Elizabeth arrived. (HT 1313-1314.) Petitioner arrived about fifteen minutes after Elizabeth did. (HT 1315.) Her relatives Willie Davis and Shirley Cavaness were also there that day. (HT 1315-1316.) Elizabeth thought, but was no longer sure, that her sister Hope was there. (HT 1314.) Petitioner's sister Denise was also there. (HT 1316.)

Later than evening, Elizabeth and petitioner left Myrtle Street and went to petitioner's mother's home and then to an arcade. (HT 1318.) Later, they returned to her home and went to sleep. The police came early the next morning and arrested petitioner. (HT 1302, 1319.) One of the officers accused Elizabeth of being involved in a crime he said petitioner had committed. (HT 1319-1320.) The officer said that they could arrest Elizabeth and her family for having petitioner in their home. The police did not tell her what they were arresting petitioner for. (HT 1320.) They made accusations suggesting she had knowledge of some money and offered to help her, but Elizabeth told them she knew nothing of any money. (HT 1321-1322.) Elizabeth had not helped petitioner count or exchange any money the day before his arrest, and had not helped him get rid of a gun.

(HT 1322.) Elizabeth never told officer Collette that she did not know where petitioner was on February 25, 1983. (HT 1323-1324.)

Elizabeth recalled contact with petitioner's lawyer, Ron Slick. (HT 1322.) She was willing to testify at petitioner's trial, but Slick told her if she did, she could be found guilty and that he did not need her. (HT 1323.)

Petitioner did not have a beard on February 25, 1983, and did not have any gray in his hair. (HT 1324.) At that time, petitioner had a Jheri Curl, which Elizabeth had given him. (HT 1324-1325.) He did not have any pockmarks on his face. (HT 1325.) Otis Clements, whom Elizabeth knew, did, however. (HT 1325.)

Elizabeth was contacted by a lady investigator and tried to give her best recollection of the events of February 25, 1983. (HT 1326.)

In 1986, Elizabeth Black had developed a drug problem, which she later resolved. (HT 1305, 1337.) She had been convicted of felonies in 1988 and 1996 for drug possession and sales. (HT 1305, 1338.) At the time of the hearing, Elizabeth had been working as a substance abuse counselor for two years, and attending school. (HT 1304.)

Denise Burton testified that in February 1983, she was living in Long Beach and attending Trade Tech School. (HT 1507.) She knew Elizabeth Black, who was then her brother's girlfriend. (HT 1508.) Elizabeth also attended classes at Trade Tech. (HT 1508.) Denise Burton last saw her brother on February 25, 1983, at Elizabeth Black's home in Long Beach. (HT 1506-1507.) She later heard from a family member that he had been arrested the next day. (HT 1509, 1553, 1559.)

In June 1983, a woman came to talk to Denise about the day before petitioner was arrested. (HT 1508-1509.) The report prepared by investigator Kleinbauer helped Denise recall that on February 25, 1983, she

was coming out of her classroom at about 12:30 p.m., when she saw her brother approaching on his bike. (HT 1509-1511.) Denise could no longer recall whether classes had ended early or whether she was on a lunch break. (HT 1556.) Elizabeth had also just been dismissed from class. (HT 1509-1511.) Denise left school and later went to Elizabeth's home. She no longer recalled precisely what time that was, but thinks it was about 2:00 p.m. (HT 1511-1513.) Elizabeth and petitioner were there watching television when she arrived. Denise no longer recalled who else was there. (HT 1514.)

Denise Burton did not have any contact with petitioner while he was in jail. (HT 1515.) She did not attend any court proceedings in petitioner's case. (HT 1515.) She had not spoken to petitioner on the telephone. (HT 1507.) Denise would have testified in court about the events of February 25, 1983, but no one asked her to do so. (HT 1516.)

Hope Black was never interviewed about the events of February 25, 1983 prior to petitioner's trial. (HT 1570.) The first time she was asked to recall that day was in November 2001, by investigator Lynda Larsen. (HT 1570, 1579.) Nonetheless, Hope remembered that in February 1983, she was living in an apartment with her mother at Myrtle and 20th Streets. (HT 1571.) She was working at ABC Day Care and enrolled in home study through a continuation school. (HT 1566-1567.) She knew petitioner, who was in a relationship with her sister Elizabeth. (HT 1565.) He spent most days at their apartment. (HT 1582.)

Hope recalled that in February 1983, the police came and kicked down her mother's front door. She was there at the time, as was petitioner. Hope saw police arrest him. (HT 1566, 1585-1586.) Hope also remembered that on the day before petitioner's arrest, she had gone to work.

Hope's habit was to finish work at noon, to walk to the continuation school to hand in homework and pick up new assignments, and then walk home. When she got home on the day before petitioner's arrest, she saw him and her sister Elizabeth at their apartment. She estimated the time to be about 1:30 or 2:00 p.m. (HT 1566-1569.) Hope thought that Elizabeth had been at school earlier in the day and that petitioner had watched Elizabeth's young daughter, because she was sick. (HT 1585.) Hope also recalled that her mother Ora Trimble was there as well as petitioner's mother Gloria Burton. (HT 1569, 1576.) It was possible that her cousin Shirley Cavaness and petitioner's uncle Robert were there as well, but Hope was not certain. (HT 1569-1570, 1576.) Hope was not sure if her cousin Willie Davis had been there, but noted that he used to come over daily. (HT 1576.) Hope also recalled going with her mother to King Park to get free butter and cheese. However, she thought they had gone to the park in the afternoon rather than the morning. (HT 1576-1578.) She acknowledged that her recollection of events were not as fresh as it would have been in June 1983. (HT 1579.)

Hope Black was not asked to testify on petitioner's behalf at his trial. She was not contacted by petitioner's trial attorney. (HT 1571.) At the time of the hearing, Hope had twice been convicted of a felony, for robbery and drugs sales. (HT 1570-1571.) In 1983, Hope was 16 or 17. She did not have any felony convictions then. (HT 1573.)

i. Detective William Collette

William Collette testified that he had been employed as a police officer by the City of Long Beach since 1968. At the time of the evidentiary hearing, he was assigned to homicide. (HT 1685-1686.) In 1983, he and his partner John Miller were assigned to investigate the

Khwaja robbery-homicide. (HT 1686.) Collette arrested Clements soon after the shootings and from the information he received, Collette obtained warrants to arrest petitioner and to search 1991 Myrtle and 909 California Street. (HT 1687.) Collette arrested petitioner early in the morning of February 26, 1983, at Ora Trimble's residence on Myrtle. (HT 1698, 1702.)

In 2001, Collette told deputy district attorney Brian Kelberg that to the best of Collette's recollection Elizabeth Black did not tell him that she did not know petitioner's whereabouts on the day and at the time of the charged homicide. (HT 1694-1695, 1696, 1711.) Nor did Collette tell petitioner's trial attorney Ron Slick that Black had made such a statement to him. (HT 1695, 1696, 1712.) Collette also told Kelberg that Ora Trimble did not tell him that petitioner had asked her to provide him a false alibi for the homicide. (HT 1695, 1696, 1711.) Collette did not tell Slick that Trimble had made such a statement to him. (HT 1695, 1696, 1712.)

It was Collette's habit and custom to write police reports when he took statements from witnesses. (HT 1689-1690.) Information from Trimble that petitioner asked her to fabricate an alibi would have been significant and memorialized in a report. (HT 1691, 1711-1712.) There is no report, however, indicating that Collette had such a conversation with Trimble. (HT 1690.) Collette also told Kelberg that he would have expected to memorialize information from Black that she did not know where petitioner was at the time of the homicide. (HT 1695, 1711-1712.) There was no entry in the homicide book of such a conversation with Black. (HT 1712.)

Collette testified that he had told deputy district attorney Kelberg that he had a vague recollection that someone may have made a comment which he overheard in the courtroom hallway after petitioner's guilt verdict

was returned about an issue raised in Question 10 of the reference order, but he had no recollection of anyone telling him directly what was alleged therein. (HT 1715,1691-1692.)

2. Respondent's Case.

Respondent called petitioner's post-conviction investigator Lynda Larsen and its own investigator, Ilene Chase, to elicit statements previously made by some of petitioner's witnesses which respondent believed to be inconsistent with testimony at the hearing.

Lynda Larsen, a private investigator for 22 years who is a partner in her firm, testified about statements made to her by Hope Black. (HT 1958.) She interviewed Hope Black on November 30, 2001. (HT 1959.) Larsen took notes during the interview but did not reduce them into a report, because there was a delay in funding for investigative work from the court. (HT 1960, 1975.) Hope told Larsen that she worked at ABC nursery school when petitioner was arrested (HT 1960), but Larsen recollected that Hope was not certain whether she had worked on February 25, 1983 (HT 1965). Hope also told her that she went to a continuation school in the mornings. (HT 1967-1968.) Hope said that she left school before noon and then went to her home at 1991 Myrtle Street. (HT 1969.) Her sister Elizabeth and petitioner were there when she arrived, as were her mother Ora Trimble and petitioner's mother. (HT 1970.) Willie Davis and Shirley Cavaness were also there. (HT 1973.) Larsen did not press Hope for specific times because the investigator did not want to suggest information to the witness. (HT 1977.) Larsen did not show Hope the report made by Kristina Kleinbauer of Kleinbauer's interview with Ora Trimble because Larsen wanted Hope's best recollection of events. (HT 1981, 1982.)

Larsen testified that Hope Black was in prison at the time of the interview and not particularly cooperative. Hope was adamant, however, that she saw petitioner at her home the day before he was arrested. (HT 1979.)

Larsen escorted Hope Black, who did not have transportation, to the courthouse to testify at petitioner's hearing. (HT 1977, 1980.) Hope told Larsen at that time that she remembered getting butter and cheese from the park on the day in question. (HT 1977-1978, 1980-1981.)

Ilene Chase is a special agent employed by CYA and worked as an investigator for the California Department of Justice in 1998. (HT 1983-1984.) She attempted to interview Hope Black and Ora Trimble. (HT 1985-1986.) Hope declined an interview, however. (HT 1986.) Trimble told Chase that she did not want to remember anything about the events in question. (HT 2002.) But she indicated that the description of events related in Kleinbauer's reports could have been accurate. (HT 2008.) Chase also interviewed Elizabeth Black. (HT 1996.) Black recalled that on February 25, 1983, she was let out of classes at Trade Tech school at 12:30 p.m., earlier than usual. (HT 1997.) Black believed she walked home alone and arrived at about 1:00 p.m. Petitioner arrived about 5-10 minutes later. (HT 1999-2000.) Black said that Slick did not want her to testify at petitioner's trial because he thought she was lying (HT 2022) and told her that she would go to jail if she did (HT 2025). Black told Chase that her prior declarations, dated 1991 and 1993, were accurate. (HT 2025-2026.) Finally, Chase interviewed Denise Burton in 1998 (HT 1988), who recalled that she saw petitioner at her school on February 25, 1983, between 11:00 a.m. and 1:00 p.m. (HT 1991).

Respondent also called detective Collette. The detective testified that he had talked to eyewitness Michael Stewart at the scene of the Khwaja shooting. (HT 2043.) Collette claimed that Stewart did not tell him that the gunman had a beard with gray in it. (HT 2044.) The detective acknowledged that it was patrol officer Valles, rather than himself, who conducted the formal interview of Stewart. (HT 2089, 2108.) Collette therefore had no notes or report to refresh his recollection of what Stewart had told him. (HT 2093, 2092.) He admitted that he could not recall whether Stewart had described to him what the shooter was wearing. (HT 2106-2107, 2108.) Collette nonetheless claimed that he could recall what Stewart had not told him over 20 years earlier. (HT 2100-2102.)

Collette also testified that if another officer had detained a second suspect in the Khwaja investigation, that officer was obligated to make a report and to inform Collette because he was the investigating officer. There was no report of a second showup in this case. (HT 2046-2048, 2051-2052.)

Collette did not recall whether he told Elizabeth Black that he would have her arrested because she had helped petitioner count the robbery proceeds but he acknowledged he could have said something like that. (HT 2078-2079.)

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ARGUMENT

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

A. **Petitioner Had a Constitutional Right to Present a Defense at the Guilt Phase of His Capital Trial.**

It is without question that a criminal defendant must be afforded an opportunity to present a defense to the charges against him. In *Crane v. Kentucky* (1986) 476 U.S. 683, 690, the high court stated: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’ [*California v. Trombetta* (1984) 467 U.S. 479, 485.]”

The rights of a defendant to present witnesses and challenge those of the prosecution has “long been recognized as essential to due process.” (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) In fact, the U.S. Supreme Court has recognized that few rights are more fundamental. (*Id.*, at p. 302; see also *Washington v. Texas* (1967) 388 U.S. 14, 19.) In *Washington v. Texas*, 388 U.S. at p. 19, the court stated:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This is a fundamental element of due process of law.

In *People v. Frierson* (1985) 39 Cal.3d 803, this Court acknowledged the fundamental nature of the right to present a defense by

holding that defense counsel may not override his client's openly expressed desire to defend in the guilt phase of a capital case, as long as there is some credible evidence to support the desired defense.

In *Frierson*, the defendant wanted his attorney to present evidence of diminished capacity as a defense to the special circumstance allegations in the guilt phase of his capital trial. Trial counsel made a strategic decision, however, that the evidence was best used at the penalty phase in hopes of avoiding a death sentence. Accordingly, after the prosecution presented its case in the guilt phase, defense counsel rested without presenting any evidence. At this time, counsel informed the trial court that his client disagreed with the decision not to defend at the guilt phase of trial. *Frierson* wanted evidence of his diminished capacity presented. The trial court concluded, however, that it was counsel's prerogative to control the case and that he had the authority to decline to present a defense, despite the defendant's wishes to the contrary. (39 Cal.3d 810-811.) After counsel presented evidence of *Frierson's* diminished capacity in the penalty phase, the jury returned a verdict of death. (*Id.*, at pp. 808-809.)

This Court found that the *Frierson* trial court erred in allowing trial counsel to override the defendant's expressed desire to defend at the guilt phase. This Court relied upon cases decided by both it and the U.S. Supreme Court which have recognized that some rights are so fundamental that trial counsel's traditional power to control the conduct of a case must yield to the defendant's desire to exercise that right. (39 Cal.3d at p. 812-814, citing, e.g., *Brookhart v. Janis* (1966) 384 U.S. 1 [discussed below]; *People v. Robles* (1970) 2 Cal.3d 205 [right to testify]; *People v. Holmes* (1960) 54 Cal.2d 442 [right to jury trial]; *People v. Rogers* (1961) 56 Cal.2d 301 [decision whether to plead guilty to a lesser offense].)

In differentiating between the decision whether to defend and the many strategy decisions over which counsel wields control, this Court in *Frierson* stated that: “. . . the fact that the trial attorney’s action in this case was motivated by strategic considerations does not foreclose inquiry into whether the decision in question here was ‘of such fundamental importance’ [citation] that defendant’s wishes should have been respected.” (39 Cal.3d at p. 814.) This Court concluded that the situation in *Frierson* was “qualitatively different” from those cases confirming counsel’s control over trial tactics and emphasized that the defense *Frierson* wanted his attorney to present was the sole defense to the special circumstance allegations. (39 Cal.3d at p. 814.)

This Court recognized that trial counsel in *Frierson* may well have had sound reasons for choosing to withhold the diminished capacity evidence until the penalty phase of the trial. However, the Court emphasized that defendant *Frierson* nonetheless had the right to insist on defending at the guilt phase:

Given the magnitude of the consequences that flowed from the decision whether or not to present any defense at the guilt/special circumstance phase, we do not think counsel could properly refuse to honor defendant’s clearly expressed desire to present a defense at that stage. [Fn. omitted.] Just as a defendant in an ordinary criminal case retains the right to refuse to plead guilty to a lesser offense even if his counsel is convinced that such a plea will lead to a lesser penalty, a defendant in a capital trial must also retain the right to have his only viable defense to the guilt or special circumstance charges presented at the initial stage of the trial. [Fn. omitted.]

(39 Cal.3d at p. 815.) Accordingly, this Court held that defense counsel does not have the authority to refuse to present a defense at the guilt phase

of a capital trial “in the face of a defendant’s openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense. (*Id.* at pp. 812, 817-818; see also, *People v. Burton* (1989) 48 Cal.3d 843, 856.)

Frierson is consistent with U.S. Supreme Court law recognizing that an attorney cannot override his client’s express wishes to exercise a fundamental right. In *Brookhart v. Janis, supra*, 384 U.S. 1, 3, the high court granted certiorari to determine whether the State of Ohio had denied Brookhart’s constitutional right to be confronted with and to cross-examine the witnesses against him. Therein, defense counsel told the court that his client had waived in writing his right to a jury trial and wanted to be tried by the court. The trial judge, in Brookhart’s presence, determined that the written waivers of trial by jury were valid. Counsel then indicated that the case was before the court “on a prima facie case.” (384 U.S. at p. 5.)³⁰ When the court indicated that in a prima facie proceeding a defendant “not technically or legally, [but] in effect admits his guilt,” the defendant interjected, “I would like to point out in no way am I pleading guilty to this charge.” (*Id.* at p. 6.) Despite Brookhart’s statement, his attorney then agreed to the truncated proceeding. (*Ibid.*)

The high court in *Brookhart* reversed the defendant’s conviction, finding that the defendant’s “emphatic statement” to the judge that he “in no way” wanted to plead guilty demonstrated he did not agree to a prima facie proceeding. (384 U.S. at p. 7.) The U.S. Supreme Court framed the issue as follows:

³⁰ In such a proceeding, the prosecution is required to make only a prima facie showing of the defendant’s guilt. The defendant cannot offer evidence or cross-examine the state’s witnesses. (See 384 U.S. at p. 7.)

Our question therefore narrows down to whether counsel has the power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plea not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances.

(384 U.S. at p. 7.)³¹ Both *Frierson* and *Brookhart* thus make clear that an attorney cannot override a defendant's clearly expressed desire to exercise a fundamental right.

If it has been established that trial counsel overrode his client's express desire to exercise a fundamental right, there need not be an additional showing that counsel's action prejudiced the defendant. (*Brookhart v. Janis, supra*, 384 U.S. at pp. 3-4.) The U.S. Supreme Court's opinion in *Brookhart* is consistent with *Frierson*, wherein this Court imposed no additional requirement of prejudice after it found that the record showed that *Frierson* had expressed his desire to defend and the availability of some credible evidence supporting a defense.³² Some constitutional

³¹ See also, *Faretta v. California* (1975) 422 U.S. 806, 848 (Blackmun, J., dissenting), [where defense counsel adopts a trial strategy that significantly affects one of the accused's constitutional rights over the wishes of the defendant or without adequate consultation, there is a remedy, citing *Brookhart v. Janis, supra*]; compare with *Florida v. Nixon* (2004) 160 L.Ed.2d 565 [counsel was not ineffective for conceding defendant's guilt in hopes of avoiding a death sentence where he repeatedly advised defendant of his strategy and defendant did not object to it].

³² In *Frierson*, the diminished capacity evidence presented in the penalty phase demonstrated that there was some credible evidence that could have been presented at the guilt/special circumstance phase. (39 Cal.3d at p. 815, fn. 3.) The record also expressly reflected a conflict between *Frierson* and his attorney over whether to defend at the first phase of the capital trial. (*Id.* at p. 818, fn. 8.) Since both of these elements were

rights are so basic to a fair trial that their violation can never be considered harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Certainly a criminal defendant's right to defend against capital murder charges must be one of these basic rights. Moreover, the violation of a defendant's right to present a defense in the guilt phase of a capital trial defies analysis by harmless error standards and is undoubtedly a "structural" error, reversible per se. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310.)³³

As in *Frierson*, petitioner in this case was denied his fundamental constitutional right to present a defense at the guilt phase of his capital trial. As set forth below, the evidence adduced at the evidentiary hearing ordered by this Court amply demonstrates that petitioner made clear his desire to exercise his right to defend but that his attorney, Ronald Slick, ignored petitioner's wishes, perhaps because counsel believed (as did the trial court in *Frierson*) that he, rather than his client, had the final word as to whether to defend at the guilt phase. Moreover, the hearing record clearly shows that at least some credible evidence existed to support a guilt phase defense. As a result, petitioner's conviction and sentence should be reversed.

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established by the appellate record, this Court reversed the special circumstance findings.

³³ Cf. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741 [harmless error analysis not applied where trial court improperly circumscribed defense counsel's closing argument and failed to properly instruct the jury, errors which prevented the defendant from presenting his theory of the defense].

B. Petitioner Openly Expressed His Desire to Present A Guilt Phase Defense

1. What Is a Clearly Expressed Desire to Defend?

The Referee’s Report erroneously interprets the Court’s decision in *People v. Frierson, supra*, 39 Cal.3d 803, as requiring petitioner to articulate with lawyer-like specificity the legal defenses – alibi and mistaken identification – that he “wanted *in fact* to present,”³⁴ as well as to identify the particular witnesses supporting those defenses. For example, the Referee finds that although petitioner made specific reference to his “alibi” in a *Faretta* motion, this “did not specifically advise the trial judge that Petitioner told Mr. Slick that he wanted *in fact* to present an alibi defense as opposed to merely desiring more investigation before a final tactical decision could be made.” (Referee’s Report at 16; emphasis in original.) As another example, the finding “[t]here is no direct evidence that Petitioner told Ms. Kleinbauer (or Mr. Slick) that [his] witnesses could support a ‘guilt phase defense’” (Report at 15) requires that petitioner use the specific words “guilt phase defense” in communicating with his investigator. (See also, *id.*, at 17 [“even ‘notice’ of a potential defense is not a request or a demand to present it at trial.”]; *id.*, at 19 [petitioner did not tell Slick “that he wanted specific witnesses to be called or have any specific defense, including ‘alibi’ or ‘mistaken eyewitness identification,’ presented at trial”].)

This Court must reject the Referee’s crabbed and illogical analysis of what petitioner is required to show to prove he was denied his right to defend under *Frierson*. The precision in language required by the Referee

³⁴ Referee’s Report at 16; emphasis in original.

is unreasonable and values form over the substance of petitioner's core constitutional rights. No reasonable person who heard petitioner's insistence on his innocence, who knew that evidence supported defenses of alibi and mistaken identification, and who heard that petitioner would rather represent himself than have his lawyer go to trial unprepared would interpret these facts as a failure to assert his right to a defense.

In *People v. Frierson*, 39 Cal. 3d at p. 815, this Court held that counsel cannot properly refuse to present any defense at all at the guilt/special circumstance phase of a capital trial in the face of his client's clearly expressed desire to present a defense at that stage. The determination of whether there is a clearly expressed desire to defend under *Frierson* must be made on a case by case basis.

Frierson's recognition of a defendant's fundamental right to present a defense is illusory if a formulaic incantation by a defendant is required to preserve that right. The Referee's requirement of such precision in speech is inappropriately applied to a lay person in general and, for the reasons discussed below, to petitioner in particular.

The Court's reference order does not appear to contemplate the precision in language required by the Referee. For example, Question 8 asks: "Did petitioner *tell or make clear* to Slick's investigator that he wanted to put on a guilt phase defense?"³⁵ *Frierson* does not suggest that a defendant must use the language of a lawyer to express his desire to defend, much less that he identify the specific defenses to be presented and the particular witnesses whose testimony will support those defenses. The defendant in *Frierson* told his attorney that he wanted "a defense." (39

³⁵ Emphasis added.

Cal.3d at 811.) It was the attorney who explained to the trial court that his client wanted to present a defense of diminished capacity.³⁶ Frierson himself neither articulated the particular defense he wanted to present nor named specific witnesses supporting that defense; in fact, he said only that his lawyer told him he was going to call psychiatrists and other witnesses. Nothing in *Frierson* supports the Referee's interpretation of that decision as requiring a defendant to personally specify (without the aid of counsel, another core constitutional right) the particular defense he wants to present or the witnesses who support that defense.

The Referee's Report imposes a burden on petitioner that is far greater than *Frierson* requires, and far greater than the California or Federal Constitutions can permit. (See *Gideon v. Wainwright* (1963) 372 U.S. 335; *Strickland v. Washington* (1984) 466 U.S. 668.) In fact, in *Brookhart v. Janis, supra*, the U.S. Supreme Court found that the defendant therein had expressed his desire to defend by telling the trial judge, "I would like to point out in no way am I pleading guilty to this charge" in response to the trial court's explanation that in the prima facie proceeding his attorney had requested a defendant in effect admits his guilt. (384 U.S. at p. 6.) The high court found that this statement demonstrated Brookhart's unwillingness to proceed in a prima facie proceeding and his desire to contest the charges. (*Id.* at p. 7; see also, sec. A., *ante.*)

The Referee's reliance on petitioner's not having told Slick "that he wanted specific witnesses to be called or have any specific defense,

³⁶ One can infer from the *Frierson* opinion that Mr. Frierson's trial attorney -- unlike petitioner's -- conducted a reasonable investigation, communicated with his client, and was willing to articulate potential defenses to guilt.

including ‘alibi’ or ‘mistaken eyewitness identification,’ presented at trial” (Report at 19) cannot be squared with *Frierson*.³⁷ While a capital defendant has the constitutional right to demand a guilt phase defense, he does *not* have the prerogative to direct the contours of that defense. *Frierson* recognizes that counsel maintains his traditional power to control matters of ordinary trial strategy, such as whether a particular witness should be called, whether certain evidence should be introduced, or whether an evidentiary objection should be interposed. (39 Cal.3d at p. 813; see also, cases cited therein.) Petitioner had the right to demand that some defense be presented on his behalf, but he did not have the right to demand that Slick call any particular witness, present any particular piece of evidence, or advance any particular theory.

Petitioner, who was an educationally disadvantaged 19 year old at the time of trial (see subsection 2.d., *post*), could not have been expected to articulate legal theories in any formalistic sense, such as asking for “alibi” or “mistaken identity” defenses. Moreover, it is not the burden of the defendant to identify defenses and the witnesses supporting the defenses. The Referee inappropriately requires a defendant to assume the role of his or her attorney in expressing a desire to defend. Under the Referee’s interpretation of *Frierson*, a defendant charged with assault by means of force likely to produce great bodily injury who bit a victim during an epileptic seizure would be required to state “I want to present a defense of

³⁷ As petitioner sets forth in subsection 2.e., *post*, he did testify at the reference hearing that he requested specific witnesses. Petitioner believes the evidence that he wanted to defend amply supports his testimony.

unconsciousness”³⁸ and identify the witnesses – including experts – supporting that defense. It is, however, the lawyer’s job to identify legal defenses, as well as to investigate witnesses – whether specifically named by his client or not – who may support available legal defenses.

This Court’s decision in *In re Lucas* (2004) 33 Cal.4th 682, recognizes the role and importance of counsel in a capital case. There, the Court rejected respondent’s argument that trial counsel’s failure to conduct background and social history investigation was excused because his client did not reveal that he had been abandoned and abused as a child, stating:

[C]ontemporary professional standards required counsel to conduct adequate investigation of petitioner’s background even if petitioner himself failed to come forward with evidence of his difficult history. It was counsel, not petitioner, who should have decided what information was relevant to the case in mitigation.

(33 Cal.4th at 730). It was Slick, not petitioner, who was required to identify and present the legal defenses of alibi and misidentification suggested by petitioner’s statements to Kleinbauer and supported by her investigation, because petitioner clearly expressed his desire to defend.

In *Lucas*, the Court reasoned that an investigation of a capital defendant’s background was required without self-reported abandonment and abuse, because “the accused would not necessarily understand the significance of information that would be uncovered by such an investigation. . . .” (33 Cal.4th at 730). Similarly, it is not reasonable to require in the instant case that petitioner precisely articulate the significance of the information discovered by the investigation into his

³⁸ CALJIC 4.30.

defenses of alibi and mistaken identification. Yet, that is the burden that the Referee imposes on petitioner.

Petitioner has testified that he did, in fact, ask Slick to call particular witnesses and that he did, at least in layman's terms, inform his counsel how those witnesses could support a defense. Slick disputes this claim. Even if petitioner's testimony on this point is set aside, the uncontroverted evidence in the hearing record, which is discussed below, shows that petitioner did as much or more than can reasonably be expected of any criminal defendant trying to exercise his constitutional right to defend. He professed his innocence to Slick (by letter and in person), to Slick's agents, Kristina Kleinbauer and Dr. Kaushal Sharma, and to the trial court; he identified persons who could show that he was elsewhere when the crimes occurred; he stated he had not confessed and was being "framed;" he also questioned the state eyewitness identification case, to the extent that he was able.

This was sufficient to clearly express his desire to defend under *Frierson*. It was Slick's obligation as counsel to take the information provided by petitioner, and petitioner's request to defend because he was innocent, and present the best defense that the evidence allowed. The factual bases for defenses – that he was not present when the crimes were committed and had been mistakenly identified by the prosecution's witnesses – are clearly set forth in the record. Kleinbauer's investigation corroborated petitioner's defenses, and revealed additional witnesses supporting his alibi and mistaken identification. Petitioner's statements during the *Faretta* hearings show his desire to complete investigation into

his defenses. Why would he be willing to forgo the assistance of counsel so that investigation could continue if he did not want to defend?³⁹

2. The Evidence that Petitioner Desired to Defend.

a. Petitioner's Statements to Kleinbauer.

In a memo dated April 26, 1983, Ron Slick directed his investigator, Kristina Kleinbauer, to “take a statement” from petitioner, to determine his “participation in [the] robberies [and] murder.” (Exh. 8.) On June 15 and 17, 1983, Kleinbauer interviewed petitioner at Los Angeles County Jail. (HT 224-225, 227.) Petitioner told Kleinbauer that he was not involved in the charged offenses. (HT 227, 264-35; exh. 1.) He told her where he had been on February 25, 1983, and gave her the names of the persons he was with at the time charged offenses were committed.”⁴⁰ (HT 236, 238, 242,

³⁹ The explanation offered by the state through Slick, and apparently adopted by the Referee, was that petitioner desired to “delay” his trial (HT 771). This explanation flies in the face of all the other evidence, and it frankly makes no sense at all in this case, where petitioner has consistently maintained his innocence, has evidence supporting defenses, and explained at the trial that he wanted the investigation to be completed. Petitioner has now been waiting 22 years for a chance to put on a defense against the charges.

⁴⁰ Petitioner told Kleinbauer that he was at the home of his girlfriend, Elizabeth Black, on the morning of February 25, 1983. (HT 236-38; Exh. 1.) Elizabeth woke him up at 7:00 a.m., when she left for school. Petitioner left Elizabeth’s house on his bike and arrived at Trade Tech school about 12:30 p.m. (HT 242-43; exh. 1.) Petitioner and Elizabeth started back to her house, but one bike tire had a leak so he left it at his mother’s house. Elizabeth got home before petitioner, who arrived there about 1:20 p.m. (HT 243, 256-57; exh. 1.) Ora Trimble, Hope Black, Gloria Burton, and Penny’s cousin Shirley were also at the house when petitioner arrived. (*Ibid.*)

Testimony at the hearing established that Kleinbauer’s report was

244-45, 265; exh. 1.)⁴¹ Petitioner also told Kleinbauer that if anyone identified him it was a mistake, and that he had not been in a lineup for identification purposes. (HT 264-65; exh. 1.) He said that he had not confessed to the Long Beach police, but they kept telling him they “had him,” that his interview with the police had not been tape recorded, and that he felt like he was being asked to take the fall for somebody else. (HT 264; exh. 1.)

b. Slick’s Knowledge of Petitioner’s Statements and Kleinbauer’s Witness Interviews.

On July 15, 1983, Kleinbauer gave Slick the names of the witnesses that petitioner believed should be interviewed, petitioner’s statements about the guilt phase defenses those witnesses could support, and her reports about her interviews of the witnesses Ora Trimble, Elizabeth Black, Gloria Burton and Denise Burton. (HT 231, 234-35, 236, 245-46, 257, 260-61.)⁴²

Before trial, Slick read Kleinbauer’s report about what petitioner was doing and who he was with at the times of the crimes, her reports of

incorrect in one respect. That is, it omits petitioner’s having gone from Elizabeth Black’s residence to his mother’s residence to tell her about the free cheese and butter in the park, before he went to meet Elizabeth at Trade Tech school. (HT 272, 1860.)

⁴¹ Petitioner apparently gave Kleinbauer additional information shortly before trial began about the potential witnesses he had identified. During one of his attempts to have Slick removed as his attorney, petitioner told the trial court: “The investigator has been telling me, ‘I am coming back.’ I recently called and delivered addresses and stuff to continue my investigation.” (RT 15 [Aug. 11, 1983, *Faretta* hearing].)

⁴² The information these witnesses provided Kleinbauer is set out in the Statement of Facts, section B.1.a., *ante*. (See also, Exceptions, Question 3, *post*.)

interviews of the witnesses identified by petitioner,⁴³ as well as her reports of the Susana Camacho and Michael Stewart interviews.

c. Petitioner's Letter to Slick.

Petitioner wrote to Slick before trial, telling Slick that he was not guilty and was home with his family. He asked Slick to help him prove his innocence, stating: "After all you can look into it you will see that I'm not the one who commit this crime and I'm looking to you to help me win, - and we can win" (HT 556; exh. 15.) Petitioner also pointed out weaknesses in the state's identification case. He wrote that one witness who testified at the preliminary hearing [Robert Cordova] admitted he saw the perpetrator's face only from a side view. He stated that the "main witness" [Zarina Khwaja] testified that she had never seen him before. Petitioner said he had not been in a live lineup for the K-Mart victims (HT 557; exh. 15) and that he believed they had identified him at the preliminary hearing based only on his dark skin tone (HT 557; exh. 15.)⁴⁴

Petitioner told Slick that the police were trying to "frame" him for the crimes by claiming that he had confessed when he had not. Petitioner asked Slick to help him prove that the police accusations were contrived. Petitioner felt that if Slick could get a "highly educated group" of jurors, together they could show them that he was not responsible for the crimes. (HT 559; exh. 15.)

⁴³ Billing records indicate that Slick reviewed Kleinbauer's report on July 23, 1983. (HT 539-40; exh. 13.)

⁴⁴ Petitioner wrote, "And reading about the two ladies at the K-Mart store is way out the picture for if there was a person coming in the court room not being Andre Burton and as dark as me they would have pick him out too . . ." (HT 557; exh. 15.) This comment appears to have been a layman's attempt to raise the suggestive nature of an in-court identification.

d. Petitioner Expressed His Desire to Defend in His *Faretta* Motions.

The record shows that petitioner openly expressed a desire to defend during the *Faretta* hearings in the trial court. He professed his innocence, spoke of incomplete investigation, and asked to represent himself so that he could prove to the jury that he had not committed the charged crimes.

August 10, 1983, was petitioner's first opportunity to raise his motion for self-representation in the trial court.⁴⁵ At this time, the investigation Slick asked Kleinbauer to conduct had not been completed.⁴⁶ (HT 308-1; see also, exh. 8 [memorandum from Slick to Kleinbauer dated April 26, 1983 outlining investigation].) Petitioner told the trial court that he wanted to represent himself because his investigation was not complete and he was dissatisfied his communication with Slick and Slick's preparation for trial. (HT 1862.) Petitioner stated:

Your Honor, I would like to represent myself due to the circumstances of **lack of interest as far as the investigation is concerned with my case.** There isn't any that should have

⁴⁵ Slick announced ready for trial on July 26, 1983, and the case was trailed to August 2, 1983. (RT 8 A.) On August 2, the case was trailed to August 3, and on August 3, it was trailed to August 9. (CT 106.) Slick testified he had no recollection of any contact with petitioner during the trailing period (HT 554), and that he believed August 10 was petitioner's first court appearance during the trailing period. (HT 564; see also, CT 106.)

⁴⁶ Slick directed Kleinbauer to take a statement from all witnesses and to investigate Otis Clements' background. When petitioner's trial started, Kleinbauer had not interviewed three potential alibi witnesses whom she had identified, other witnesses to the Khwaja case incident, including the three Cordova brothers and the Khwajas, or the K-Mart victims. In addition, she had not conducted investigation regarding codefendant Otis Clements.

been taken care of. **I haven't spent or had enough time to communicate with my lawyer because he haven't given me the time,** because he feel that to me it is not worth it to him...

As far as the investigation is concerned, **the investigator has been working with my case is willing to come forth to the court and can work with my - - with my case.**

(RT 1-2; emphasis added).

On August 11, 1983, petitioner again asked to represent himself and stated as follows:

Your Honor, I would still like to represent myself. I have an investigation report here that is not exactly the information that I gave to an investigator. . . .

These statements and this investigation report are not true statements coming from my mouth. They are different to the realness in which my statements that I have gave even to the investigator - - none of this majority as far as the realness of my alibi. . . .

Mr. Ron Slick also just now given me the whole file of my case. This is my first time ever getting the papers, of knowing about what was happening with my case. **I know for sure that we have a lack of interest and is really out of hand and the court is not paying attention to this. This is my reasons for wanting to represent myself.**

(RT 8; emphasis added). Later in this proceeding, petitioner told the court:

. . . . I haven't even seen Ron Slick. I see Ron Slick every time I come to court and I am tellin' him the real, but all I am gettin' is the fake, the frame **I want to investigate my case and find out all about the things,** because **the investigator that investigated this case told me personally that something is shaky about my case and that Ron is not really on my side for this case and she wanted to be with me, to work with me,**

because she know that it is something about this case that is very shaky.

(RT 10; emphasis added.) Petitioner further stated:

. . . the investigator has been telling me, “I am coming back.”
I recently called and delivered addresses and stuff to continue my investigation The investigator that investigated this report constantly was telling me all the things that were shaky about this, about wanting **to be rushed into this .**
..

(RT 16; emphasis added; see also, RT 391 [on August 16, 1983, petitioner stated, “I also motion to resubmit the conflict of interest motion filed verbally on Mr. Slick [August 11, 1983]”].)

Petitioner’s statements at the *Faretta* hearings clearly expressed his desire to present a defense. Petitioner was 19 years old at the time of his trial and had never been through a jury trial (HT 1953). Moreover, Slick was on notice that petitioner was environmentally, educationally and emotionally deprived. The CYA records he reviewed indicated, inter alia, that petitioner was highly dependent upon others and at age 16 was functioning at the third to fifth grade levels academically. (Exh. B; see also, HT 1123-1124.) Petitioner’s ability to articulate his concerns to the trial court was also restricted by the court’s impatience with petitioner and stated belief that Slick was a competent lawyer. In fact, court went so far as to threaten petitioner with ejection if he caused any disruption. (RT 14 [Aug. 11, 1983]). Even with these disabilities, petitioner was able to advise the trial court that his investigation was not complete, that he wanted to present a defense, and that he was innocent.

As will be discussed in the Exceptions to the Referee’s Report, *post*, petitioner’s *Faretta* hearing statements regarding Slick’s failure to

communicate with him and the incomplete state of the investigation are inconsistent with petitioner having been informed of and consenting to Slick's strategy of presenting no guilt phase defense. If petitioner had agreed with this strategy, he would have no cause to complain about the incomplete state of the investigation or his limited ability to talk to his lawyer.

e. Petitioner's Testimony That He Told Slick He Wanted to Defend.

Before the day he made his first *Faretta* motion, petitioner told Slick that he wanted to present a defense and wanted his alibi witnesses called to the stand. (HT 1861, 1890-91 1908-09, 1930.) Once petitioner learned that Michael Stewart was an eyewitness who could assist his defense, he asked Slick to call Stewart as a witness. (Exh. D; see also, HT 1885).⁴⁷

f. Kleinbauer Understood That Petitioner Wanted to Defend.

Kristina Kleinbauer understood that petitioner wanted to present a guilt phase defense. Petitioner told her he wanted witnesses to be called

⁴⁷ On August 11, 1983, petitioner received Kleinbauer's investigation report, which included her interview of Michael Stewart. (RT 8, 15). Stewart told Kleinbauer that the gunman had gray in his beard and hair. (Exh. 1).

In a declaration dated April 4, 1985, petitioner stated, "I did know from our investigator that a witness had been located who gave a different description of the person who did the shooting of Mr. and Mrs. Khwaja, and I wanted to know why that witness had not been subpoenaed to come to court." (Exh. D; HT 1885). Although petitioner during his hearing testimony could not recall if he had Michael Stewart in mind (HT 1888), the most likely interpretation is that he was referring to Stewart.

and to testify in his defense at his trial. (HT 313.) In a declaration dated May 15, 2000, Kleinbauer stated:

I have been asked by Mr. Baruch [former counsel for Mr. Burton] whether Mr. Burton made it clear that he wanted to present a defense at the guilt phase of the trial. Many years have passed and I no longer recall Mr. Burton's exact words on this subject. However, from my dealing with him, it was always clear to me that he did. He consistently told me that he had not committed the charged crimes and that he had not confessed to the Long Beach police. He expressed to me his concern that his trial was scheduled to start although my investigation was far from complete. He made it clear to me that he wanted me to finish my investigations before he went to trial. From our conversations, I understood that he wanted to present a defense. Nothing Mr. Burton ever said to me led me to believe that he would have agreed with Mr. Slick's decision not to present a guilt phase defense.

g. Petitioner's Post-Conviction Statements Corroborate His Desire to Defend.

Jeffrey Brodey, who represented petitioner in preparing and filing a motion for a new trial in 1984 and 1985, testified that petitioner said he told Slick he wanted to put on a defense at trial and that he had witnesses he wanted to call, but that Slick would not listen. (HT 1187-88.)

L. Marshall Smith who represented petitioner on his direct appeal and in federal habeas proceedings, testified petitioner told him that he told Slick he wanted to present witnesses at the guilt phase. (HT 126.)

3. Slick's Testimony That Petitioner Did Not Express a Desire to Defend Is Not Worthy of Belief.

Slick testified at the evidentiary hearing that petitioner did not tell him he wanted to present an alibi defense (HT 721), a defense based on mistaken identity (HT 933), or any specific defense (HT 919, 1035).

The Referee’s Report relies almost exclusively on Slick’s testimony in finding petitioner did not express a desire to defend. However “the testimony of trial counsel cannot be treated as coming from a totally disinterested witness.” (*Bolius v. Wainwright* (5th Cir. 1979) 597 F.2d 986, 989.) Had Slick testified to anything other than the absence of a desire to defend, he would have placed himself in an awkward ethical position by revealing that he had overridden his client’s demand for a defense. Clearly, “the weight [of trial counsel’s] testimony must be discounted by the possibility of a conflict of interest . . .” (*Id.* at 990.)

Slick’s denial that petitioner’s expressed desire to defend is contradicted by the testimony of Kleinbauer, petitioner, Brodey and Smith. Slick’s testimony cannot be reconciled with exhibit 15, the letter petitioner sent to Slick, in which he professes his innocence; tells Slick he was home with his family at the time of the crimes; points out the weaknesses in the identification evidence; and asks Slick to work with him to fight the charges.⁴⁸ Finally, Slick’s testimony cannot be reconciled with petitioner’s *Faretta* hearing statements about his innocence and the need for further investigation.

a. Slick’s Limited Contact with Petitioner.

Slick’s testimony that petitioner acceded to a strategy of not defending the case must be evaluated in the context of his extremely limited contact with petitioner and the glaring absence of any documentation of any conversations with petitioner in his case file.

⁴⁸ Slick testified he did not interpret petitioner’s letter as expressing a desire to defend. (HT 933-34.)

Slick made only one visit to the county jail during the entire time he represented petitioner. (HT 528-30; exh. 13, pp. 2-3; HT 1857-58.) He has no present memory of what he said in that meeting and no notes from the meeting exist. (HT 529-30.) Slick also had brief contact with petitioner at court appearances. (HT 510, 512, 515-16, 527, 541, 545 [Slick]; HT 1858 [Burton].) There is no document in his file memorializing the occurrence or subject matter of any conversations between Slick and petitioner during the single jail visit or at the courthouse. (HT 512-13, 515, 516, 524-25, 527, 529, 541, 544, 545-46, 721, 763-64, 768, 774.)

Slick's testimony that he advised petitioner about his guilt phase "strategy" of not defending and that petitioner agreed to this approach is undermined by his inability to recall the manner in which petitioner responded to this purported advice, the absence of any note in Slick's file about this advice, and Slick's inability to recall when he obtained petitioner's agreement to forgo a defense. (HT 721, 763-65, 768, 770). It is also significant Slick first asserted that petitioner consented to his "strategy" some 15 years after the crime and trial, and only after the Court issued its order to show cause on the *Frierson* claim.

b. Slick's Admissions to Jeffrey Brodey and L. Marshall Smith.

Slick's testimony that petitioner did not express a desire to present a defense was impeached by Slick's admissions to the contrary to Jeffrey Brodey and L. Marshall Smith. At a meeting between Slick and Brodey in 1985, Slick said that petitioner said he wanted to put on a defense, but he [Slick] felt the defense would not work. (HT 1173.) Slick also admitted that he was aware of defense witnesses and the statements by those

witnesses to an investigator, and remembered there was an out-of-state witness he did not call. (HT 1174.) L. Marshall Smith testified that in 1985, Slick admitted: that petitioner had witnesses; that petitioner told him he wanted to present a defense; and that he (Slick) did not call witnesses because the state's case was so strong. (HT 60, 152.) Slick told Smith that petitioner's case was a "slam dunk" as to guilt and there was no point in calling witnesses. (HT 48, 53.)

c. Slick's Abysmally Poor Memory.

Slick's testimony that petitioner never expressed a desire to defend is undermined by his demonstrably poor memory of relevant events. Slick does not recall whether petitioner gave him the names of witnesses who might support a defense (HT 714), but speculates that he may have obtained the names of the defense witnesses from petitioner, his family members, or Kleinbauer (HT 716-17). Slick could not even remember the defenses petitioner's witnesses supported. He said ". . . I don't remember in that kind of detail what he told me" (HT 720-21) and admitted that he had no notes on the subject (HT 721).⁴⁹

Slick's hearing testimony that he has a present memory that petitioner did not request a defense is in stark contrast to his inability to remember Kleinbauer's 1983 statements on this issue. For example, he does not recall if Kleinbauer told him that petitioner said he was not at the scene of the crimes and testified that looking at Kleinbauer's report (exh. 1) would not help him remember. (HT 722.) Slick remembers hearing that

⁴⁹ Documentation of any conversations with petitioner is absent from Slick's files. (HT 512-13, 515, 516, 524-25, 527, 529, 541, 544, 545-46, 763-64, 763-64, 768, 774.)

petitioner questioned the identifications by witnesses at the preliminary hearing, but does not remember who told him this. (HT 722.)

Slick was unable to remember even basic facts about the case, and the dire state of his memory is demonstrated throughout his hearing testimony. Reading the transcripts of the testimony of the August 11, 1983, *Faretta* hearing did not refresh Slick's recollection of giving petitioner the police and investigation reports about the case. (HT 714-15.) Slick had no memory of when Michael Maloney, Ph.D., came to the courthouse in Long Beach, and Slick testified that his recollection would not be refreshed by looking at billing records. (HT 1063-64; see also, HT 797 [no memory of whether Maloney was present when Slick talked to Elizabeth Black and looking at billings would not refresh his memory].) Slick's memory was rarely, if ever, refreshed, even by reviewing documents from his file or trial transcripts. (See, e.g., HT 672, 715, 722, 724, 726, 919-920, 1018, 1082.)

Not only was Slick unable to recall the events of petitioner's trial in 1983, he was unable to recall far more recent events.⁵⁰ The most glaring example is his hearing testimony that he did not know what became of his original trial file.⁵¹ (HT 554, 1057, 1998.) After so testifying, Slick produced what he described as his "original" file. (Exh. 63). However, a

⁵⁰ For example, Slick had no memory that he testified at an evidentiary hearing in Samuel Bonner's habeas corpus proceedings in 1990. (HT 1771.) The transcript of Slick's testimony in *Bonner* was marked for identification as exhibit 59. (HT 1788-1789; see also, HT 2279.)

⁵¹ Slick testified that he gave his original file to an unknown person from the California Attorney General's Office some time before 1998. (HT 1059.) He first said he did not know if he received any material from the Attorney General in return for his original file, but then said that he thought the Attorney General sent him something since the time he gave them his original file, but did not remember. (*Ibid.*)

review that file and the file Slick produced during his hearing testimony (exh. 36) shows that both contain a mixture of original documents and copies, as well as material of relatively recent vintage establishing that Slick has had access to both files over the last few years. For example, exhibit 36 contains documents showing that the file was in Slick's possession and was handled by Slick as recently as December 2, 2002.⁵²

In summary, Slick's asserted memory that petitioner did not request a defense, 20 years after the fact and without any documentation, strikingly contrasts with his admitted inability to remember other legally significant information, such as whether petitioner gave him the names of potential witnesses or defense theories. Slick's explanation of this phenomenon – "It's a whole lot easier to remember specifically what didn't happen than what did, and it's just a human function, I think" (HT 920; see also, HT 950) – is unconvincing and illogical.

d. Slick's Hearing Testimony on Material Facts Was Impeached by Prior Inconsistent Statements.

Slick was also impeached with prior inconsistent statements on several points, undermining the credibility of his testimony.⁵³ For example,

⁵² Exhibit 63, a box addressed to Slick showing the sender as Deputy Attorney General Kerrigan Keach, who was formerly assigned to this case, includes documents establishing that Slick used this file as recently as May 15, 2001. (Priority Mail from Deputy Attorney General Chung L. Mar, addressed to Commissioner Slick, dated May 12, 2001 and received by the Compton Judicial District on May 15, 2001.)

⁵³ In his Exceptions to the Referee's Report, Question 1, *post*, petitioner has set forth numerous reasons why Ronald Slick was not a credible witness. Additional examples of Slick's lack of credibility are raised throughout this brief. Petitioner incorporates them herein by reference.

although Slick claimed that petitioner's statements during the four *Faretta* hearings did not indicate to him that petitioner was dissatisfied with Slick's representation (HT 790), Slick acknowledged that the transcripts showed otherwise (HT 564.) Although Slick testified that he had concluded that petitioner's co-defendant Otis Clements was a liar (HT 668), he previously stated he had listened to Clements' confession and found it to be credible (HT 669). Slick acknowledged at the hearing that petitioner told him that he had been framed (HT 561, 666; see also, RT 9, 11), but Slick has previously said that petitioner never said he was being framed (HT 1081-83). Finally, although Slick told the trial court that he had investigated petitioner's claim of being framed (HT 667; see also, RT 11), Slick admitted that he had not interviewed Clements or investigated his reputation in the community for violence or untruthfulness, or investigated his history of setting up others to take criminal responsibility for his actions (HT 667-69). In truth, the only investigation that Slick did of Clements was to listen to the tape of his third confession (HT 669), which alone should have alerted Slick that Clements was lying to police and that further investigation was necessary.⁵⁴

e. Slick Would Not Likely Remember That Petitioner Wanted to Defend.

Slick testified that in 1983, he believed that the decision whether or not to call witnesses was his alone. (HT 1027). Simply put, Slick had no particular reason to take note of petitioner's desire to present a defense. Slick's testimony that petitioner did not tell him he wanted to defend and consented to no defense is not based on a true memory, particularly because

⁵⁴ Each of Clements' statements contradicted and conflicted with the others. (See Exceptions, Question 3, *post.*)

there is no other evidence that petitioner agreed not to defend and abundant evidence he wanted to do so.

f. Slick's Bias Against Petitioner.

Slick's testimony that petitioner did not request a defense is of dubious credibility in light of his bias against petitioner. There are several reasons to believe that Slick is biased against petitioner. He did not provide his complete file to petitioner's appellate counsel (HT 176-77), but did give his file to the Attorney General (HT 994-95, 1059-60, 1091-92.) Slick has made himself available for interviews by the Attorney General's Office on two occasions. (HT 1080-83.) He has been in contact with each Deputy Attorney General assigned to this case. (HT 1092-93; exh. 63.) He has signed declarations that have been filed as exhibits to the Attorney General's pleadings in this case. (HT 1090, 1098.) Although Slick met with Deputy District Attorney Brian Kelberg on January 9, 2003, he cancelled a meeting with counsel for petitioner scheduled for the next day.⁵⁵ (HT 1083-84.)

In other cases in which his performance was questioned, Slick appears to have helped the state, and not his client. (See, e.g., HT 1771, 1773-76, 1779, 1791.) More to the point, Slick was clearly displeased to have his actions called into question at the evidentiary hearing, even though he put on no defense at the guilt phase of trial and his client received a

⁵⁵ Mr. Slick explained his refusal to meet with petitioner's present counsel before the hearing, in emotional testimony, that these post-conviction proceedings left him feeling like "the defendant," although it is his client, not he, who has spent 20 years in custody before his first opportunity to present witnesses in court. (HT 1152-53.)

death sentence despite the availability of credible evidence supporting guilt phase defenses.

Slick's inappropriate contact with eyewitness Michael Stewart during the reference hearing was further evidence of his bias. Slick approached Stewart in a restroom in the courthouse during a break in the proceedings. Slick introduced himself and told Stewart he believed that they had spoken previously (HT 659-661), although whether Slick had himself contacted Stewart prior to petitioner's trial was a contested issue at the hearing. The fact that Slick – an attorney and court commissioner – would approach a witness in this manner at the very least raises an inference that he was not a neutral participant in these proceedings.

In sum, the weight of the evidence supports petitioner's testimony that he told Slick he wanted to establish his innocence, by presenting alibi and mistaken identification witnesses. Slick's testimony to the contrary is unpersuasive. It is important to note that Slick has not asserted that petitioner requested a defense, but later agreed to a recommendation by Slick to forego a guilt phase defense in order to maximize the chances for a life sentence in the penalty phase. Slick claimed in his testimony that petitioner *never* asked for a guilt phase defense. This claim is unbelievable in light of petitioner's repeated denials of guilt, his willingness to provide the names of persons who could demonstrate he was not at the scene of the crimes, his questions about the credibility of the state's identification case, the investigation that discovered witnesses who supported alibi and mistaken identification defenses, his denial that he confessed and assertion that he was being framed by police and Otis Clements, and his request for Slick's help in proving his innocence. Because Slick's testimony flies in

the face of every other known fact relevant to the question of whether petitioner asked for a defense, it must be rejected.

C. Some Credible Evidence Existed to Support the Defense.

1. What Constitutes “Some Credible Evidence?”

As set out above, this Court in *Frierson* held that defense counsel does not have the authority to refuse to present a defense at the guilt phase of a capital trial “in the face of a defendant’s openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense. (39 Cal.3d 803, 812, 817-818; see also, *People v. Burton, supra*, 48 Cal.3d at p. 856.)

What constitutes “some credible evidence” is not precisely spelled out in the *Frierson* opinion. However, it is readily apparent, given the facts in *Frierson* and this Court’s treatment of them, that it is not a demanding standard. Significantly, the diminished capacity evidence *Frierson*’s attorney refused to present in the guilt phase was presented in the penalty phase of trial, but it failed to convince any of *Frierson*’s jurors that a death sentence was unwarranted. It is thus highly unlikely that this same evidence, had it been presented in the guilt phase, would have convinced the jurors that the prosecutor had failed to establish the validity of the special circumstance alleged.

In fact, this Court recognized that a defendant’s insistence on presenting a defense at the guilt /special circumstance stage of a capital trial “may in the final analysis be *harmful* to his case . . .” (39 Cal.3d at p. 816, paraphrasing *People v. Robles, supra*, 2 Cal.3d at p. 215, emphasis added), which makes clear that the question is not whether the desired defense would have prevailed at trial. Making clear that the standard does not require a showing that the result would have been different, in *Frierson* this

Court distinguished that defendant's diminished capacity evidence, which it concluded was supported by some credible evidence, from a defense "which has *no* credible evidentiary support or on which *no* competent counsel would rely." (39 Cal. at p. 815, n. 3; emphasis added.)

As demonstrated in the preceding section, petitioner wanted Slick to defend against the charges by presenting evidence that the eyewitness identifications of him were mistaken and that he was elsewhere when the crimes occurred. As summarized below, there was at least some credible evidence to support both of these mutually consistent defenses. Petitioner need not prove that this evidence was strong enough to convince his jury that he was not guilty of the charged offenses. But the evidence Slick could have presented certainly was not so weak that no competent counsel would have relied upon it. Thus, petitioner has met his burden under *Frierson*.

2. Mistaken Identification Evidence.

The record of the reference proceedings demonstrates that the testimony Michael Stewart could have given at trial constituted some credible evidence to support petitioner's claim that he was mistakenly identified as the perpetrator of the Khwaja crimes. Stewart, an eyewitness to the East Pleasant Street shootings, would have made a powerful witness for the defense because he described the man he saw in a manner that differed dramatically from petitioner's appearance on February 25, 1983. Stewart's testimony at trial would have been credible and probative.⁵⁶

⁵⁶ A more thorough discussion of Michael Stewart and the other eyewitnesses is set forth in petitioner's Exceptions to the Referee's Report. (See Exceptions, Questions 7 and 9, *post*.) The purpose of this section is to summarize the facts showing that some credible evidence existed to support the defenses petitioner requested his attorney to present.

Michael Stewart had an excellent opportunity to observe the man who shot Anwar Khwaja and his mother. Stewart first saw the man when he exited a red truck and walked down the street. (Exh. 1; HT 589-590.) Stewart next saw him as he was returning to the truck after the shooting. The gunman passed right by Stewart, within a foot or two. (Exh. 1; HT 590-591.) Finally, Stewart had an opportunity to observe the man again as he fled in the truck. (HT 592, 593; see also, exh. 1.) Stewart estimated that he had seen the gunman's face for a total of 30-60 seconds (HT 632) and had seen him sufficiently well to give an accurate description of him to police (HT 618). Stewart, who had law enforcement training (HT 588-589), was also able to provide police with the first three numbers of the truck's license plate (exh. 1; HT 626).

The description Stewart gave of the man he saw on East Pleasant Street differed markedly from petitioner in age and appearance. The man Stewart saw was in his late thirties and had a beard with gray in it. (Exh. 1.) Stewart was definite about the beard with gray. (*Ibid.*) This description was highly probative because it excluded petitioner, who was 19 years old at the time of the charged crimes (exh. K at p. 51) and had no beard and no gray hair (HT 757-758; exh. 20).

Stewart could have provided other information at trial which would have tended to exclude petitioner. Stewart described the gunman as taller and much heavier than petitioner was on February 25, 1983. (Exh. K at pp. 22, 51; exh. 1.) Stewart also indicated that the gunman had a short afro hairstyle. (Exh. K at p. 22.) Petitioner, however, had a Jheri Curl on the day of the shootings. (HT 1324-1325, 1516, 1573; exh. 20.)

Michael Stewart's account of the events on East Pleasant Street has remained materially consistent over 20 years. (See Exceptions, Question 7,

post.) Most importantly, Stewart has consistently stated that he told police the gunman was older, and had beard with gray in it. (See exh. 1 [1983]; exh. 11 at p. 6 [1990]; HT 597, 646 [2003].) As a complete stranger to petitioner, Stewart was not subject to an attack for bias and had no reason to provide petitioner's jury with anything other than his best recollection of what he witnessed on February 25, 1983.

Had Stewart been called as a witness at petitioner's trial, he likely would have eliminated petitioner as the shooter, as he did at the evidentiary hearing. (HT 650; see also, HT 1887, 1148.)

Although the testimony of Michael Stewart without more constitutes some credible evidence to support petitioner's claim that he was misidentified by the prosecution's witnesses, testimony from eyewitness Susana Camacho would have added to his defense. Camacho's memory of the Pleasant Street shootings was substantially diminished by the time of petitioner's evidentiary hearing. However, she reported prior to petitioner's trial that the man she saw running down the street was white. (Exhs. 1, 43; see also, HT 1389, 1390.) This description excluded petitioner, who is a very dark-skinned African-American. (Exhs. 63, 20.) While Camacho's testimony alone might not have constituted some credible evidence supporting a mistaken identification defense, it did, when added to Stewart's testimony, have some value.

Moreover, the probative value of testimony from Stewart and Camacho could have been enhanced if petitioner's trial attorney had challenged the accuracy of the identifications of petitioner made by the

prosecution's eyewitnesses.⁵⁷ As petitioner fully explains later in this brief, each of these witnesses had only a single brief opportunity to observe the perpetrator, under stressful circumstances while the witness was afraid. Each identification of petitioner was cross-racial, made for the first time in the highly suggestive setting of a courtroom or preceded by an equivocal identification from an unduly suggestive photographic lineup. (See Exceptions, Question 9, *post.*)

Slick could have shown the jury that Robert Cordova's identification at trial of petitioner as the man who shot the Khwajas was highly questionable. The jury did not know that Cordova had described the perpetrator to police as taller and 40-60 pounds heavier than petitioner (exh. K at pp. 23, 51), or that the man Cordova saw was in his thirties and had pock marks or scars on his cheek (exh. K at p. 23). Petitioner, 19, had an unblemished face (HT 1325; exh. 20), although Otis Clements' face was scarred (HT 1325; exh. 22). Cordova had an extremely limited opportunity to observe the gunman. Although the jurors knew that Cordova saw the shooter for only five seconds or so (RT 367), they did not know that he primarily saw the man's face from a side view and only saw his full face for one second (CT 35-36). They did not know that Cordova was approximately 60-75 feet away from the shooter (see exh. K at p. 6 and RT

⁵⁷ As petitioner has emphasized herein, he is not obligated to establish that the evidence which supported his desired defenses would have convinced the jury not to convict him. Accordingly, this Court should not evaluate the probative value of the evidence supporting his defenses by weighing it against the prosecution's evidence. Petitioner believes that it is appropriate, however, for this Court to consider ways in which Slick could have supported the testimony of the potential defense witnesses, including cross-examination of the state's witnesses. (See Exceptions, Question 9, *post.*)

365, 671) or that he was afraid for his own safety at the time (CT 32, 34). The jury was not aware that Cordova's first opportunity to identify petitioner came in the inherently suggestive setting of the courtroom. (CT 36-37.) Nor was it aware of the substantial difficulties of making an accurate cross-racial identification such as that made by Cordova. (See exh. K at pp. 10 [Cordova is hispanic]; and 51 [petitioner is black].)⁵⁸

Slick could have also demonstrated to the jury that Anwar Khwaja's identification of petitioner was not reliable. The jury was unaware that the only identification Mr. Khwaja made of petitioner came in the prejudicial setting of the courtroom, six months after the charged offenses. (See, generally, exh. K [no pretrial identification documented].) The jury did not know that Khwaja failed to provide a description of the man who shot him to police, although he was able to give much information after he was wounded. (See exh. K at pp. 3, 11.) Slick failed to use the facts the jury did know to petitioner's advantage – that Khwaja saw the gunman only briefly, that he suffered serious injury as a result of the shooting, and that the cross-racial identification made by Khwaja, who is east asian (exh. K at p. 1) was inherently suspect. Khwaja testified that the gunman came upon him suddenly; he did not see the man approach. (HT 352.) The man

⁵⁸ Petitioner sought to call Robert Cordova to testify at the reference hearing. The Referee declined, however, to hear from Cordova. (HT 1623-1624; see also, Exceptions, sec. C., *post.*) Petitioner proffered that Robert would have testified that he was very scared and nervous at the time of the shooting and that he might have mis-identified petitioner since he saw the gunman for only a second from a "far-away distance" of about 75 feet. (Exh. 47 [marked for identification only].) Robert would have also testified that prior to identifying petitioner in court, Long Beach police showed him a single photograph of petitioner and told him they believed it was of the man who had shot the Khwajas. (*Ibid.*)

immediately put a gun to Khwaja's face, demanded money, and shot at him twice. Khwaja lost his right eye as a result. (RT 354-355.) The jury also did not know that Khwaja's trial testimony was inconsistent with information he gave to police in key respects. Most notably, Khwaja testified that he had already been to the bank when he was robbed of \$190 in coins (RT 349-351, 355), but he told police that he was on his way to the bank and that the cash receipts from his store he was going to deposit were taken from him (exh. K at p. 11; see also, p.4). Also, at trial Khwaja said he saw petitioner shoot his mother and watched her fall to the ground (RT 355) but he told police he saw nothing further after seeing his mother approach his car (exh. K at p. 3).

Given the facts set forth above, it is obvious that Michael Stewart had a far better opportunity to observe the Pleasant Street gunman. Moreover, there were no other eyewitnesses who could have identified petitioner. Zarina Khwaja, Anwar's sister, did not see the gunman's face. (HT 1598.) She was unable to identify him in court. (HT 1598, 1604, RT .) In fact, at the preliminary hearing she stated that she had never seen petitioner before. (CT 22.) There is no evidence that either of Robert Cordova's brothers, Larry or Del, could have identified petitioner.⁵⁹

⁵⁹ Petitioner sought to have both Larry and Del Cordova testify, but was prevented from doing so by the Referee. (HT 1630-1631; see also, Exceptions, sec. C., *post*) Petitioner proffered that Larry would have testified that he went to court with his brother Robert but did not recognize petitioner as the man he saw on East Pleasant Street. (Exh. 49 [marked for identification only].) Petitioner proffered that Del would have testified that he could not have truthfully testified at trial that petitioner was the man he saw, and that he felt pressured and coerced by police to do so. Del would have also said that based on his recent contact with petitioner, he does not believe that petitioner was the man he saw. (Exh. 53 [marked for

Slick also could have challenged the identification made by Lisa Searcy, who was robbed at the K-Mart. The jury did not know that Searcy's unequivocal identification of petitioner at trial (RT 346) followed a pretrial identification of him which was equivocal and made in response to viewing a highly suggestive photographic lineup. Detective William Collette showed Searcy a lineup which included two dated photos of petitioner. (Exh. K at p. 78.) Despite the extreme suggestiveness of this lineup, Searcy made only a tentative identification of petitioner, stating "[t]his looks the same," when she selected the second of petitioner's two pictures. (*Ibid.*) The jury did not hear Searcy testify that the gunman appeared suddenly (CT 9) and that she was afraid for her life during the encounter (exh. K at p. 75).

The jury also did not know that Searcy and her friend Margetta Heimann had described a gun very different from that described by the homicide eyewitnesses. The K-Mart victims gave police a very specific description of the weapon they saw at about 1:00 p.m. on February 25, 1983: a small black or blue .22 caliber revolver, with a short barrel, similar to a starter pistol or the RG moded .22 Saturday Night Special. (Exh. K at pp. 74-76.) By contrast, the witnesses to the incident on Pleasant Street that occurred after 1:00 p.m. on the same date reported seeing a longer barreled .38 caliber gun. (Exh. K at p. 12.)

Searcy and Heimann also described the perpetrator's clothing differently from the homicide witnesses. (Compare exh. K at p. 74 with p. 22.) And Searcy, who is white (exh. K at p. 74), is a different race than petitioner. Slick could have used these facts to create doubt that petitioner committed the K-Mart offense, as well as doubt that one person was

identification only].)

responsible for both the K-Mart and Khwaja offense. This would have been useful in defending against the homicide since Collette told the jury that petitioner had confessed to both crimes.

In sum, there was some credible evidentiary support for the misidentification defense petitioner desired his counsel to present.

3. Alibi Evidence.

There was also some credible evidence to support the alibi defense petitioner wanted his attorney to present. The evidence adduced at petitioner's hearing establishes that at least five witnesses could have provided mutually corroborating testimony at trial that would have been highly probative and credible. Testimony from Ora Trimble, Elizabeth Black, Gloria Burton, Denise Burton and Hope Black would have strongly tended to establish that petitioner was at 1991 Myrtle Street at the time of the Khwaja offense, and that he was not at the scene of the K-Mart robbery approximately one hour earlier.

Elizabeth Black would have testified at trial that she saw petitioner arrive at Trade Tech school between 12:15 and 12:30 p.m. Petitioner was there to meet her and walk with her back to her home at 1991 Myrtle Street. (Exh. 1.) Denise Burton would have corroborated Black's testimony. Denise also attended Trade Tech, and saw petitioner there at about 12:30 p.m. (Exh. 1; HT 1510-1511.)

Elizabeth Black would have also testified that as she and petitioner walked back to her home from school, they parted for a short time so that he could put his bike with a bad tire away, and that she arrived at her Myrtle Street home at about 1:00 p.m. Petitioner came in about 15 minutes later. (Exh. 1.) Gloria Burton would have corroborated this testimony, as she was at the Trimble-Black home that day and remembered her son arriving

shortly after Elizabeth did, at about 1:30 pm. (*Ibid.*) Ora Trimble also remembered petitioner arriving, although she put his arrival at about 2:00 p.m., (*ibid.*), a time which nonetheless tended to rule out his participation in the shootings. Hope Black also recalled that petitioner was at the Myrtle Street apartment when she arrived home between 1:30 and 2:00 p.m. (HT 1567.)

This testimony accounted for petitioner's whereabouts on the afternoon of February 25, 1983, from approximately 12:30 p.m. until well after the charged offenses, except for the brief period during which he separated from Black on the walk home from Trade Tech to deal with his bike's flat tire. Petitioner could not, then, have met up with Clements and committed the K-Mart robbery at 1:00 p.m. and the East Pleasant shootings at 1:55 p.m., much less have spent the bulk of the day with Clements looking for crime victims as would have occurred if the confessions of both Clements and petitioner were true.

The recollection of each of these witnesses was materially consistent with that of the others, which tended to establish the credibility of each. The witnesses' ability to tie their recollection of February 25, 1983, to particular notable events further enhanced their credibility. Petitioner's arrest and the searches of the Myrtle Street apartment and Gloria Burton's home on February 26, 1983, were undoubtedly startling events which gave the witnesses a benchmark to use in recalling what occurred on February 25th, the previous day.⁶⁰ The giveaway of cheese and butter on the morning

⁶⁰ Ora Trimble, Elizabeth Black and Hope Black each recalled the search of their home and petitioner's arrest there. (Exh. 1; HT 1242-1243 [Trimble]; HT 1302, 1319 [E. Black]; HT 1566, 1585-1586 [H. Black].) Gloria Burton remembered the search of her home as well. (Exh.

of February 25th also provided a reference point for recalling events later in the day,⁶¹ as did the Trade Tech school schedule.⁶²

Investigator Kristina Kleinbauer, who personally interviewed Ora Trimble, Elizabeth Black, Gloria Burton, and Denise Burton before trial, believed that they would make good, credible witnesses and be helpful to petitioner's defense. (HT 366-367.)⁶³

The facts set out above amply demonstrate that there was some credible evidence to support an alibi defense. When this evidence is considered in combination with the credible evidence supporting a misidentification defense, it is clear that petitioner has met his burden under *People v. Frierson* to prove that there was some credible evidence to support his desire to defend based on his innocence of the crimes charged.

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⁶¹ Ora Trimble, Gloria Burton and petitioner each told Kleinbauer about the butter and cheese giveaway. (Exh. 1; see also, HT 1248-1249 [Trimble's hearing testimony].) Twenty years later, Hope Black still remembered getting cheese and butter, although she thought it happened in the afternoon. (HT 1576-1578.)

⁶² Elizabeth Black told Kleinbauer that she recalled being dismissed from class earlier than usual because the regular teacher was not there. (Exh. 1.)

⁶³ A thorough discussion of the credible and probative nature of the potential alibi testimony is presented in petitioner's Exceptions to the Referee's Report. (See Exceptions, Questions 3 and 7, *post*; see also, Statement of Facts, B.1.a. and B.1.h., *ante*.) A summary of that evidence is presented herein to demonstrate that petitioner has met his burden under *People v. Frierson, supra*, 39 Cal.3d 803, to prove that there was some credible evidence to support his desired defenses.

CONCLUSION

Because petitioner has demonstrated that he was denied his constitutional right to present a guilt phase defense at his capital trial, his conviction and sentence should be reversed by this Court.⁶⁴

⁶⁴ As petitioner explains fully in section C. of his Exceptions to the Referee's Report, *post*, the Referee significantly narrowed the scope of the hearing and prevented petitioner from presenting additional relevant evidence. Because he was unable to adduce all of the evidence which supported his claim of innocence, this Court should not deny relief without granting petitioner a full opportunity to prove that he was denied his right to present a defense in the guilt phase of his capital trial.

EXCEPTIONS TO THE REFEREE'S REPORT

A. STANDARD OF REVIEW.

A habeas corpus petitioner bears the burden of establishing that he is restrained under an invalid judgment. (*In re Lucas, supra*, 33 Cal.4th 682, 694.) To prevail, a petitioner must prove facts that establish a basis for relief by a preponderance of the evidence. (*Ibid.*)

The standards under which a reviewing court reviews a referee's findings are well settled. (*In re Lucas, supra*, 33 Cal.4th at p. 694.) The referee's findings of fact, although not binding upon this Court, are entitled to great weight when supported by substantial evidence. (*Ibid.*) This Court must, however, conduct an independent examination of the record before deciding whether deference is due. "It is important to reiterate that the deference to which a referee's factual findings are entitled is appropriate only if substantial and credible evidence supports the findings." (*In re Hitchings* (1993) 6 Cal.4th 97, 109.) Quoting *People v. Ledesma* (1987) 43 Cal.3d 171, and other cases, this Court explained in *In re Hitchings, supra*, that a referee's factual findings are "not binding on this court, and we may reach a different conclusion on an independent examination of the evidence produced at the hearing [the referee] conducts even where the evidence is conflicting. . . ." (6 Cal.4th at 109, citations and internal quotation marks omitted.)

Moreover, no deference is due by the reviewing court when the referee has made conclusions of law or of mixed questions of law and fact. (*In re Lucas, supra*, 33 Cal.4th at p. 694.) This Court must independently review the referee's resolution of any legal issues, or of mixed questions of law and fact. (*Ibid.*; see also, *People v. Scott* (2003) 29 Cal.4th 783, 812.) This is particularly true for mixed questions of law and fact which implicate

a defendant's constitutional rights. (*In re Ledesma, supra*, 43 Cal.3d at p. 219.)

Questions of fact “concern the establishment of historical or physical facts” (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888⁶⁵; see also, *In re Pratt* (1999) 69 Cal.App.4th 1294, 1314.) By contrast, questions of law “relate to the selection of a rule” and mixed questions of law and fact “concern the application of the rule to the facts and the consequent determination whether the rule is satisfied.” (*Crocker v. San Francisco, supra*, 49 Cal.3d at p. 888; *In re Pratt, supra*, 69 Cal.App.4th at p. 1314.) This Court has explained the distinction between questions fact and law as follows:

If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. (See generally *People v. Louis* (1986) 42 Cal.3d 969, 985-987 [.])

(*Crocker v. San Francisco, supra*, 49 Cal.3d at p. 888; *In re Pratt, supra*, 69 Cal.App.4th at p. 1314; see also, *Cuylar v. Sullivan* (1980) 446 U.S. 335, 342 [“‘issues of fact’ refers ‘to what are termed basic, primary, or historical facts: facts “in the sense of a recital of external events and the credibility of their narrators. . . .””] A mixed determination of law and fact “requires application of legal principles to the historical facts”].)

Mixed questions of law and fact include the “ultimate issue” in a case, as well as its component parts. (See *In re Ledesma, supra*, 43 Cal.3d

⁶⁵ Hereinafter cited as “*Crocker v. San Francisco*.”

at p. 291; see also, *In re Lucas, supra*, 33 Cal.4th at p. 694; *In re Marquez* (1992) 1 Cal.4th 584, 603.) For example, where a claim of ineffective assistance of counsel has been made, whether the assistance of counsel was ineffective is the ultimate issue, subject to independent review. (*In re Ledesma, supra*, 43 Cal.3d at p. 291.) So too are its components: “whether counsel’s performance was inadequate and whether such inadequacy prejudiced the defense.” (*Ibid*; see also, *Cuyler v. Sullivan, supra*, 446 U.S. at p. 342 [findings about the roles two attorneys played in the defenses of the defendant therein and his co-defendants are factual, but whether those attorneys engaged in multiple representation is a mixed question of law and fact].)

In petitioner’s case, the ultimate issue is whether he was denied his constitutional right to present a defense in the guilt phase of his capital trial. The first component of this issue is whether “Slick [overrode] a clearly expressed desire of petitioner to put on a guilt phase defense” (Reference Question 11, citing *People v. Frierson, supra*, 39 Cal.3d 803.) The second component is whether “that defense would have been credible” (Question 11), or in the language of *Frierson*, 39 Cal.3d at p. 812, whether some credible evidence existed to support the defense(s) petitioner wanted his counsel to present.

Although this Court did not expressly ask the Referee to decide the ultimate issue in petitioner’s case, it did ask him in Reference Question 11 to make a finding as to each component of a *Frierson* claim. Question 11 is thus a mixed question of law and fact. Its resolution “requires a critical consideration, in a factual context, of legal principles and their underlying values.” (*Crocker v. San Francisco, supra*, 49 Cal.3d at p. 888.) Whether Slick overrode a clearly expressed desire by petitioner to put on a guilt

phase defense involves the determination of historical facts but also resolution of the legal issue of what a defendant must do to openly express his desire to defend. Similarly, whether there existed some credible evidence to support petitioner's desired defenses requires the resolution of factual questions as well as the legal issue of how the existence of some credible evidence is measured for *Frierson* purposes. Accordingly, the Referee's findings in response to Question 11 – which implicates petitioner's constitutional rights (see *In re Ledesma, supra*, 43 Cal.3d at p. 210) – are not entitled to deference by this Court, but instead must be independently reviewed.

Although Reference Questions 1-10 primarily pose questions of fact⁶⁶, the Referee has interpreted them in a way which also implicate legal issues, and thus involve the resolution of mixed questions of law and fact.

In his findings regarding Reference Question 1, for example, the Referee has read quite literally this Court's question whether petitioner told Slick that witnesses would support a guilt phase defense or defenses. Petitioner believes the proper reading of this question under *Frierson* is whether he gave Slick information that put Slick on notice that possible defenses existed. Petitioner argues that the Referee's interpretation is inappropriate under *Frierson*, which does not require that a criminal defendant explicate to his attorney what types of legal defenses are supported by the facts of his case. (See Petitioner's Brief on the Merits, sec. B.1., *ante* [hereinafter "Brief"]; see also, Exceptions, Question 1, *post*.) Because the Referee's answer to this part of Reference Question 1 involves

⁶⁶ As petitioner demonstrates in this brief, very few of the Referee's fact findings are supported by substantial evidence.

the resolution of an important legal issue – what is necessary to put counsel on notice that the client wishes to defend – his findings on it are not entitled to deference.

Another example is the Referee’s resolution of the questions raised in Reference Questions 3, 7 and 9. Petitioner believes that the Referee has applied incorrect legal standards in addressing whether the potential defense witnesses were credible, could have given probative testimony, and would have enabled Slick to present a credible defense. As explained more fully below, the Referee resolved these issues by weighing the potential defense evidence against what he believes to be the strength of the evidence the prosecution did present and could have presented at trial. The Referee also considers whether Slick’s tactical decision not to present a defense was a reasonable one. Finally, the Referee limited the introduction of what evidence the defense could have presented, considering only that actually known to Slick, and refusing to admit that which Slick reasonably could have discovered prior to trial. (See Exceptions, Questions 3, 7 and 9, and sections A. and C., *post.*)

In answering Questions 3, 7 and 9, the Referee has misapplied *Frierson*. That case does not require that a defendant be prejudiced by his counsel’s failure to call witnesses and so the strength of the prosecution’s evidence is not relevant. The trial attorney’s strategic decision-making is also irrelevant to a *Frierson* claim. Further, whether a habeas petitioner is limited to evidence that his trial attorney actually possessed for the purpose of showing that some credible evidentiary support existed is a legal question this Court may have to decide. (See, *ibid.*) Because the Referee’s findings implicate each of these legal issues, they are not entitled to deference by this Court.

In addition, as petitioner shows in this brief, several of the Referee’s findings are not entitled to deference because in making factual findings, the Referee repeatedly ignores significant parts of the record. “Failure to consider key aspects of the record is a defect in the fact-finding process.” (*Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1008, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 346.) Although the Ninth Circuit was considering in *Taylor v. Maddox* whether the state court’s fact findings were entitled to deference by the federal court, its description of the fact-finding process is apt. “Fact-finding is a dynamic, holistic process that presupposes for its legitimacy that the trier of fact will take into account the entire record before it.” (366 F.3d at p. 1007.) Thus, “[i]n making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge’s findings.” (*Ibid.*) “[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding.” (*Id.* at p. 1008.) Where the Referee in petitioner’s case has failed to acknowledge, must less reconcile, key facts, this Court should not defer to his factual findings.

With these principles in mind, petitioner proceeds to show why this Court should reject most of the Referee’s findings in this case.

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B. EXCEPTIONS TO THE REFEREE’S FINDINGS.

Petitioner excepts to the Referee’s findings as set forth below.

Reference Question 1

Did petitioner give Attorney Ron Slick or his investigator the names of witnesses he believed should be interviewed and tell Slick that those witnesses could support a guilt phase defense or defenses? If so, when did petitioner do so, who are those witnesses, and what theory or theories of defense did petitioner tell Slick those witnesses would support? In particular, did petitioner tell Slick that he wanted Slick to present an alibi defense and/or defend on the ground that the eyewitness identification was mistaken or could be undermined by other eyewitnesses?

Petitioner believes it is useful to divide this Reference Question into two parts. Petitioner first addresses the Referee’s findings as to the following:

Did petitioner give Attorney Ron Slick or his investigator the names of witnesses he believed should be interviewed and tell Slick that those witnesses could support a guilt phase defense or defenses? If so, when did petitioner do so, who are those witnesses, and what theory or theories of defense did petitioner tell Slick those witnesses would support?

The Referee finds that petitioner gave defense investigator Kristina Kleinbauer the name of witnesses petitioner believed should have been interviewed. (Referee’s Report at 15.) This finding is supported by substantial evidence.

As the Referee acknowledges, Slick “delegated to Ms. Kleinbauer the job of identifying and interviewing potential defense witnesses.” (Referee’s Report at 15, citing exhibits 1 and 8.) In a memorandum dated April 26, 1983, Slick directed Kleinbauer to “take a statement” from petitioner to determine his participation in the charged offenses. (Exh. 8;

HT 518-522.) On June 15 and 17, 1983, Kleinbauer interviewed petitioner at the Los Angeles County Jail, as Slick requested. (HT 224-225, 227.) During these interviews, petitioner told Kleinbauer that he was not involved in the charged offenses. (HT 227; exh. 1.) Petitioner told her where he had been and who he had seen at the time of the Khwaja homicide. (HT 236, 238, 242, 244-45; exh. 1.)

In brief, petitioner told Kleinbauer that on the morning of February 25, 1983, he was at the apartment of his girlfriend, Elizabeth (Penny) Black at 1991 Myrtle Street in Long Beach. Elizabeth woke him up at 7:00 a.m. and she left for school. They agreed petitioner would meet Elizabeth at school later. Elizabeth's mother, Ora Trimble, and Elizabeth's sister, Hope Black, were also there. Ora and Hope went to Martin Luther King Park, to get some cheese and butter that was being given away. Hope returned to the apartment first, and then left again. Ora returned a bit later. Petitioner left soon thereafter and went to his mother's house to tell her about the free cheese and butter. From there petitioner went to the Trade Tech school to meet Elizabeth. He arrived at about 12:30 p.m. As they walked back to Myrtle Street, petitioner separated from Elizabeth so that he could put his bike with a flat tire at his mother's house. Thus, Elizabeth returned to 1991 Myrtle before petitioner did. When he arrived there at about 1:20 p.m., he saw his mother Gloria Burton, Ora Trimble, Hope Black and Elizabeth's cousin Shirley. He and Elizabeth stayed at her apartment until later that evening, when they went out. They returned and slept there. The next morning, the police came to Myrtle Street and arrested him.⁶⁷

⁶⁷ The information Kleinbauer received from petitioner is fully set out in exhibit 1. Both petitioner and Kleinbauer testified at the hearing that the investigator's report was inaccurate in one key detail. Petitioner

Petitioner also told Kleinbauer that he had not made an inculpatory statement to Long Beach police. After he was arrested, petitioner told police he had nothing to do with the crimes, but the police kept telling petitioner that they “had him.” Petitioner took a polygraph test, but the results were not discussed in front of him. He continued to insist that he was not involved. The police did not record this interview. Petitioner told Kleinbauer that he had never confessed to anyone and that he felt like he was being asked to take the fall from somebody else. (HT 264; exh. 1.) Petitioner also told Kleinbauer that if anyone had identified him, it was a misidentification because he was not there, and that he was not put into a lineup for identification purposes. (HT 264-265; exh. 1.)

Based on the information she received from petitioner, Kleinbauer began to interview persons who had seen him that day. (HT 247.) She interviewed Ora Trimble, Elizabeth Black, and Gloria Burton. (HT 313, 247, 257; exh. 1.) After learning that Denise Burton was also a potential alibi witnesses, Kleinbauer interviewed her as well. (HT 260; exh. 1.) Kleinbauer also interviewed two percipient witnesses to the Khwaja shootings, Susana Camacho and Michael Stewart. (HT 267; exh. 1.) Kleinbauer memorialized the information provided by petitioner and the witnesses she interviewed into a report, which was admitted into evidence at petitioner’s hearing as exhibit 1. (HT 246-247, 255, 314-315, 267-268, 275.)⁶⁸ Kleinbauer gave a portion of exhibit 1, including the information

had told Kleinbauer that after he left 1991 Myrtle Street he went to his mother’s home to tell her about the free cheese and butter, and then on to Elizabeth’s school. (HT 272, 1860.)

⁶⁸ The information Kristina Kleinbauer received from the witnesses she interviewed is fully set forth in exhibit 1. (See also,

from petitioner, to Slick on July 15, 1983. (HT 266; see also, HT 717.) Slick acknowledged that he read this, as well as the summaries of Kleinbauer's interviews with Ora Trimble, Elizabeth Black, Gloria Burton and Denise Burton before trial started. (HT 534-535, 537-539.)⁶⁹ Kleinbauer also gave Slick her reports of the eyewitness interviews. (HT 277; see also, HT 717.)

Although the Referee finds that petitioner gave Kleinbauer the names of Ora Trimble, Hope Black, Elizabeth Black, Gloria Burton and Denise Burton⁷⁰ (Report at 15), he finds insufficient evidence to conclude that petitioner asked that witnesses Willie Davis, Shirely Ann Cavaness or Olivia Green be interviewed or that petitioner told Kleinbauer or Slick that they could support a particular defense theory (Report at 16). The findings related to Davis, Cavaness and Green are not supported by substantial evidence.

Exhibit 1 shows that petitioner told Kleinbauer that Elizabeth's cousin Shirley (Cavaness) was at 1991 Myrtle when he arrived at about 1:20 p.m. Ora Trimble also recalled that Cavaness was there when petitioner

Statement of Facts, sec. B.1.a., *ante.*)

⁶⁹ Billing records indicate that Slick reviewed Kleinbauer's reports on July 23, 1983. (HT 539-540; exh. 13.)

⁷⁰ Although petitioner did not initially identify his sister Denise Burton as a potential alibi witness, it is reasonable to assume that he did not understand, when talking to Kleinbauer in June, that it was significant that Denise had seen him at Trade Tech before the charged crimes occurred. Before petitioner was given a copy of the police reports during trial, he would not have had a full understanding of the state's case and would not have understood the importance of his sister's ability to corroborate Elizabeth Black's testimony that petitioner met Black at school at 12:30 p.m. on February 25, 1983.

arrived. (Exh. 1.) Thus, Slick was on notice that Cavaness was a potential alibi witness and that she needed to be interviewed. When Kleinbauer interviewed Trimble and Elizabeth Black, she learned that Willie Davis was also at their home when petitioner arrived (exh. 1), so that he too was a potential alibi witness who needed to be interviewed. Although petitioner himself may not have recalled that Davis was at the Trimble-Black home when he arrived on the afternoon of February 25, 1983, petitioner gave his defense investigator the information that led to her learning that Davis was a potential witness.

By providing Elizabeth Black's name to Kleinbauer, petitioner also was indirectly responsible for the investigator learning of Olivia Green's presence at Myrtle Street. Although Green did not see petitioner at the time of the crimes, and thus was not a potential alibi witness, she should have at least been interviewed as Elizabeth indicated that Green, the sister of Otis Clements, had received some information about the identity of the shooter. (See exh. 1, p. 9.) As petitioner discusses below, it was not his duty to specifically inform his attorney of how any particular witness could support a particular legal defense theory.

Although the Referee recognizes that petitioner gave the names of witnesses he believed should be interviewed to Kleinbauer, he states that "it is unlikely that Petitioner gave these names directly to Mr. Slick." (Referee's Report at 15.) This finding is not supported by substantial evidence and is, in any event, superfluous. Petitioner testified that he told Slick what he was doing when the crimes occurred (HT 1858), which would have entailed naming the alibi witnesses. Slick did not contradict this testimony, as he was unable to recall from whom he received the names of

potential witnesses. (HT 716-717.)⁷¹ Slick admitted that he could not recall what petitioner said about the alibi witnesses “in that kind of detail.” (HT 721.) The Referee does not acknowledge this testimony. His conclusion that petitioner did not give witness names directly to Slick is thus not supported by the evidence.

However, even if one assumes for the sake of argument that petitioner did not give Slick the witness names directly, the task was accomplished through Kristina Kleinbauer. Slick delegated to her the job of identifying potential witnesses. Petitioner gave her the names of witnesses of whom he had knowledge.⁷² Kleinbauer memorialized this information and gave it to Slick. Slick admitted that the information he received from Kleinbauer indicated to him that the witnesses named by petitioner could support a guilt phase defense or defenses. (HT 717.) Thus, whether directly or indirectly, petitioner gave Slick the names of potential witnesses he believed should be interviewed.

The Referee also concludes that petitioner did not tell the

⁷¹ Slick readily admitted that petitioner told him he was not involved in the charged crimes and that he was not at the scene when they occurred. (HT 561.) Slick also acknowledged that petitioner told him he had not confessed and that the police were “framing” him. (HT 561, 723, 727, 854-855.)

⁷² The record shows that petitioner did not receive a copy of the police reports or of Kleinbauer’s investigative reports until August 11, 1983, during trial. (RT 8.) Thus, he could not have named eyewitnesses such as Stewart and Camacho as potential witnesses before his trial began. Moreover, it was not his duty to do so. Once he informed the defense team that he had been misidentified, it was Slick’s duty to determine, from police reports and independent investigation, whether there were eyewitnesses who could support this claim.

investigator or his trial attorney that the witnesses he named could support particular defenses. The Referee acknowledges that the “tenor of Petitioner’s statements to Ms. Kleinbauer” raise a “reasonable inference that these names were suggested as alibi witnesses.” (Referee’s Report at 15.) The Referee also recognizes that petitioner “talked to the trial judge about his ‘alibi’ on August 11, 1983” (*Ibid.*) Nonetheless, the Referee states that “there is no direct evidence that Petitioner told Ms. Kleinbauer (or Mr. Slick) that those witnesses could support a ‘guilt phase defense.’ The story provided by Petitioner to Ms. Kleinbauer (summarized in Exhibit 1) does, however, suggest an alibi defense and, further, that the family members and acquaintances named by Petitioner were potential alibi witnesses.” (Referee’s Report at 15.) This finding is correct only insofar as the record does not show that petitioner used the exact words quoted by the Referee.

Petitioner believes that the Referee has interpreted Reference Question 1 in a legally untenable way.⁷³ Petitioner does not read Question 1 as limited to a determination of whether he used the specific words “guilt phase defense.” A more reasoned interpretation is that it calls for a determination of whether the witnesses named by petitioner could support a guilt phase defense or defenses, and whether petitioner gave those names for that purpose, regardless of the language used. (See Brief, sec. B.1., *ante.*) The evidence shows that petitioner told Kleinbauer, and therefore Slick, that the witnesses whose names he provided could account for his

⁷³ A referee’s finding on a mixed question of law and fact is subject to independent review by the reviewing court. (*In re Lucas, supra*, 33 Cal.4th 682, 694.) Because the Referee has interpreted Question 1 in a manner that implicates an issue of law as well as fact, his findings on it are not entitled to deference by this Court but should be reviewed independently. (See also, Exceptions, sec. A., *ante.*)

whereabouts at the time of the crimes, i.e., supported an alibi defense. The evidence also shows that petitioner questioned the reliability of any eyewitness identifications made of him. As a result of the information received from petitioner, investigator Kleinbauer interviewed eyewitnesses Stewart and Camacho, witnesses who supported a mistaken identity defense (see Exceptions, Question 7, *post*).

A letter petitioner sent to Slick provides further evidence that petitioner informed his counsel that the witnesses could support alibi and mis-identification defenses. In the letter, admitted as exhibit 15, petitioner told Slick that he was innocent, had not confessed to police, and was at home with his family. He also questioned the reliability of the eyewitness identifications made at the preliminary hearing. (Exh. 15.)⁷⁴ Putting the letter together with the information memorialized in exhibit 1, it is clear that petitioner was articulating, albeit in layman's terms, that there were witnesses who could support defenses of alibi and mistaken identification.

Petitioner turns to the next part of Reference Question 1:

In particular, did petitioner tell Slick that he wanted Slick to present an alibi defense and/or defend on the ground that eyewitness identification was mistaken or could be undermined by other eyewitnesses?

In summary, the Referee concludes “while there is evidence that Mr. Slick learned from his investigator, Ms. Kleinbauer, the names of potential witnesses, there is no credible evidence that Petitioner told Mr. Slick that he wanted specific witnesses to be called or have any specific defense, including ‘alibi’ or ‘mistaken eyewitness identification,’ presented at trial.”

⁷⁴ The contents of this letter are more fully discussed below. (See also, Exceptions, Question 4, *post*.)

(Referee's Report at 19.) This finding is not supported by substantial evidence, nor are the findings the Referee uses to arrive at this conclusion.

Petitioner testified that he told Slick that he wanted Slick to present a defense at trial. (HT 1861, 1890-1891, 1927, 1930.) He told Slick that he wanted the alibi witnesses called to the stand. (HT 1891, 1908-1909.) Once petitioner learned that Michael Stewart was an eyewitness who could assist his defense, he asked Slick to call Stewart as a witness as well. (HT 1885; exh. D.)⁷⁵ Many other sources of evidence established petitioner's openly expressed desire to defend, including the letter he sent to Slick (exh. 15), the 1985 declaration (exh. D), testimony from Kristina Kleinbauer, Jeffrey Brodey and Marshall Smith, and petitioner's remarks during the four *Faretta* hearings. (See Brief, sec. B., *ante*.)

In his findings, the Referee discounts all of this evidence, apparently both as direct evidence that petitioner asked Slick to present witnesses or as evidence corroborating petitioner's hearing testimony on this point. (See, generally, Referee's Report at 15-19.) As petitioner demonstrates below, none of these findings are supported by substantial evidence.

As petitioner has shown, the statements he made during the four *Faretta* hearings evinced his desire to defend. Petitioner indicated during the hearings that he was innocent, that he had not confessed to police, that he was being "framed," that he had an alibi, that the defense investigation was not complete, and that the People had no fingerprint, gun, or similar

⁷⁵ Petitioner testified that in a 1985 declaration he indicated that when he learned from the investigator that there was an eyewitness who described the gunman in a way that differed from how he looked, he wanted to know why that person had not been called to testify. (HT 1885; see exh. D.) Although petitioner could no longer recall if he was referring to Michael Stewart (HT 1888), this is the most likely interpretation.

physical evidence connecting him to the crimes. These remarks put Slick on notice that petitioner wanted to prove he had not committed the charged crimes. (See Brief, sec. B.2.d.; see also, Statement of Facts, sec. A.1., *ante.*)

The Referee acknowledges that petitioner “talked to the trial judge about his ‘alibi’ on August 11, 1983” (Referee’s Report at 15.) Nonetheless, the Referee concludes that petitioner’s remarks were made “in the context of a request to represent himself and for a continuance and this is apparently how it was understood by the trial judge. Petitioner’s oblique reference to an ‘alibi’ did not specifically advise the trial judge that Petitioner told Mr. Slick he wanted *in fact* to present an alibi defense as opposed to merely desiring more investigation before a final tactical decision could be made.” (*Id.* at 16.) While the Referee is technically correct, his premise – that petitioner was required to tell Slick or the court that he wanted “in fact” to present an alibi defense – is mistaken. This hyper-technical assessment of petitioner’s statements (1) imposes a burden on an unskilled defendant that is not supported by law, and (2) ignores the only reasonable inference that can be drawn from petitioner’s desire to complete the investigation. (See Brief, sec. B., *ante.*)

Overall, petitioner’s statements during the *Faretta* hearings plainly indicate that (1) the investigation into his alibi was not complete and (2) that he was asking to represent himself so that the investigation could be completed. Even if petitioner’s statements are read as a desire to complete the investigation into his innocence rather than a demand for a specific alibi defense, the only reasonable inference to be drawn is that petitioner wanted

to defend against the state's case.⁷⁶

At the time of the *Faretta* motions, petitioner did not know Slick would not defend. (See Exceptions, Questions 4 and 5, *post*.) Petitioner did know that witnesses had been subpoenaed (*ibid*), thus he had reason to believe that Slick might present at least some kind of defense. However, given the fact that the investigation had not been completed prior to the start of trial (see Exceptions, Question 6, *post*), it is logical to conclude that petitioner's immediate fear at the time was that a defense would be poorly and inadequately presented. His desire to complete the investigation thus evinced a desire to defend.

Moreover, even if the Referee chooses not to accept petitioner's *Faretta* remarks as independent evidence that he openly expressed his desire to defend, at a minimum they were corroboration of petitioner's testimony at the evidentiary hearing that he asked Slick to call witnesses, as these remarks were completely inconsistent with someone who – according to Slick – had acquiesced in a strategy of no defense.⁷⁷

⁷⁶ The Referee's concern as to how the trial judge would have interpreted petitioner's remarks about his alibi is misplaced. (See Referee's Report at 16.) Slick had far more information about the case and about petitioner's version of the facts than did the trial court. Thus, regardless of how the judge should have viewed petitioner's remarks, they certainly put Slick on notice that he wanted to defend.

⁷⁷ The Referee suggests that petitioner's statement about his alibi is unintelligible. (Referee's Report at 16.) As the Referee recognized, petitioner was young and unsophisticated. (*Id.* at 17) Moreover, Slick was on notice that petitioner was operating at a very depressed academic level. (See exh. B [petitioner's CYA file].) To the extent that petitioner's remarks were hard to understand, that should have prompted Slick to spend extra time with him to ensure that they were effectively communicating with each other.

Petitioner also relies on exhibit D, the declaration he signed in April, 1985 which was filed in support of a motion for new trial as evidence of his expressed desire to defend. In this declaration, petitioner stated, “I did know from our investigator that a witness had been located who gave a different description of the person who did the shooting of Mr. and Mrs. Khwaja, and I wanted to know why that witness had not been subpoenaed to come the court.” (Exh. D, ¶ 7; HT 1885.) Given the information in Kleinbauer’s report, the most reasonable inference is that petitioner was referring to Michael Stewart. (See exh. 1.)

The Referee states that even if petitioner was referring in the declaration to Michael Stewart, “this Court cannot conclude by a preponderance of the evidence from this brief reference that Petitioner made a clear demand to Mr. Slick that he wanted a guilt phase defense consisting of an alibi or mistaken identification.” (Referee’s Report at 16.) The Referee finds the declaration ambiguous as to when petitioner asked Slick why Stewart had not been subpoenaed. (*Ibid.*) When petitioner’s statement is put into context, however, there is no ambiguity. Kleinbauer interviewed Stewart on August 8, 1983. (Exh. 1.) She delivered her report of the information she received from Stewart to Slick on August 10th. (HT 269, 277.) Petitioner first obtained Kleinbauer’s report on August 11th. (RT 8, 11.) Jury selection began on this same day. (CT 109.) Thus, when petitioner refers to the “first day we appeared in court” (exh. D, ¶ 7), it is

In addition, Slick should have known that petitioner’s remark about the “realness” of his statements to Kleinbauer about his alibi was a reference to the fact that Kleinbauer had failed to include in her report that petitioner told her he went home to tell his mother about the free butter and cheese before he met Elizabeth Black at her school.

reasonable to assume he was speaking of August 11th. Even if it was a day or two later, the Referee does not explain how that has any relevance to the key fact here – that petitioner asked Slick to put Stewart on the stand. In fact, it does not.

Petitioner undated letter to Slick, exhibit 15, also provides direct evidence of his desire to defend, as well as corroborates petitioner’s hearing testimony. (See Brief, sec. B.2.c., *ante*.) This letter raised guilt defenses of alibi and misidentification. In it, petitioner told Slick that he was home with his family and not guilty, and asked Slick to prove his innocence. He said, “After all as you can look into it you will see that I’m not the one who commit this crime and I’m looking to you to help me win, – and we can win” (Exh. 15; HT 556.) Petitioner pointed out the weaknesses in the state’s identification case. First, he said that a witness at the preliminary hearing [Robert Cordova] admitted he saw only a side view of the perpetrator’s face. Second, petitioner wrote that the “main witness” [Zarina Khwaja] testified that she had never seen him before. Third, he wrote that he was never in a live lineup. (Exh. 15; HT 557.) Fourth, he emphasized that the K-Mart victims identified him at the preliminary hearing based on his dark skin tone rather than on a true recall of their assailant’s facial features. (Exh. 15; HT 557.)⁷⁸

The Referee acknowledges this letter but states: “This Court believes that this [letter] was reasonably clear notice to an experienced defense counsel that Petitioner had a potential *alibi* defense. The fact that Petitioner was only 19 and not very sophisticated at the time of the trial further

⁷⁸ Petitioner was correct in his belief that the eyewitness identifications in this case were weak and subject to challenge. (See Exceptions, Questions 7 and 9, *post*.)

supports this conclusion. But even ‘notice’ of a potential defense is not a request or a demand to present it at trial.” (Referee’s Report at 16-17; emphasis in original.) This finding is legally and factually flawed.

Significantly, the Referee fails to engage in any meaningful discussion of the content of petitioner’s letter. The Referee ignores petitioner’s pleas to Slick to work together to win and his desire to see his attorney so that they could do so. Any reasonable attorney would have interpreted the letter as expressing petitioner’s desire to defend against the charges. Even if one assumes *arguendo* that the letter without more is insufficient to meet petitioner’s burden under *People v. Frierson, supra*, of showing that he openly expressed his desire to defend, it is corroboration of petitioner’s hearing testimony that he asked Slick to call witnesses in his behalf.

Kristina Kleinbauer’s testimony also amply demonstrates that petitioner openly desired to defend. (See Brief, sec. B.2.f., *ante*.) Kleinbauer testified that petitioner told her he wanted defense witnesses to be called at trial. (HT 313.) He never told Kleinbauer that he agreed with Slick not to present a defense at the guilt phase. (RT 319-320, 436.) Kleinbauer also stated, in a May 15, 2000, declaration prior to the hearing:

I have been asked by Mr. Baruch [former counsel for petitioner] whether Mr. Burton made it clear that he wanted to present a defense at the guilt phase of trial. Many years have passed and I no longer recall Mr. Burton’s exact words on this subject. However, from my dealings with him, it was always clear to me that he did. He consistently told me that he had not committed the charged crimes and that he had not confessed to the Long Beach police. [Petitioner] expressed to me his concern that his trial was scheduled to start although my investigation was far from complete. He made it clear to me that he wanted me to finish my investigations before he

went to trial. From our conversations, I understood that he wanted to present a defense. Nothing Mr. Burton ever said to me led me to believe that he would have agreed with Mr. Slick's decision not to present a guilt phase defense.

(Exh. H, ¶ 4; see also, HT 451.)

The Referee discounts this evidence from Kleinbauer. The Report states that the investigator's "current recollection about her conversations with Petitioner is virtually non-existent. She was often confused and distracted during her testimony. Much of Ms. Kleinbauer's testimony came as a result of leading questions by Petitioner's counsel. Little, if any, weight can or should be given to her current testimony." (Referee's Report at 17.) This finding is not supported by substantial evidence.

Ms. Kleinbauer had recently been diagnosed with brain deterioration from the early stages of Alzheimer's disease. (HT 304.) She began treatment for this condition six months before she testified at the reference hearing. (*Ibid.*) Although her illness causes her some memory problems, it did not cause her problems in her work as a teacher or impact her ability to drive a car, for example. (HT 306, 321.) It did cause her some difficulties testifying in court, because she was nervous. (*Ibid.*) Obviously, then, any confusion or distraction observed by the Referee was due to Kleinbauer's medical condition.

In any event, the record is clear that Kleinbauer's memory was refreshed when testifying by documents created when she was not experiencing symptoms of her disease. (HT 304, 321.) In 1983, when Kleinbauer worked on petitioner's case, she did not experience any memory problems. (HT 304-305.) Exhibit 1, in which Kleinbauer recorded the information she received from petitioner, was thus prepared at a time when events were fresh in her mind and when she did not have a medical

condition that affected her memory. Nor was Kleinbauer's memory impaired when she signed a declaration in 1993. (HT 305; see exh. G.) Her illness caused her only minimal impairment when she executed another declaration in 2000. (HT 305; see exh. H.)

The Referee's criticism that Kleinbauer testified in response to leading questions was an inappropriate ground for disregarding her testimony. Given Kleinbauer's medical condition, some leading questions were appropriate. Moreover, there was no objection to any leading question by respondent or by the Referee. The Referee may not allow counsel to examine a critical witness who happens to be the victim of Alzheimer's disease by leading questions, and then discredit the testimony as a result.

The Referee also finds it telling that in the three declarations Kleinbauer executed in this case, she failed to state that in 1983 petitioner advised her or Slick of his "desire to put on a specific defense or call particular witnesses." (Referee's Report at 17, citing exhibits F, G, and H.) This inference is unwarranted. First, the declarations describe petitioner's consistent insistence that he was innocent, that he was elsewhere when the crimes occurred, that he was misidentified, and that he had not confessed to police, as well as the investigation Kleinbauer conducted in response to this information from petitioner. These matters are relevant to the *Frierson* claim.⁷⁹ Second, each of these declarations was written prior to the issuance

⁷⁹ Indeed, it is hard to imagine why a defendant would insist on his innocence and provide so much information for investigation, or why he would ask to fire his lawyer so that investigation could be completed, if he had no desire to defend against the capital charges.

of this Court's very detailed reference order.⁸⁰ Until this Court asked eleven very specific questions, petitioner had no way of knowing that these proceedings would come to focus on the names of particular witnesses and/or defenses. As petitioner has explained, in *People v. Frierson, supra*, 39 Cal.3d 803, this Court did not indicate that a defendant must name particular witnesses and/or defensive theories but simply that he must request a defense. In fact, a criminal defendant is not permitted to demand any particular witness or defense. He is only entitled to *a defense* in the guilt phase of a capital trial rather than *no defense*, if he requests one. (See Brief, sec. B.1., *ante*.) Understandably, then, in 2000 after this Court had issued an order to show cause on the *Frierson* claim – but before the reference order was issued – petitioner's counsel asked investigator Kleinbauer whether petitioner made it clear that he wanted to present a defense at trial. (Exh. H, ¶ 4.) She stated that he had. (*Ibid.*) The Referee is thus mistaken in attaching significance to the absence of specific statements about demands for particular witnesses and defenses in these 1987, 1993 and 2000 declarations.

Petitioner's points out that this finding by the Referee is particularly curious given the statements he made during the hearing. Respondent sought to have paragraph four of exhibit H admitted as a prior inconsistent statement, asserting that Kleinbauer's failure to say that petitioner requested specific witnesses or a particular defense contradicted her hearing

⁸⁰ Also, the 1993 declaration was offered in support of a habeas corpus petition that raised numerous claims, most of which concerned trial counsel's ineffective assistance at the guilt and penalty phases and the prejudice arising from counsel's errors and omissions. (See Petition for Writ of Habeas Corpus, filed August 30, 1993.)

testimony. (HT 2212-2213.) The Referee questioned this theory, stating: “Well, maybe I’m not understanding your argument, Mr. Kelberg, but this paragraph seems to fairly clearly state that Mr. Burton said that he did want to put on a defense, he had not committed the crimes, he wanted the investigations to be completed before he went to trial, and he wanted to present a defense; so I don’t see that as inconsistent.” (HT 2214.) The Referee then suggested that petitioner would seek admission of the paragraph because “I read that as being fairly consistent with the defense here.” (HT 2214-2215.) When respondent again tried to convince the Referee that what was missing from the declaration was damning, the Referee said, “The whole context of that paragraph, Mr. Kelberg, in fairness is that’s what Mr. Burton was telling her, and while she doesn’t recall the words, she is paraphrasing what he told her. [¶] He wants a defense is what it says. . . . He did.” (HT 2215-2216.) The Referee said to respondent, “I understand as an advocate that’s how you’d like to analyze it. I think I would come down with a different reading based on what I know so far. But, anyway, I just don’t see that as inconsistent. [¶] But I would imagine, Ms. Morrissey, you would like to jump at the chance of having paragraph four come in?” (HT 2216.) When petitioner’s counsel agreed that she would, the Referee admitted it. (*Ibid.*) Respondent immediately withdrew his request that the paragraph be admitted, stating: “If the court says it’s not inconsistent, then I’m not offering it.” (HT 2217.) The Referee then backtracked a bit, stating that “I think there’s a prima facie basis for each of you to make an argument.” (*Ibid.*) The Referee indicated, however, that he viewed the paragraph as “more consistent than inconsistent.” (*Ibid.*) Although the Referee indicated that he would not make a final decision on the weight to be given to paragraph four until after hearing final arguments

(HT 2218), his remarks were quite telling. The Referee’s Report, which does not refer to this colloquy, fails to offer an explanation for the Referee’s abrupt about-face.⁸¹

The Referee also states: “This Court cannot give much weight to this statement [exhibit H, ¶ 4] made 17 years after the events in question. It was evident from Ms. Kleinbauer’s testimony and demeanor at the Reference Hearing that she was substantially biased in favor of Petitioner. It was further evident that she had no real memory of the events in 1983, but nevertheless she tried to shade her answers in a manner most favorable to Petitioner.” (Referee’s Report at 17.) These findings are not supported by substantial evidence. As petitioner has explained above, the first time Kristina Kleinbauer was asked directly whether petitioner made it clear he wanted to present a defense was in 2000, after an order to show cause on the *Frierson* claim was issued by this Court. Moreover, a fair reading of the record shows that Kleinbauer’s memory was as strong as that of any other witness and was far better than Slick’s. To the extent Kleinbauer was flustered on the stand, it was attributable to her medical condition. However, Alzheimer’s disease did not impede her ability to refresh her recollection with written materials generated at a time when her memory was unimpaired. (HT 304, 321.) Slick’s memory, in contrast, was rarely if ever refreshed by trial file materials, trial transcripts or any other document. (See, e.g., Statement of Facts, sec. B.1.e.11., *ante*.)

Although the Referee accuses Kleinbauer of bias towards petitioner and of shading her answers in his favor, the Referee provides not one fact to

⁸¹ There was only a brief reference to exhibit H, paragraph four, by respondent in argument. (See HT 2373.) It is hard to believe this comment changed the Referee’s view of the document.

support the finding of bias or one example in her testimony of shading. (See Referee’s Report at 17.) In fact, a fair reading of the investigator’s testimony discloses no evidence of either. In contrast, petitioner has pointed to specific facts which demonstrate Slick’s extreme bias against petitioner. Slick repeatedly cooperated with respondent while he refused to work with petitioner’s first post-conviction counsel to prepare a declaration or even to meet with petitioner’s current counsel prior to the reference hearing. Slick divulged attorney-client privileged materials to respondent – without his client’s waiver – while withholding these materials from petitioner. (See Brief, sec. B.2.f.; see also, Statement of Facts, sec. B.1.e., *ante*.) Slick even testified that he viewed himself to be the “defendant” in the proceedings. (HT 1152.)⁸² Inexplicably, the Referee finds Kleinbauer to be biased but not Slick. The Referee’s failure to find any bias in Slick, or to even acknowledge the evidence cited by petitioner, amounts to unequal treatment of the witnesses, which undermines his factual findings overall. (See Exceptions, sec. C.7., *post*.)

Slick also “shaded” his answers repeatedly for respondent’s benefit, yet the Referee failed to hold him accountable for this. One prime example of this is Slick’s testimony about whether petitioner had asked him to present an alibi defense. On direct examination, Slick’s answer – “Not that I remember.” – was somewhat vague. (HT 721.) However, when respondent questioned him on cross-examination, Slick’s response had become an unequivocal, “No. . . . He did not do that.” (HT 920; see also, HT 919-920.) Again, the Referee’s failure to analyze the testimony of the

⁸² Slick appears to have a practice of assisting respondent rather than his client when he feels like his performance is being questioned. (See, e.g., HT 1771, 1773-1776, 1779, 1791.)

reference hearing witnesses in a consistent way undermines all of his fact findings.

The Referee finds it “telling” that Kristina Kleinbauer did not alert someone that Slick was refusing petitioner’s request to present a defense. (Referee’s Report at 17.) This finding is not supported by the record. In fact, it is based on a misunderstanding of the relevant evidence. Kleinbauer was not in a position to put anything on “the record” in 1983. (See Report at 17.) She was an investigator whose role was to help petitioner’s lawyer prepare a defense. There is no evidence that Kleinbauer was ever in court, before the trial judge. Moreover, the record is clear that Kleinbauer – like petitioner – did not know that Slick was not going to defend the case. She met with Slick on August 10, 1983, the day before petitioner’s trial commenced. (HT 269.) Slick, however, did not even tell her that trial would begin the next day. Kleinbauer was surprised to learn from someone other than Slick that petitioner’s trial had begun, because there was still investigation that needed to be done. (HT 277-278.) When Slick later had Kleinbauer serve subpoenas to two witnesses on August 16th for August 17th (see exh. I [Slick’s trial file]), she would have reasonably assumed that Slick did intend to put on a guilt phase defense.

The Referee finds that because Kleinbauer took the “extraordinary step” of contacting Jeffrey Brodey to seek advice, if she believed that petitioner wanted to defend but was prevented from doing so by Slick, she “would have said or done something in 1983 to make this *particular* concern known”. (Referee’s Report at 17; emphasis in original.) But as petitioner explains above, Kleinbauer did not know that Slick would not defend. Even if she had, it is unreasonable for the Referee to expect that Kleinbauer would have taken action because she realized that petitioner was

being denied of his rights. The attorneys involved in this case believed at the time, which was prior to this Court's decision in *People v. Frierson*, that it was counsel's decision whether to present a defense. (HT 1027 [Slick]; HT 1224 [Brodey].) The Referee fails to explain how an investigator untrained in the law would know better.

Finally in regards to investigator Kleinbauer, the Referee states: “[T]he credible evidence adduced at the Reference Hearing was that Petitioner was concerned about how quickly his case was moving forward and that he thought that Mr. Slick was not devoting enough time to his case. Based upon the contemporaneous evidence, petitioner made these concerns, *but no others*, known to Ms. Kleinbauer and she sought to assist petitioner with some legal advice to address these concerns.” (Referee’s Report at 17-18; emphasis added.) The finding that petitioner expressed only concern about the speed at which his case was proceeding and Slick’s inattention is contrary to the evidence adduced at the hearing. Petitioner also complained to Kleinbauer that the investigation was not complete. (HT 280, 318.)⁸³ And, what the Referee again fails to recognize is that petitioner could not have complained to Kleinbauer that Slick intended on not defending because petitioner did not know that Slick would rest without calling any witnesses. As of the morning of August 17th, Slick had not yet decided whether to call witnesses. In fact, at least some witnesses had been subpoenaed. (See Exceptions, Question 4, *post*.) The Referee fails to explain, then, how petitioner could have informed Kleinbauer before trial that his lawyer would not put on any evidence in his behalf. For all of these

⁸³ Petitioner’s concern that the investigation was not finished was well-founded. (See Exceptions, Question 6, *post*.)

reasons, the Referee's analysis of Kristina Kleinbauer's testimony is not supported by the evidence and should be rejected.

The Referee also refuses to "give much weight" to the corroborating testimony of Marshall Smith and Jeffrey Brodey (Report at 18), both of whom testified that they heard Slick admit that he knew petitioner wanted to defend.

L. Marshall Smith, petitioner's initial post-conviction counsel, testified that petitioner said to Smith that he told Slick he wanted to call witnesses to testify on his behalf. (HT 126, 135.) Slick told Smith that petitioner had told Slick that he wanted to present his witnesses. (HT 60; see also, exh. 3.) Slick admitted there were witnesses he could have called. (HT 60.) Kristina Kleinbauer also said to Smith that petitioner had told her that he informed Slick he wanted an alibi defense put on. (HT 147-148; see also, Statement of Facts, sec. B.1.b., *ante*.)

The Referee refuses to credit Smith's testimony because Smith could not produce notes of his conversation with Slick and because he found Smith biased in petitioner's favor. (Referee's Report at 18.) Again, the Referee applies one set of standards to witnesses who gave testimony favorable to petitioner and another to Slick. The Referee concludes that because Smith still represents petitioner in federal court, he has a bias in favor of petitioner. (Referee's Report at 18.) The federal proceedings have been in abeyance for over ten years, however, and Smith has been practicing law in Minnesota since 1990. (See Statement of Facts, sec. B.1.b., *ante*.) Any connection he has now to petitioner is sufficiently tenuous to dispel a claim of bias. In comparison, Slick is so biased against petitioner he believes that he [Slick] is the defendant in this case. It is also astounding that the Referee faults Smith for not taking notes of his 1985

conversation with Slick, when Slick has no notes of this same conversation nor of any contact with petitioner. The Referee is more than willing to rely on Slick's 20 year old, admittedly poor and infrequently refreshed memory, although he ignores the fact that Smith memorialized what Slick told him in a 1987 declaration, prepared two years after the conversation occurred. The double standard employed by the Referee discredits the value of his findings about Smith. (See Exceptions, sec. C.8., *post.*)

Jeffrey Brodey, who represented petitioner in moving for a new trial, testified that petitioner said he told Slick he wanted to call witnesses to testify on his behalf. (HT 1187-1188.) When Brodey met with Slick prior to filing the motion, Slick said he knew that petitioner wanted to put on a defense, but Slick felt that it would not work. (HT 1173; see also, Statement of Facts, sec. B.1.c., *ante.*)

The Referee points to a lack of notes by Brodey and also finds that the attorney's failure to raise a *Frierson* claim in the new trial motion is "compelling evidence that Petitioner was not concerned about the alleged failure to call witnesses at the time of his trial, but has chosen to raise this 'issue' only with the benefit of new attorneys and the substantial passage of time." (Referee's Report at 18.) Petitioner objects to these findings as they are not supported by substantial evidence. Brodey's lack of notes is no more significant than Slick's lack of notes of their conversation. More importantly, the Referee's conflation of the absence of a *Frierson* claim in the new trial motion into compelling evidence that petitioner did not want to defend is erroneous. Brodey drafted petitioner's 1985 declaration and decided what to put in it, based on the legal grounds he was raising in the new trial motion. (HT 1206-1207.) Brodey's focus in this motion was whether Slick knew about the guilt phase witnesses and his reasons for not

calling them; he viewed petitioner's unfair trial through the lens of an ineffective assistance of counsel claim. (HT 1216.) Brodey did not raise the denial of petitioner's right to present a guilt phase defense in the motion for new trial because, he testified, the *Frierson* issue "wasn't significant to me at the time. . . ." (HT 1215-1216.) This was because *People v. Frierson, supra*, 39 Cal.3d 803, has not yet been decided (HT 1225.)⁸⁴ Brodey did not know that *Frierson* was pending or under review by the Court when he prepared the motion for new trial. (HT 1232.)

In fact, the Referee's assertion that petitioner has raised the *Frierson* "issue" only with the benefit of new attorneys and the substantial passage of time" (Report at 18) is simply inaccurate. Petitioner's counsel raised the *Frierson* claim on direct appeal (see *People v. Burton, supra*, 48 Cal.3d 843, 856), and in his first habeas corpus petition, filed on October 28, 1987. Although petitioner was able to re-raise the *Frierson* claim with additional factual support in 1993,⁸⁵ the case history shows that petitioner raised the *Frierson* claim as soon as practicable and that the Referee's finding is therefore erroneous.

⁸⁴ The opinion in *People v. Frierson, supra*, 39 Cal.3d 803, was issued on September 19, 1985. Brodey moved for a new trial for petitioner on May 20, 1985. (CT 349.)

⁸⁵ In 1987, petitioner's counsel had no duty, and no funds, to broadly investigate and present habeas corpus claims. The 1987 petition was filed to flesh out the *Frierson* claim as raised on direct appeal. Only after receiving significant investigative and expert funding in federal court after the completion of his direct appeal in 1989, was petitioner able to present additional evidence to support his right to defend claim and to present a comprehensive ineffective assistance of counsel claim. These claims were included in the 1993 habeas petition. This Court then found that petitioner had made a prima facie case for relief based on the *Frierson* claim and ordered the reference hearing.

The Referee discounts all of this evidence showing that petitioner asked Slick to defend and chooses to rely simply on Slick's hearing testimony. He states: "Mr. Slick denied during the Reference Hearing that he had been asked by Petitioner to put on a particular defense or to call specified witnesses and he appeared credible to this Court when he so testified. (H.T. 770; 1808-09; 919-46). Nothing elicited in the examination of Mr. Slick suggested a reason or motive for him to have disregarded a direct request by this client to call alibi witnesses." (Referee's Report at 18.) These findings are not supported by substantial evidence and are contrary to the evidence in the record.

The evidence shows two key reasons why Slick would have disregarded his client's wish to defend. First, Slick testified that he wanted to preserve his own credibility for the penalty phase. (See, e.g., HT 794.) Slick stated that his concern about maintaining credibility with the jury in the second phase of trial was the "first and most important reason" he did not present a defense. (HT 944.) In fact, the Referee later acknowledges that Slick's strategy was to seek to "maintain credibility with the jury for a likely penalty phase of the trial" (Referee's Report at 27; see also, *id.* at 19.) Second, Slick stated at the reference hearing that he believed the decision whether to present witnesses was his alone. (HT 1027.) Slick also believed that the alibi and mistaken identification witnesses would not be probative. (See Exceptions, Questions 3 and 7, *ante.*) Although petitioner wholeheartedly disagrees with the wisdom of Slick's decision not to defend, given Slick's beliefs it is easy to understand why he chose to disregard

petitioner's request to present witnesses.⁸⁶ Because the Referee has failed to consider any of this testimony, his findings are not entitled to any weight. (See *Taylor v. Maddox*, *supra*, 366 F.3d at pp. 1007-1008 [fact-finder must acknowledge significant portions of the record].)

The idea that Slick was a credible witness (Report at 18) is also disproved by the evidence. As petitioner has explained above, the Referee simply ignores the strong evidence that Slick was biased against petitioner and felt that he needed to defend himself in these proceedings.

Moreover, Slick's testimony that petitioner did not request a defense is highly dubious because Slick admitted that he had no memory of petitioner's reaction to being informed that Slick would not defend. (HT 763-764; see also, *Exceptions*, Question 4, *post*.) If Slick could not recall how petitioner reacted, how could he be so sure that petitioner did not at that time request Slick to call witnesses at trial? In fact, Slick's testimony in general about the discussions he had with petitioner concerning case strategy was weak and contradictory. For example, although Slick claimed that he gave petitioner his evaluation of the case (that petitioner would lose), "early on," he could not say when this occurred. (HT 765-766.) Slick did not know if he had Kleinbauer's reports about the alibi or mis-identification witnesses when he told petitioner he would lose the case. (HT 767.) Although Slick claimed he told petitioner his intended strategy, Slick could not say when he did so or recall any details of the conversation. (HT 763.) He could not say whether he did so before or after receiving Kleinbauer's investigation reports. (HT 768.) Slick had no notes of this

⁸⁶ Petitioner also emphasizes that it was Slick's habit and custom to disregard his client's expressed desire to defend. (See *Exceptions*, Question 4, *post*.)

conversation with petitioner and, as noted above, could not say what petitioner's reaction was when Slick told him he would not present a defense. (HT 763-764.) In sum, Slick's recall of his discussion of case strategy with petitioner was so lacking that his testimony that petitioner never asked for a defense should not be credited.

As petitioner has demonstrated in these pleadings, Slick's memory of the events which occurred at the time of petitioner's trial was extraordinarily poor and it was rarely, if ever, refreshed by written materials. (See Statement of Facts, sec. B.1.e.; Brief, sec. B.2.c. *ante*.) The Referee recognized as much during the hearing, stating "I continue to be concerned about the extent to which this Court is receiving the benefit of Slick's actual thinking and memory from 20 years ago." (HT 892; see also, HT 857-858.) One brief but telling example of Slick's poor memory is his testimony that he had no recollection of what occurred at the *Faretta* hearings and that his memory would not be refreshed by reading the transcripts of those proceedings. (HT 726.) If Slick could not remember what petitioner said during these pivotal proceedings – even with reference to the trial transcripts – how is that he could recall, without any documentary prompts, that petitioner never requested a defense?⁸⁷

In light of Slick's abysmal memory, his testimony – given 20 years

⁸⁷ Slick's bad memory was not limited to events 20 years past. His testimony concerning the trial file in petitioner's case demonstrated that Slick's recent memory was also very limited. Slick did not remember that he had a box of trial materials in the closet of his courthouse chambers until after the close of the evidentiary portion of petitioner's hearing, although documents in that box demonstrated that he had handled it in the relatively recent past. (See Statement of Facts, sec. B.1.e., and Brief, sec. B.2.c., *ante*.)

after the fact and uncorroborated by any contemporaneously generated documentary evidence – that petitioner never requested a defense strains credulity. Further straining credulity is Slick’s response to respondent’s question about how he could be so sure that petitioner had not asked for a defense when his recollection of other events was so poor that it was not refreshed by documents from the trial file. Slick responded, “It’s a whole lot easier to remember specifically what didn’t happen than what did, and it’s just a human function, I think.” (HT 919-920; see also, HT 950.) This justification is unconvincing and illogical. Moreover, Slick’s testimony that petitioner never asked to defend was directly impeached by attorneys Smith and Brodey. As discussed above, Slick admitted to both on separate occasions that he knew petitioner wanted him to present witnesses but that Slick did not do so because he believed a defense would not succeed. (HT 1173 [Brodey]; HT 60, 152 [Smith].)⁸⁸

Given the evidence discussed above, there was no basis for the Referee to credit Slick’s uncorroborated and impeached testimony that petitioner never asked for a defense.

In contrast to Slick’s bare and incredible testimony is petitioner’s testimony that he asked Slick to present a defense at trial including alibi and other witnesses, which was well-supported by a variety of other evidence. As noted above, this included petitioner’s remarks at the four *Faretta* hearings; Kristina Kleinbauer’s testimony, declaration (exh. H, ¶ 4) and her

⁸⁸ In fact, Slick was impeached on several critical issues, which generally undermines his credibility. Slick had to back-track after making the following claims: that petitioner had expressed no dissatisfaction during the *Faretta* hearings; that Slick realized alleged co-perpetrator Otis Clements was lying; and that Slick investigated petitioner’s claim that Clements had framed him. (See Brief, sec. B.2.d., *ante.*)

report (exh. 1); petitioner's letter to Slick (exh. 15); testimony by Jeffrey Brodey and the declaration he had petitioner sign (exh. D); and testimony by Marshall Smith. (See also, Brief, sec. B.2., *ante.*)

Despite this ample corroboration, the Referee concludes that petitioner's testimony "is entitled to little weight." (Referee's Report at 18; see also, *id.* at 16.) The Report states: "Petitioner's 1983 statements contradict his most recent testimony. For example, Petitioner conceded that he never told the judge during his trial that Mr. Slick was refusing to call certain witnesses or put on a particular defense. (H.T. 1933; 1936-42). . . . Had Petitioner in fact have demanded a specific defense or specific witnesses to be called, he would have so advised the trial judge, especially on August 11 or August 17, 1983, when the events were most fresh in his mind." (Report at 18-19.) These findings are not supported by the record.

Petitioner did not know at the time of the final *Faretta* motion that Slick would not present evidence. Slick had informed the trial court on August 16th that he needed more time to interview witnesses before deciding whether to present a defense case, and that he would do so the next day. On August 17th, Slick did not rest until *after* petitioner moved for self-representation one last time. (See Exceptions, Question 4, *post.*) The Referee fails to explain how petitioner could have told the trial judge on August 11th or even August 17th that Slick was refusing to call certain witnesses when he did not know.⁸⁹

⁸⁹ The Referee states that petitioner "conceded" that he did not tell the trial judge that Slick was refusing to present witnesses or put on a particular defense. (Referee's Report at 19, citing HT 1933, 1936-1942.) This "concession" was built on a misunderstanding by both counsel and the court. During petitioner's testimony, respondent asked the Referee to take judicial notice that both sides had rested when petitioner made his fourth

Moreover, petitioner's remarks during the *Faretta* proceedings were not inconsistent with his hearing testimony, as the Referee suggests. (Referee's Report at 19.) In fact, they were quite consistent with someone who wanted to defend and did not know what his attorney had in mind. Petitioner fully addresses the significance of what he said during these hearings elsewhere. (See Exceptions, Question 6, *post*.) In brief, petitioner repeatedly told the trial court, inter alia, that he was innocent of the charged crimes, that he had an alibi, that he did not confess, that Clements was lying about petitioner's involvement, that he wanted further investigation completed so he could prove his innocence, that he had recently given the defense investigator additional witness contact information to continue the investigation, and that his trial attorney had not adequately communicated with him about the case. (*Ibid*; see also, Statement of Facts, sec. A.1., *ante*.) The Referee's finding that these remarks were inconsistent with petitioner's trial testimony is clearly erroneous.

The Referee also acknowledges petitioner testified at the reference proceedings that he gave Slick the names of Denise Burton, Ora Trimble

and final *Faretta* motion. (HT 1935.) Petitioner's counsel checked the record, agreed with respondent's characterization and the Referee did take judicial notice as requested. (HT 1936-1936.) Faced with this stipulation, petitioner then understandably agreed with respondent that he knew at the time he requested self-representation for the last time that Slick had not presented the alibi witnesses. (HT 1936.) During oral argument, petitioner's counsel informed the Referee that she had mis-read the record when she agreed to respondent's request for judicial notice and that the reporter's transcript plainly showed that Slick rested *after* petitioner's final *Faretta* motion. (HT 2386-2388.) Respondent acknowledged that petitioner's counsel was correct and stated that he had no problem withdrawing from the stipulation. (HT 2388-2389.) Given these facts, petitioner's "concession" is insignificant.

and Elizabeth Black as possible witnesses. The Referee discounts this testimony, however, finding that “there is no evidence which is reasonably contemporaneous with the February 1983 events to corroborate” it. (Report at 16.) This finding is not supported by the evidence. As discussed above, Kleinbauer’s report (exhibit 1), petitioner’s remarks in the *Faretta* hearings, and his letter to Slick (exh. 15) amply support his hearing testimony.

Petitioner also emphasizes that the Referee expects too much from a criminal defendant. While it would have been convenient if petitioner had precisely enunciated every shortcoming of Slick and fully set forth what he hoped his attorney would do, that simply is not realistic. As the Referee acknowledges, petitioner was 19 and unsophisticated. (Referee’s Report at 17.) He had never been through a jury trial before. (HT 1953.) Although his comments could have been more erudite, he did his best to tell the trial court what was happening. In response, the trial judge repeatedly informed him that Slick was the best Long Beach had to offer and that petitioner was lucky to have him as an attorney. (RT 2, 2-3, 13.) The trial court even threatened petitioner with ejection from the courtroom (RT 14), although the record makes clear that petitioner was polite and respectful (see, generally, Statement of Facts, sec. A.1., *ante*). Indeed, petitioner even raised his hand at one point to get the judge’s permission to speak. (RT 15.) Under these circumstances, a reasonable person uneducated in the law would assume that to voice his complaints more expansively would be futile and possibly harmful. And, the trial court’s threat to remove him from the courtroom undoubtedly had a chilling effect on petitioner’s willingness to add to what he had told the court. In light of these facts, it is unreasonable

for the Referee to fault petitioner for not saying more.⁹⁰

In concluding that petitioner did not ask for any specific witnesses or defenses to be presented, the Referee states, “The more logical conclusion is that Mr. Slick advised Petitioner that the case against him was strong and that the best tactical approach was to defend at the penalty phase of the case so as not to lose credibility with the jury. (H.T. 765-66; 822; 856; 872-77).” (Referee’s Report at 19.) This is not a logical conclusion, however, and it is not supported by the evidence. As petitioner has shown above, Slick’s testimony that he advised petitioner that the case against him was strong and that he would not defend was not worthy of belief, as Slick could provide no details whatsoever about any conversation he had with petitioner. As petitioner demonstrates *post*, Slick never informed his client that he would rest without calling any witnesses on petitioner’s behalf in the guilt phase. (See Exceptions, Questions 4 and 5.)

Finally, the Referee concludes that petitioner demanded to represent himself simply to delay his trial. (Referee’s Report at 19.) Petitioner takes exception to this finding. He shows later in this pleading that the Referee’s finding is not supported by substantial evidence and that in fact petitioner sought self-representation due to his well-founded dissatisfaction with Slick. (Exceptions, Question 6, *post*.)

⁹⁰ The Referee also faults petitioner for not saying more in exhibit D, the declaration he signed in 1985 in support of a new trial motion. (Referee’s Report at 19.) As petitioner has explained above, Brodey – not petitioner – prepared the declaration. Brodey prepared it to support legal claims that did not include *Frierson*, which had not yet been decided. In any event, exhibit D does state that petitioner informed Slick he wanted an eyewitness who almost certainly was Michael Stewart called at trial. Thus the declaration supports petitioner’s testimony that he asked for a defense.

In summary, petitioner emphasizes a key point. Slick did not testify that he knew petitioner wanted to defend but that after Slick explained his intended strategy of saving his credibility for the penalty phase petitioner agreed to present no witnesses. Rather, Slick claimed at the hearing that petitioner *never* expressed a desire to defend. Given the evidence adduced at the reference hearing, this claim is patently unbelievable. As a result, the whole of Slick's testimony on this subject should be rejected by this Court.

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Reference Question 2

Did petitioner tell Slick that petitioner's purported confession had been falsified. If so, when did he do so, and did Slick have any reason to believe that the officer or officers who reportedly took the confession were not credible?

The Referee found that petitioner did advise Slick that his purported confession had been falsified. (Referee's Report, p. 19.) This finding is supported by substantial evidence. Petitioner personally told Slick that he had not confessed to police. (HT 1859 [petitioner]; HT 561, 728, 854-855 [Slick].) Petitioner also communicated to Slick by letter that he had not confessed to police (exh. 15), and through investigator Kristina Kleinbauer (exh. 1). Finally, petitioner stated in open court and in Slick's presence that he had not confessed. (RT 16-19.)

As to when petitioner told Slick his confession had been falsified, the Referee apparently credits the recollections of petitioner and Slick that petitioner did so "early on" in the case. (Report, p. 19.) Substantial evidence supports a finding that petitioner did inform Slick from the outset that he had not confessed. As noted in the Report, both Slick and petitioner testified at the evidentiary hearing to this effect. (Report, p. 19, citing HT 727-728 [Slick]; HT 1158-1159 [petitioner].) Supporting this testimony is evidence that petitioner told investigator Kleinbauer during their first interviews on June 15 and 17, 1983, that he had not confessed. (Exh. 1.) In addition, the letter petitioner wrote to Slick, which is undated, appears to have been written after the preliminary hearing and before Slick's first and only interview of petitioner in the county jail on July 1, 1983. (See exhs. 15 and 13; see also, exh. D.)

As to whether Slick had any reason to believe that the officer or officers who reportedly took the confession were not credible, the Referee

makes several findings but fails to directly answer this question. The Referee begins by dismissing the evidence relied upon by petitioner as relevant only to Slick's strategy decision not to contest the confession and thus outside the scope of this Court's reference order. The Referee's Report states: "In essence, Petitioner is now asking this Court to find fault with Mr. Slick's strategic decisions to cast doubt on Mr. Slick's testimony on this issue. [¶] This court has not been asked to render findings on a general assertion of ineffective assistance of counsel or to analyze Mr. Slick's strategic decisions, apart from the specific questions which are contained in the Supreme Court's October 25, 2000 Order." (Report, pp. 19-20.)

The Referee goes on to state that the evidence "establishes that Mr. Slick had extensive and personal familiarity with the arresting officers and had a supportable opinion as to their credibility and persuasiveness with juries in the City of Long Beach where they worked." (Report, p. 20.) The Referee found it "significant . . . that no evidence was introduced of personal animus against Petitioner on the part of the officers . . ." (*Ibid.*)

The Report's analysis of the evidence relevant to whether Slick had "any reason to believe" the officers lacked credibility is seriously flawed and its findings are not supported by substantial evidence. The Referee has improperly framed the inquiry as a subjective one (what Slick believed) as opposed to an objective inquiry (whether he had reason to believe the officers were not credible). He has also misunderstood the significance of the evidence petitioner marshaled in the post-hearing briefing which demonstrated that there was reason for Slick to believe that investigating officers Collette and Miller were not credible. In addition to the passage quoted above, the Report states:

Petitioner (through his current counsel) suggests that there

was evidence sufficient to give Mr. Slick reason to believe that the officers who took the purported confession from Petitioner were not credible. Petitioner focuses on the police reports and suggests that they were incomplete and lacked reliability. Further, Petitioner now claims that Mr. Slick should have put the People's investigation on trial regarding, e.g., witnesses who 'may have been interviewed together,' 'affidavits of probable cause for search and arrest warrants [which] were misleading,' and a police failure to use a photographic or live line-up. Thus, with the benefit of hindsight, Petitioner now suggests ways that his case could have been defended differently. . . .

(Report, p. 19.)

As petitioner has emphasized throughout these proceedings, Slick's strategic decision-making is not at issue under *People v. Frierson* and the parties did not litigate the reasonableness of those decisions at petitioner's evidentiary hearing. (See Exceptions, sec. C.5., *post*; see also, Brief, sec. A., *ante*.) Thus, petitioner did not seek to show in the briefing submitted to the Referee that Slick could have defended the case differently but rather that a preponderance of the evidence established that Slick had objective reasons to question the credibility of Collette and Miller. This evidence, which is discussed at length below, was not offered in "hindsight" but was available to Slick prior to trial.

Ironically, it is the Referee who inappropriately focuses on Slick's tactics. The Report's conclusion that Slick "had extensive and personal familiarity with the arresting officers and had a supportable opinion as to their credibility and persuasiveness with juries in the City of Long Beach where they worked" (Report, p. 20) is in essence a justification of Slick's tactical decision not to challenge the credibility of Collette when the detective testified at trial that petitioner had confessed. This finding is not

responsive to Reference Question 2, which posed a very limited, objective inquiry: “. . . did Slick have *any reason to believe* that the officer or officers who reportedly took the confession were not credible?” (Ref. Question 2; emphasis added.) Question 2 does not ask about Slick’s subjective belief or opinion as to the credibility of Collette and his partner, or whether that belief is supportable. Slick’s calculation of how persuasive a Long Beach jury would find testimony from them to be is not part of the reference question and was not litigated by petitioner.⁹¹

In addition, the Referee’s reliance on the lack of evidence of personal animus toward petitioner by the officers is misplaced. As demonstrated later in this brief, the Referee significantly narrowed the scope of petitioner’s evidentiary hearing, and concluded that only evidence known to Slick prior to trial was relevant. (See Exceptions, sec. C.1., *post.*) Any effort by petitioner to adduce evidence of animus would have undoubtedly been rebuffed by the lower court as outside the bounds of the proceedings. Moreover, while evidence of personal animus might provide one explanation for the officers’ actions in this case, it is not the only possible explanation; indeed it is far less compelling than the explanation supported by the evidence and put forward by petitioner.

Whether or not the detectives knew of petitioner prior to his arrest and/or had any animus toward him, they had a strong incentive to fabricate a confession after Otis Clements named petitioner as the shooter. As shown below, by the time a report of the disputed confession was prepared on

⁹¹ The Referee has denied petitioner his federal and state constitutional rights to a full and fair hearing because petitioner was not given an opportunity to litigate the reasonableness of Slick’s trial decision-making. (See Exceptions, sec. C.5., *post.*)

February 28th (of statements allegedly made on February 26th), police had no evidence to corroborate Clements' self-serving claim that petitioner was the shooter. They had no eyewitnesses to the shooting on East Pleasant Street who had identified petitioner.⁹² They had no murder weapon, no bank bag, no inculpatory fingerprint evidence, and no proceeds from the robbery. From Clements, however, they had all the information necessary to create a bogus statement which they could attribute to petitioner. Fabricating a confession was not only the easiest way to close the Khwaja homicide investigation but also key to salvaging their case against Clements. Had an objective, thorough investigation pointed away from petitioner as the shooter, then the statements from Clements, which the detectives already knew were replete with inconsistencies, would have become close to worthless. The police would have been left with a weakened case against Clements and no alternative suspects. The Referee's failure to recognize these facts undercuts his reliance on any lack of animus held by the detectives toward petitioner.⁹³ (See *Taylor v. Maddox*, *supra*, 366 F.3d at pp. 1007-1008.)

As stated above, the Referee incorrectly ignored a wealth of evidence available to Slick prior to imposition of petitioner's death sentence

⁹² Indeed, as set forth above, the eyewitnesses had given descriptions that tended to rule petitioner out as the shooter.

⁹³ In a later portion of this pleading, petitioner discusses three murder cases that involve serious misconduct by the Long Beach Police Department. (See Exceptions, Question 3, *post*.) In none of these cases was there any suggestion that the misconduct was motivated by animus held by the police officer involved toward the defendant. These cases thus provide further proof that a lack of personal ill will toward petitioner by the officers is insignificant.

which gave trial counsel reason to question the credibility of Long Beach detectives William Collette and John Miller. This included evidence that 1) Collette and Miller conducted an investigation of very poor quality which was practically guaranteed to inculcate petitioner, 2) that the detectives were dishonest in dealing with witnesses Elizabeth Black and Ora Trimble, and 3) that Collette and Miller had engaged in questionable conduct in the *Oscar Morris* case, which Slick was also handling.

1. The Investigation Conducted by Detectives Collette and Miller Was So Incomplete and Unobjective That It Reflected on Their Credibility.

In *Kyles v. Whitley* (1995) 514 U.S. 419, 446, n. 15, the United States Supreme Court recognized that: “When . . . the probative force of evidence depends upon the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.” However, details of the investigatory process potentially affect not only the weight to be given to the evidence produced but also the credibility of the officers who conducted the investigation. (*United States v. Sager* (9th Cir. 2000) 227 F.3d 1138, 114.)

In petitioner’s case, the investigation conducted and overseen by detectives Collette and Miller was so deficient that it not only reduced the probative force of the evidence it produced but also gave Slick reason to believe that the investigating officers were not credible. As discussed below, the police reports generated in petitioner’s case were rife with inconsistencies and omissions. The detectives made materially misleading statements in order to persuade a magistrate to issue warrants to arrest petitioner and to search premises where he lived. They engaged in highly questionable eyewitness identification and interrogation procedures and

failed to disclose exculpatory evidence. These deficiencies were so extreme that they gave petitioner's trial counsel reason to believe that Collette and Miller were not credible, whether or not he subjectively doubted them.

A. The Police Reports Were Conflicting and Inadequate.

At petitioner's evidentiary hearing, the Referee recognized that the police reports were "sparse" and "pretty pathetic." (HT 1436.) In fact, the police reports provided to Slick prior to petitioner's trial contained inconsistencies and inadequacies so significant that they raised serious questions about the reliability of the investigation and, as a consequence, the credibility of detectives in charge of it.

Most disturbing in this regard is the failure by police to consistently report whether homicide eyewitnesses Michael Stewart and the three Cordova brothers positively identified Otis Clements as a participant in the charged crimes. Two Long Beach patrol officers, Valles and Workman, prepared reports relating to these witnesses. According to the reports, Valles was one of the first officers to respond to E. Pleasant Street after the shootings, where he interviewed Stewart and the Cordova brothers. (Exh. K. pp. 10, 22-23.)⁹⁴ Valles later transported these witnesses to 1136 E. Hill to see whether they could identify Clements, who had been detained at that location. (*Id.* at p. 24.) Valles reported that *none* of the witnesses identified Clements. He stated: "Upon arrival, the witnesses were unable to identify [Clements], but witness CORDOVA, Larry advised filing officer that the

⁹⁴ Throughout this discussion, petitioner cites the police reports admitted into evidence during the evidentiary hearing as exhibit K for the purpose of showing what information was in the reports and thus known to Slick prior to trial, not for the truth of the facts set forth in the reports.

jacket that this subject was wearing looked like the jacket of suspect #2 who did the shooting.” (*Ibid.*)⁹⁵

Officer Workman, who arrived at the scene after Valles, also prepared a report relating to Stewart and the Cordovas, although Workman failed to make clear whether he was relating information he obtained directly from the eyewitnesses or from another officer or officers. (Exh. K pp. 10-13.) In a startling contrast to Valles, Workman claimed that Clements *was* positively identified, although he did not specify who made the identification. Workman stated: “Officer VALLES transported witnesses to the scene and [Clements] was identified as having been the driver of the suspect vehicle.” (*Id.* at p. 13.)

It is hard to imagine in a homicide investigation a detail more critical than whether a suspect has been positively identified by an eyewitness. Yet in the face of this glaring conflict as to whether Clements had been identified, detectives Collette and Miller, who were responsible for the investigation overall and for knowing the contents of all reports in the case (HT 2111), apparently did nothing to resolve the discrepancy. There is no follow up report addressing the inconsistency. There is nothing in the homicide book to indicate that any of the witnesses were asked to review the reports of their interviews for accuracy or sign a written statement.⁹⁶

⁹⁵ Valles also reported that the four witnesses were able to identify various features of Vining’s truck, including the color, a bumper sticker, and a partial license plate number. (Exh. K. p. 24.) The detail provided by Valles of what the witnesses told him makes clear that his report that they did not identify Clements could not have been the result of a typographical error.

⁹⁶ Collette testified at the evidentiary hearing that to his knowledge Long Beach Police Department had never adopted a policy of

This critical failure by Collette and Miller gave Slick reason to wonder whether the detectives were working to find the truth or get a conviction at any cost, and thus to question their credibility.

There were other important discrepancies in the police reports relating to the eyewitnesses upon which Collette and Miller failed to follow up. Whether the eyewitnesses saw a gun and what it looked like was inconsistently reported. According to Valles, the Cordovas saw the gunman with a possible .38 chrome plated four-inch barrel revolver. (Exh. K p. 23.) Workman indicated that they saw a blue steel gun. (*Id.* p. 12.) Workman reported that Stewart also saw the gunman with a blue steel revolver, possibly a four-inch .38 caliber, as well as with a canvas bank bag. (*Ibid.*) Valles, however, noted that Stewart saw the canvas bag but did not report that Stewart saw a gun. (*Id.* at p. 23.)⁹⁷ These additional inconsistencies, and the failure of detectives Collette and Miller to address them, raised questions about the credibility of the investigation and the officers in charge

requiring officers to have a witness review his statement for accuracy and sign it. (HT 2114, 2116.) Michael Stewart testified that no police officer asked him to review any police reports for accuracy. (HT 647.)

⁹⁷ Compare generally, Workman's report (exh. K pp. 10-13) with Valles' report (*id.* pp. 22-25). In many instances, one of the officers has reported a fact allegedly given by the witnesses that was not noted in the report of the other officer. For example, Workman said that Stewart saw the bag and gun in the suspect's right hand; Valles said nothing about a gun or about the suspect's handedness. Valles' report included physical descriptions from the witnesses; Workman's did not. Workman said that the Cordovas heard three shots; Valles said they heard shots but could give no further description. These differences raise questions about the accuracy and completeness of both reports.

of it.⁹⁸

The detectives also failed to take the very basic step of recovering and/or preserving important ballistics evidence. Officer Workman reported that one of the two bullets fired by the gunman into Anwar Khwaja's car was embedded in the car's dashboard. (Exh. K. p. 3.) So far as the police reports show, this slug was never recovered and analyzed. If it was, that fact and any resulting analysis was not disclosed to the defense. (See generally, exh. K.)⁹⁹ The slug could have provided important exculpatory evidence. If, for example, it was not from .38 caliber ammunition, the validity of petitioner's disputed confession, in which he supposedly claimed to have used a .38 police special to commit the crimes, would have been seriously undermined (*id.* p. 57).¹⁰⁰

Collette and Miller also curiously failed to determine how much money was stolen from Anwar Khwaja, a basic investigative step that would be expected in a competent investigation designed to ascertain the truth. Officer Workman interviewed Khwaja at the scene, and Zarina

⁹⁸ The Referee also noted that the reports seem to indicate that the Cordova brothers were interviewed together rather than separately, which would be "problematic." (HT 1436.)

⁹⁹ Slick requested, in his informal discovery request dated April 21, 1983, "[r]esults of any and all laboratory tests of the Long Beach Police Department or any other agency." (Exh. 35.)

¹⁰⁰ If analysis of the bullet had shown an absence of blood or tissue, it would have undermined Anwar Khwaja's testimony that he was hit in the head by both shots fired by the gunman. (See RT 353-354.) Proving that Khwaja was unable to report accurately how many bullet wounds he suffered would have tended to cast serious doubt on his ability to identify the man who shot him. No medical evidence was provided to the defense or presented at trial on this point.

Khwaja later at the hospital. (Exh. K. pp. 10-11, 13.) Both told him that Mr. Khwaja was on his way to the bank to deposit the store's cash receipts when he was robbed. (*Id.* pp. 11, 4.) Anwar Khwaja was unable to tell Workman how much money was in the bank bag. (*Id.* p. 11.) Workman theorized that the gunman had followed Khwaja from his store. Workman stated, "A loss will have to be determined at a later time when the victim has sufficiently recovered or store employees are able to determine such." (*Id.* p. 14.) There were no reports in the homicide book, however, to indicate that Collette and Miller sought to determine how much was in Khwaja's bag, either from the victim himself or from his store employees.

Moreover, although the detectives later received information that conflicted with statements made by Anwar Khwaja and his sister that he was on his way to the bank, they failed to investigate further. During a second interrogation of petitioner's alleged co-perpetrator Otis Clements, Clements claimed that he and petitioner had followed Khwaja *from* the bank and that Khwaja had only coins in the bank bag he was carrying. (Exh. K, pp. 40, 42.)¹⁰¹ Whether Khwaja had already been to the bank or was on his way there when he was robbed and whether coins or cash receipts were taken from him could have been easily ascertained by contacting the Bank of America branch on Atlantic to see whether Khwaja had made a deposit on the afternoon of February 25, 1983. The fact that Collette and Miller neglected to definitively resolve these conflicts gave

¹⁰¹ Clements' initial story was not inconsistent with what the Khwajas had told police on the day of the shootings. During his first interrogation, Clements said that he and petitioner first encountered Anwar Khwaja on E. Pleasant Street, and that \$1,000 was in the bank bag. (Exh. K, pp. 35-36.)

Slick additional reason to question their credibility.

The detectives also failed to conduct any kind of objective investigation which could have corroborated or disproved the claims made by Otis Clements. Collette and Miller knew that Clements had repeatedly lied during his interrogations.¹⁰² They also knew that eyewitnesses had described the shooter in a manner that varied greatly from the way petitioner looked on February 25th but tended to match Clements. (See sections B. and C., *post.*) However, they did not take steps to determine if Clements had falsely accused petitioner to protect himself or an accomplice. For example, Collette and Miller failed to obtain warrants to search the motel room Clements was living in, although Clements had enough time after the shooting to return there before arriving at Rev. Handy Vining's house on East Hill Street, where Clements was arrested. They failed to look for and impound Clements' car, which would have been parked at Vining's if Clements was telling the truth and might have contained relevant evidence. They failed to contact Vining's daughter and Clements' sister, whom Clements claimed he and petitioner saw prior to the shootings. (See generally, exh. K.)¹⁰³

¹⁰² For example, Clements changed his story about whether he knew petitioner had a gun prior to either robbery; whether the K-Mart robbery had occurred; whether he and petitioner had checked out any banks; whether they had followed Anwar Khwaja from a bank; whether Clements had agreed to be the getaway driver; and where he and petitioner separated after the shooting. (Compare exh. K pp. 33-37 with exh. K pp. 38-43.)

¹⁰³ Petitioner sought to call Elizabeth Vining at the evidentiary hearing, who would have testified that Clements lied when he told police that he had seen her on the morning of February 25, 1983 and that she had given him the keys to her father's truck. The Referee ruled that her testimony was not relevant to the proceedings. (See Exceptions, sec. C.3.c.,

In sum, the failure of detectives Collette and Miller to conduct investigation necessary to address the many inconsistencies contained in the police reports and to otherwise conduct a thorough, objective investigation gave Slick reason to question the credibility of these officers.

B. The Detectives Submitted Materially Misleading Affidavits of Probable Cause.

The materially misleading affidavits of probable cause submitted to the magistrate in this case also gave Slick reason to question the credibility of the detectives. Detective Miller, possibly with Collette's assistance and surely with Collette's knowledge, prepared affidavits for a warrant to arrest petitioner and for warrants to search residences associated with him.¹⁰⁴ In the affidavits, Miller relied heavily on information provided by eyewitness Michael Stewart. (Exh. K pp. 68-69, 47-48.) Yet the detective misleadingly stated that Stewart had positively identified Clements as the driver of the get-away truck. (Exh. K p. 69; see also, p. 48.) Miller knew or should have known, that Valles – who was present at the showup of Clements – reported that Stewart had not made an identification. Miller chose not to disclose this critical discrepancy in the affidavits.¹⁰⁵

post.)

¹⁰⁴ The affiant of both affidavits was John Miller. (Exh. K pp. 47-50, 68.) Collette could not recall whether he assisted Miller in preparing the affidavits or reviewed them before they were submitted to a magistrate. (HT 2093-2095.) Collette did testify that he was familiar with all the reports in petitioner's case, pursuant to his habit and custom as an investigating officer. (HT 2111.)

¹⁰⁵ The report prepared by Valles was typed on February 25, 1983 (exh. K p. 22) and so was available when Miller prepared the affidavits on February 26th (*id.* p. 50). In addition, Miller stated in the affidavit that he and Collette questioned unformed officers (*id.* p. 68),

The probable cause affidavits also relied heavily on the statement of Otis Clements (see exh. K, pp. 48, 69-71), who immediately after his arrest on February 25th blamed petitioner for the crimes and denied any culpability. But again, Miller's characterization of the facts was very misleading. Miller reported in one of the affidavits that Clements had "admitted to being involved in the murder and robbery" (*id.* at p. 48), which naturally would have led the magistrate to believe that Clements had admitted some culpability. In fact, in his first interrogation Clements claimed that he had no knowledge prior to the shooting that petitioner had a gun or was planning to commit a robbery, and that he (Clements) was forced to act as petitioner's getaway driver at gunpoint. (See exh. K. pp. 33-37.)¹⁰⁶ Clements' self-serving implication of petitioner on February 25th was a "textbook example" of a co-defendant statement that is presumptively unreliable since Clements sought therein to exculpate himself while inculpating petitioner. (*Whelchel v. Washington* (9th Cir. 2000) 232 F.3d 1197, 1205; see also *People v. Duarte* (2000) 24 Cal.4th 608, 617 [co-defendant may have believed that the police had sufficient evidence to link him to the crimes, and that he had little to lose and perhaps something to gain by admitting his role while attempting to minimize his participation

which surely would have included Valles, the officer who personally interviewed the Cordova brothers as well as Stewart. At the evidentiary hearing, Collette testified that he received information from Valles prior to talking to Stewart. (HT 2091, 2107-2108.)

¹⁰⁶ In his second statement, given on February 28, 1983, Clements substantially changed his story. He dropped his claim that he was unwittingly duped by petitioner and admitted that he had followed Anwar Khwaja's car knowing that petitioner intended to rob the occupants. (See exh. K. at pp. 38-43.)

and shift primary responsibility to others].) Miller chose not to disclose to the magistrate the fact that Clements was a presumptively unreliable source because he had denied any culpability while casting all blame on petitioner; instead Miller created the impression that Clements was a reliable source because he had admitted his involvement.

Miller also failed to inform the magistrate that Clements' claim that petitioner shot the victims was further suspect because the description of the gunman provided by eyewitnesses matched Clements in important particulars. According to the report prepared by officer Valles, the Cordova brothers had observed pock marks or scars on the shooter's cheek. (Exh. K. at p. 23.) Stewart told Valles that the shooter had a short afro hair style. (*Id.* p. 22.) Collette and Miller could see from their contact with Clements that his face was scarred and that he had a short afro. (See exh. 22.) In addition, Larry Cordova told Valles that the jacket Clements was wearing upon his arrest looked like the jacket worn by the shooter. (Exh. K. p. 24.) In contrast, the detectives knew that petitioner did not have facial scarring or pockmarks.¹⁰⁷ Miller chose not to put this information, which tended to exclude petitioner and inculpate Clements, into the affidavits he submitted.

Finally as to the affidavits, Miller misreported the description of the gun he received from Clements. Miller stated that on February 25th Clements told him and Collette that petitioner had used a blue steel revolver. (Exh. K. p. 69.) Miller's narrative report of the unrecorded

¹⁰⁷ Presumably the detectives could see in the photograph of petitioner they showed to Clements (see exh. K. p. 37) that petitioner did not have any facial scars or pockmarks. Although it is not known what photograph the detectives then had available, evidence adduced at the evidentiary hearing established that petitioner did not have a scarred face. (HT 1325 [Black]; exh. 20 [petitioner's 2/26/83 booking photo].)

interrogation reported, however, that Clements had described the gun as a long-barrel .38 caliber, black with brown wooden grips. (Exh. K. p. 37.) Significantly, Miller's claim in the affidavit that Clements described the gun as a blue steel revolver matched the description given by the eyewitnesses as reported by officer Workman. (Exh. K. pp. 3, 11 [Anwar Khwaja]; p. 12 [Stewart]; p. 12 [Cordovas].) When considered in isolation, this error could have been an innocent one. However, when considered with all of the other questionable aspects of Collette and Miller's investigation of petitioner's case, it seems more likely that it was a conscious effort to build a case against petitioner at any cost.

In sum, the affidavits submitted in order to obtain search and arrest warrants gave Slick reason to believe that the investigating officers in this case were not credible.

C. The Detectives Employed Highly Questionable Eyewitness Identification Procedures.

The eyewitness identification procedures the detectives used in this case also gave Slick reason to believe that the detectives were not credible. Unbelievably, *not one* of the many available homicide eyewitnesses was shown either a photographic or live lineup, although both Clements and petitioner were in Long Beach custody within 24 hours of the shootings. These witnesses included Michael Stewart, Robert, Larry and Del Cordova, Zarina Khwaja, and Susana Camacho. (See generally, exh. K at pp. 2-7, 9-14, 22-25.) Instead, the detectives waited to see whether some of these witnesses could identify petitioner for the first time in court, an extremely suggestive practice. (See *People v. Palmer* (1984) 154 Cal.App.3d 79.)

The only reasonable explanation for this critical investigative failure is that the detectives did not want to run the risk of creating exculpatory

evidence that the defense could use to challenge the purported confession. This conclusion is supported by the fact that the detectives knew from police reports that several eyewitnesses had described the gunman in ways which tended to exclude petitioner. Once Collette and Miller arrested petitioner, they could see that he had a Jheri Curl hairstyle, rather than the short afro seen by Stewart. (HT 1323-1324, 1516, 2573.) They could see that petitioner had no pock marks or other facial scars, as described by the Cordovas. (See exhs. 20 and L. [petitioner's 2/26/83 booking photo].) The detectives knew that petitioner weighed 160 pounds (exh. K. p. 51), which was 40-60 pounds less than the shooter's weight as reported by the witnesses (*id.* pp. 22-23).¹⁰⁸ Finally, the detectives knew that the witnesses had described someone significantly older than petitioner, who was 19 at the time of his arrest (exh. K. p. 51).¹⁰⁹

The detectives' failure to show a lineup to any of the homicide witnesses is especially glaring when one considers that Collette took the time to prepare a photographic lineup and show it to K-Mart robbery victims Searcy and Heimann. This effort by Collette actually provided

¹⁰⁸ Stewart told Valles that the shooter weighed 200 pounds. (Exh. K. p. 22.) The Cordovas reported that the man weighed 200-220 pounds. (*Id.* p. 23.)

Petitioner also notes that Stewart and the Cordovas all estimated the shooter to be 6'1" tall. (Exh. K. pp. 22-23.) Petitioner was 5'11" tall. (*Id.* p. 51 [petitioner's arrest report].) While this discrepancy is not great, the consistency between the estimates provided by Stewart and the Cordovas suggests that the shooter was taller than petitioner.

¹⁰⁹ The Cordovas told Valles that the suspect was in his thirties. (Exh. K. pp. 22, 23.) Stewart told police the man was in his late thirties. (Exh. 1.)

Slick with additional reason to question his credibility, as the lineup created was extremely suggestive. As Slick knew from police reports, Collette had put two photographs of petitioner into the array shown to Searcy and Heimann on February 28, 1983. (Exh. K. p. 78; see also, HT 1697 [Collette].) Collette acknowledged prior to trial that neither photograph fairly represented petitioner's appearance in February 1983. In a police report he stated that both photos "were outdated and not true representation [sic] as to how [petitioner] looked on the date of his arrest." (Exh. K. p. 78.) Slick knew or should have known that such a lineup was extremely suggestive.¹¹⁰ Further, Slick knew or should have known that petitioner's booking photograph from his arrest early in the morning on February 26th was then, or would very soon be, available for use in a lineup. Slick should have found it highly suspicious that Collette did not use petitioner's booking photograph instead of using two dated pictures.¹¹¹ In sum, the

¹¹⁰ Slick testified at the evidentiary hearing that he does not believe a lineup with two photographs of one person in it is suggestive, although he could not recall his thinking on the subject in 1983. (HT 687.) However, Slick later acknowledged that such a lineup procedure could be suggestive. (HT 747.) Petitioner sought to establish definitively the extremely suggestive nature of such a lineup, by proffering the testimony of Dr. Steven Clark. (See Exh. 50, ¶ 25 [dec. of Steven Clark, Ph.D., marked for identification only].) The Referee declined to hear from Dr. Clark. (HT 1444; see also, Exceptions, sec. C.3.a., *post.*)

¹¹¹ Petitioner's booking photograph appeared in the Long Beach Press Telegram's morning home edition on Wednesday, March 2, 1983 (exh. 20), which means that the photo must have been available on Tuesday, March 1st, if not before. Slick had a copy of the article in his file. (See exh. I.) Collette showed the suggestive lineup to Searcy and Mills on Monday, February 28th. It is possible that if Slick had investigated at the time, he could have established that petitioner's booking photograph was available to Collette on Monday, but that the detective purposely chose not to include

identification procedures employed in this case gave Slick reason to believe that the detectives in charge were not credible.¹¹²

D. The Detectives Failed to Disclose Potentially Exculpatory Evidence.

The failure by Collette and Miller to ensure that potentially exculpatory evidence was preserved and/or disclosed to the defense also gave Slick reason to question their credibility.

The detectives failed, at least as far as Slick knew, to develop and disclose relevant fingerprint evidence. Police reports in the homicide book indicated that latent fingerprints had been found on Margetta Heimann's truck and on Anwar Khwaja's car. (Exh. K. pp. 21, 76.) Slick knew that these prints were potentially exculpatory as Khwaja informed police that the man who robbed him had touched his car. (*Id.* p. 3.) Heimann thought her assailant may have touched her truck. (*Id.* p. 76.)¹¹³ Accordingly, Slick requested "[p]hotographs of latent fingerprints discovered and lifted at the scene, latent fingerprints found at the scene of the crime; and any written

it in the lineup. In any event, there is no reason Collette could not have waited a day to show photographs to the victims of the less important K-Mart offense, so that a fair lineup could have been created.

¹¹² At the evidentiary hearing, petitioner attempted to establish that the detectives had engaged in another highly suggestive identification procedure. Petitioner proffered evidence that they showed a single photograph of petitioner to Robert Cordova prior to trial, and told Cordova that they believed it was the man who did the shooting. (Exh. 47 [marked for identification only].) The Referee declined to hear from Cordova. (HT 1624; see also, Exceptions, sec. C.3.a., *post.*)

¹¹³ A police report that was prepared prior to petitioner's trial but not disclosed to Slick indicated that latent fingerprints were also lifted from the truck Clements was driving when arrested. (Exh. 34.)

reports of comparisons made.” (Exh. 35 [Slick’s informal discovery request, dated April 21, 1983].) None of this was provided by the detectives as requested, however. (See HT 1132-1134; exh. K.) The failure of Collette and Miller to include the results of any fingerprint analysis in the murder book, or in response to a request, gave Slick cause to consider whether the detectives were hiding the ball. In fact, if Slick had pursued the matter, he would have learned that they were failing to disclose potentially exculpatory evidence. The detectives possessed, but did not give to the defense, a report which indicated that none of the latent fingerprints recovered were petitioner’s. (Exh. 34, HT 1134.)¹¹⁴

Slick also had reason to question the credibility of Collette and Miller when he learned that they had not disclosed any information concerning a second showup. Slick knew that Michael Stewart had told investigator Kleinbauer that he was taken to a second showup and asked to view a second suspect. Police told Stewart that this second suspect was the brother of the first suspect (Clements). (Exh. 1.) Stewart indicated to Kleinbauer that the “three young Mexicans” (the Cordova brothers) also

¹¹⁴ Various courts have recognized that potentially exculpatory fingerprint evidence must be disclosed to the defense. (See, e.g., *United States v. Old Chief* (9th Cir. 1997) 121 F.3d 448, 450 [consistent with its obligations under *Brady v. Maryland* (1963) 373 U.S. 83, prosecution disclosed the potentially exculpatory results of fingerprint analysis of a bullet clip which indicated that the latent print recovered did not match defendant’s prints]; *Barbee v. Warden* (4th Cir. 1964) 331 F.2d 842, 844-845 [due process violation where state failed to provide report that defendant’s fingerprints did not match those obtained from vehicle assailant was driving, as well as other exculpatory evidence]; *State v. Cook* (La. Ct. App. 1988) 535 S.2d 988, 990 [evidence that fingerprints lifted from getaway car did not match defendant’s prints is favorable to defendant and may be material to his guilt].)

attended the showup and that one of them believed the second suspect was the shooter. (*Ibid.*) Long Beach police failed to provide Slick with any documentation of this second showup, failed to identify the second suspect, failed to disclose that one of the Cordova brothers had positively identified a suspect other than petitioner as the shooter, or to record Stewart's additional description of the gunman as in his thirties, having a beard with gray in it. (See generally, Exh. K. [homicide book].)

Although respondent claims that the second showup never occurred, Slick had no basis to assume that Stewart's recall was faulty and that the police had properly documented their investigation.¹¹⁵ Stewart was a credible witness. (See Exceptions, Questions 7 and 9, *post.*) Slick apparently gave some credence to Stewart's recollection of a second showup, because in preparation for cross-examination of Robert, Larry and Del Cordova he noted that one of them had identified someone other than petitioner. (Exh. 19; HT 760; see also, HT 1012-1013, 712.) In light of the many investigative failures in this case, the detectives' failure to produce any documentation of the second showup gave petitioner's trial attorney reason to question their credibility.

¹¹⁵ Slick failed to undertake the kind of investigation which might have confirmed the occurrence of the second showup. There is nothing in Slick's file to suggest that he or Kleinbauer interviewed any of the Cordova brothers to corroborate Stewart's version of events. There is nothing in Slick's file to suggest that he or his investigator interviewed any of the patrol officers who responded to the crime scene to see whether these officers had any information concerning the second showup. There is nothing in Slick's file to suggest that he or Kleinbauer investigated whether Clements had a brother and if so, whether that brother was the subject of a showup on February 25, 1983. (See generally, Exh. I [Slick's trial file]; see also, HT 310-311 [Kleinbauer had not yet conducted an investigation of Otis Clements prior to the start of petitioner's trial].)

E. The Detectives Engaged in Questionable Interrogation Practices.

The interrogation techniques used in petitioner's case also gave Slick reason to believe that the investigating officers were not credible. The facts known to Slick prior to trial raised a strong inference that Collette and Miller did not tape record their interrogations in this case unless and until they obtained the story they wanted. The detectives first questioned Otis Clements on Friday, February 25th. Although Clements was arrested driving the getaway vehicle, and he matched in important particulars the description of the gunman provided by the homicide eyewitnesses, no attempt by Collette and Miller to tape record the interrogation is documented by the police reports. (See exh. K. pp. 33-37.) Clements gave a second statement on Monday February 28th. Again, the detectives apparently made no effort to record this interrogation when it began. (See *id.* pp. 38-43.) In fact, it was not until this second interrogation ended that the detectives sought to record a statement from Clements, his third. (See *id.* p. 43.)

The failure of Collette and Miller to ask Clements for his consent to record their first two interrogation sessions of him renders their claim that they asked petitioner for his consent to record their first interrogation of him highly suspect. In fact, petitioner told the trial court that he had signed the *Miranda* waiver form, but had not refused to allow the police to record his questioning. (RT 16-19.) His claim is supported by the fact that the narrative report Collette prepared of petitioner's interrogation on February 26, 1983, makes no mention of the detectives asking petitioner for his

consent to record or of his alleged refusal. (See exh. K., pp. 54-58.)¹¹⁶

Although these facts do not conclusively prove that the officers were lying when they claimed that petitioner had refused to make a taped statement, they gave Slick reason to doubt the credibility of Collette and Miller.¹¹⁷

The failure of the detectives to document adequately the circumstances of the polygraph examination given to petitioner also gave Slick reason to wonder about their good faith. Collette reported in his

¹¹⁶ The contents of Collette's narrative report of petitioner's supposed confession also gave Slick some reason to question the authenticity of the statement, and therefore Collette's credibility. For example, Collette reported that petitioner claimed to have obtained \$100 in change from Anwar Khwaja. This was not consistent with the information Slick had prior to trial that cash receipts had been taken or even with Khwaja's later claim at trial that he was robbed of \$190 in coins. Petitioner's alleged explanation of what he did with the robbery proceeds was also suspect. According to Collette, petitioner claimed that he had spent the money in the bank bag and that he purportedly obtained from selling the murder weapon on marijuana. (Exh. K., pp. 57-58.) Yet no marijuana was found during the search of 1991 Myrtle. (See exh. K., pp. 72-73.) Nor was there evidence that petitioner was under the influence of drugs at the time of his apprehension on the morning of February 26th, which would be expected if petitioner had smoked hundreds of dollars worth of marijuana just hours before. (*Id.*, at pp. 51-52; compare with p. 30 [evidence of marijuana use in Clements detected].) While these points may be small, they were part of a larger set of facts that gave Slick reason to believe Collette and Miller were not credible.

¹¹⁷ The idea that the detectives would have allowed petitioner to dictate whether his interrogation was recorded is rather suspect. When petitioner was arrested, Collette and Miller believed that he was responsible for killing Mrs. Khwaja. They could have recorded their interrogation of him without his knowledge or permission. (See, e.g., *People v. Califano* (1970) 5 Cal.App.3d 476, 480 [Long Beach police used hidden microphone in police station interview room]; see also, *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 997 [Long Beach Police Department had hidden recording equipment installed in interrogation room in 1993].)

narrative that after petitioner gave an exculpatory statement to the detectives, he agreed to take a polygraph to show that he was telling the truth. (Exh. K. p. 56.) Two hours later, petitioner was released to the custody of polygraph operator M. Pella. An hour and ten minutes later, Pella allegedly brought petitioner to the homicide detail and explained to the detectives, in front of petitioner, the results of the exam and told them that petitioner was lying about his involvement in the crimes. Petitioner then reportedly said, “Okay, I’ll tell you what went down” and confessed. (*Ibid.*)

Petitioner acknowledged to investigator Kristina Kleinbauer prior to trial that he had taken a polygraph, but he denied that the results of it were discussed in front of him. (Exh. 1.) Although Pella and the polygraph seemingly played a critical role in inducing petitioner’s disputed confession, Pella did not prepare a report and the polygraph results were not included in the homicide book. (See generally, exh. K.) In fact, only Collette’s report purported to document the circumstances and results of the exam. Given petitioner’s version of events and the suspicious lack of documentation of the polygraph, Slick should have questioned whether Collette was honestly reporting what had occurred.¹¹⁸

In sum, the investigation in petitioner’s case was so unobjective and

¹¹⁸ Although this conflict about the circumstances of the polygraph examination could have been easily resolved prior to trial with adequate investigation, Slick apparently conducted none. At the evidentiary hearing, Slick could not recall whether he had seen the polygraph charts in petitioner’s case. He admitted that there were none in his case file. (HT 741-742.) In fact, there was nothing in Slick’s file or billing records to suggest that he spoke with Pella prior to trial or had Kleinbauer do so, to see if Pella could confirm Collette’s account of events concerning the polygraph. (See generally, exh. I [Slick’s file].)

one-sided that it gave Slick reason to question the integrity, good faith and credibility of the detectives who conducted it.

2. The Detectives Lied to and Threatened Witnesses.

Slick also had reason to believe Collette and Miller were not credible in light of their behavior with the Trimble/Black family, which demonstrated the detectives' willingness to use dishonesty and threats to make their case against petitioner. Elizabeth Black told investigator Kristina Kleinbauer that when petitioner was arrested at her home, Collette had threatened to arrest her and her family for harboring petitioner and accused Black of having knowledge about the crimes. Collette told Black that petitioner had told him that she had helped him count the stolen money. (Exh. 1.) Miller told Black they knew she had helped to count the money, and offered to help her if she talked to him. (*Ibid.*) At the time of petitioner's arrest, the detectives had no evidence to support these accusations against Black and her family. This dishonest, coercive and threatening conduct gave Slick reason to doubt the credibility to the detectives.

The detectives' dealings with Ora Trimble raised further questions about their integrity. Trimble testified at petitioner's evidentiary hearing that one of the detectives, possibly Miller, told her that they would report to the media that petitioner had been arrested at his mother's home on California Avenue rather than at her home on Myrtle. (HT 1245.) In fact, the detective made good on this promise, in an obvious effort to curry favor with Trimble. Shortly after petitioner's arrest, the Long Beach Press Telegram reported: "[Det. Collette] said Burton was arrested the next morning at his apartment at 909 California Ave." (Exh. 52; see also, exh. I [Slick's file containing news article].)

Collette and/or Miller also made prejudicial comments to Trimble about petitioner, telling her that he had been raised by the state since age eight. (HT 1245.) The only reasonable explanation for making such a remark was to turn Trimble against petitioner. These dishonest tactics designed to alienate potential witnesses from petitioner gave Slick additional reason to believe Collette and Miller were not credible.

3. The Detectives Engaged in Dubious Behavior During the *Oscar Morris* Case.

Slick's experience with Collette and Miller in the *Oscar Morris* case also gave him cause to believe they were not credible. Slick handled the *Morris* case at the same time as petitioner's. (HT 519.) In *Morris*, informant Joe West contacted William Collette after West was arrested on grand theft charges. (*People v. Morris* (1988) 46 Cal.3d 1, 12, 25.) West, who was on parole at the time, implicated Morris in a murder which had occurred almost four years earlier. (*Id.* at pp. 25, 10.) West cooperated in the *Morris* investigation and testified for the prosecution at trial. (*Id.* at pp. 26, 11-12.) Collette, who was in charge of the *Morris* investigation, testified that West had never asked him for any favor or remuneration. (*Id.* at p. 24; see also, HT 735 [Slick].) Slick apparently did not believe Collette's testimony, however, because he argued to the jury that West, who had been released from custody after he contacted Collette, must have received some benefits in exchange for his testimony. (46 Cal.3d at p. 25; see also, HT 734.)

Slick was correct to challenge Collette's testimony in *Morris*. In fact, West had received substantial benefits after both Collette and John Miller wrote letters on his behalf, although the letters had not been disclosed to Slick. Collette had written a letter in August 1982 – in response

to a request from West's attorney – which outlined West's cooperation on the *Morris* case. (46 Cal.3d at p. 26) Collette's letter, as well as a letter from *Morris* prosecutor Arthur Jean,¹¹⁹ were submitted to the court hearing West's grand theft case. West was thereafter sentenced to time served and probation, despite the judge's concern about his extensive prior criminal record. (*Id.* at p. 28.)¹²⁰ This Court found that Collette's testimony at the *Morris* trial that West had not asked for favors was "clearly misleading." (*Id.* at p. 33.)¹²¹

In addition to Slick's well-founded assumption at the time of the *Morris* trial that the police had provided informant West with benefits, hard evidence supporting this assumption surfaced prior to the close of

¹¹⁹ Arthur Jean was also the prosecutor in petitioner's case.

¹²⁰ Miller had also prepared a letter on West's behalf, in October 1982, which was addressed to the parole board. Miller's letter outlined West's cooperation in the *Morris* case and requested that the board consider terminating West's previously imposed sentence to state prison. (46 Cal.3d at pp. 26-27.) After receiving a similar letter from prosecutor Jean, the Board of Prison Terms met in special session and recommended that West's sentence be modified to time served. (*Id.* at p. 28.)

¹²¹ This Court noted that West, in a post-conviction declaration, directly contradicted Collette's testimony and stated that Collette and Miller had expressly offered assistance in exchange for West's cooperation and testimony. (46 Cal.3d at p. 33, 26.) The Court did not find it necessary, however, to resolve whether Collette explicitly lied on the witness stand during the *Morris* trial.

Also, during the *Morris* habeas corpus proceedings both Collette and Miller filed declarations with this Court which "flatly den[ied]" that West requested or received any promises of leniency concerning pending charges in exchange for cooperation with them. (*Id.* at pp. 25-26.) As was Collette's trial testimony, these declarations were misleading and possibly false.

petitioner's case, giving Slick further reason to believe that Collette and Miller were not credible. Collette's letter was revealed in August 1984, during post-conviction proceedings in the *Morris* case. (46 Cal.3d at pp. 28-29.)¹²² Petitioner's limited retrial began on October 17, 1984. (CT 249.) Thus Slick knew prior to petitioner's retrial that Collette had given misleading and possibly perjured testimony in the *Morris* case.¹²³

In sum, the deceptive actions of Collette and Miller in the *Morris* case, their attempted manipulation of witnesses Elizabeth Black and her mother, and their truncated investigation into the Khwaja shootings which all but guaranteed petitioner's conviction prove well beyond a preponderance of the evidence that Slick had reason to believe that the detectives were not credible. The Referee's Report dismisses all of this evidence, however, without any meaningful analysis of it. (See *Taylor v. Maddox*, *supra*, 366 F.3d at pp. 1007-1008.) Because the Report's findings relating to the second part of Reference Question 2 are not supported by substantial evidence, petitioner urges this Court to reject them and find, by a preponderance of the evidence, that Slick did have reason to believe that Collette and Miller were not credible.

¹²² Miller's letter was not revealed until August 1987. (46 Cal.3d at p. 29.)

¹²³ The parties agreed at petitioner's evidentiary hearing that the reference questions apply to the retrial as well to petitioner's initial trial. (HT 732.)

Reference Question 3

If petitioner gave Slick the names of potential guilt phase defense witnesses, did Slick or his investigator interview those witnesses, when did they do so, what information did they obtain from the witnesses, and of what potential prosecution rebuttal or impeachment evidence was Slick aware when he developed his trial strategy? . . .

The Referee found that petitioner did give the names of potential guilt phase witnesses Denise Burton, Ora Trimble, Penny Black and Gloria Burton to investigator Kristina Kleinbauer, who in turn reported them to Slick. (Referee’s Report p. 20.) Substantial evidence supports a finding that petitioner gave the investigator these names. (See Exceptions, Question 1, *ante*.) However, the evidence also shows that petitioner told Kleinbauer that “Hokey” (Hope Black) and “Penny’s cousin Shirley” (Shirley Cavaness) were at 1991 Myrtle Street when he arrived there at about 1:20 p.m. on February 25, 1983. (Exh. 1.)¹²⁴ Thus, these persons were also potential defense witnesses.

The Referee also found that investigator Kleinbauer interviewed Ora Trimble, Elizabeth Black, Gloria Burton and Denise Burton. Kleinbauer summarized the information she received from these witnesses in exhibit 1. (Report p. 20.) Substantial evidence supports these findings. (Exh. 1; HT 246-247, 313, 257, 260.) The Referee failed to acknowledge, however, that prior to petitioner’s trial Kleinbauer had not interviewed Hope Black or Shirley Cavaness. (See exh. 1, HT 409; see also, HT 278, 307.) Moreover, the Referee neglected to note that Kleinbauer had learned of an additional

¹²⁴ The Referee’s finding to Reference Question 1 correctly indicates that petitioner gave Hope Black’s name to Kleinbauer in their meetings prior to trial. (Report p. 15.)

potential defense witness when she interviewed Ora Trimble and Elizabeth Black. They told her that Black's cousin Willie Davis was also at 1991 Myrtle Street when petitioner arrived that afternoon. (Exh. 1.) Kleinbauer did not interview Davis prior to trial. (See exh. 1.)

As to whether Slick personally interviewed any potential defense witnesses, the Referee concluded that he had interviewed Elizabeth Black and Gloria Burton. (Report p. 21.) These findings are supported by substantial evidence.

Ron Slick's bill reflected that he interviewed Gloria Burton on May 16, 1983. (HT 536; exh. 13.) Gloria Burton died prior to petitioner's evidentiary hearing. (HT 1374.) Thus, petitioner was unable to present her testimony at the evidentiary hearing to corroborate Slick's testimony that they had spoken prior to trial. Petitioner did, however, seek to call his post-conviction investigator Lynda Larsen to testify to statements made by Gloria Burton before her death, as contained in a declaration Mrs. Burton signed on February 19, 2000, which was filed as an exhibit to petitioner's traverse. (See HT 1374-1376; Petitioner's Traverse, exh. 2.) Petitioner argued that Larsen's testimony was relevant, *inter alia*, to whether Mrs. Burton had been interviewed by Slick and if so, what information he had obtained from her. (HT 1375.) The Referee ruled that Larsen's proffered testimony was inadmissible hearsay. (HT 1372, 1376.) Petitioner asserts that the Referee's ruling was erroneous (see Exceptions, sec. C.3.b., *post*) and that Larsen's testimony would have provided additional evidence that Gloria Burton had been interviewed by Ron Slick.

Larsen's testimony would have also established that Mrs. Burton told Slick, as she told his investigator, that she saw petitioner arrive at 1991 Myrtle Street at about 1:30 p.m. on February 25, 1983. As the Referee

recognized, Slick had no independent recollection to speaking to Mrs. Burton. (Report p. 21; HT 528.) He had no recollection of the content of this interview. His file did not contain any notes of this interview. (HT 805-806; see also, exhs. I, 36 and 63 [Slick's files].) Lynda Larsen's testimony would have established Gloria Burton gave to Slick the same information about her son's whereabouts on the day in question as she had previously given to his trial investigator. (Petitioner's Traverse, exh. 2; see also, exh. 1.)

The Referee's finding that Slick spoke to Elizabeth Black (Report p. 21) is also supported by substantial evidence. Slick testified that he spoke to Elizabeth Black, but he could not recall when. He believed that he might have interviewed Black with Dr. Maloney present, but he could not remember. (HT 796.) Slick's testimony that he interviewed Black directly is supported by her testimony. Elizabeth Black recalled having one contact with Slick. Black thought she met Slick at the court building. (HT 1322.) She could not recall whether she had also met Slick in his office. (HT 1353.) Black did recall that although she was willing to testify at petitioner's trial, Slick told her that she could be found guilty if she did. (HT 1323.)

1. Potential Rebuttal or Impeachment Evidence

The Referee acknowledges that Slick could not remember if he was aware of any potential prosecution rebuttal or impeachment evidence when he developed his trial strategy. (Report p. 21; HT 736-737.) Nonetheless, the Referee concludes that three types of such evidence existed prior to trial. (Report p. 21.) As petitioner demonstrates below, the Referee's findings on this question are not supported by substantial evidence.

First, the Referee states that exhibit 33 (notes Slick claimed he found

in his file in 1998) contains information which could have been used by the prosecutor to impeach Elizabeth Black and Gloria Burton. (Referee's Report p. 21.) As is discussed more fully later in this brief, the Referee's reliance on exhibit 33 is misplaced. Slick himself had no recollection of making the note or of receiving the information contained therein. Moreover, he testified that was troubled by the note because he never confirmed the information it purported to document. (See Exceptions, Question 10, *post.*)

Even if one discounts the fact that Slick could not provide any information concerning the genesis of exhibit 33, the Referee fails to explain how the information in it could have been used to impeach Elizabeth Black or Gloria Burton. Although the note asserts that William Collette told Slick that Black had told the detective that she knew nothing about petitioner's whereabouts on the day of incident (exh. 33), Collette testified at petitioner's hearing that Black did not make this statement to him and that he did not tell Slick that she had. (HT 1694-1696, 1711-1712; see also, exh. 54).¹²⁵ There was no police report documenting the purported conversation between Collette and Black, as both Collette and Slick would have expected there to be. (HT 1689-1691, 1695-1696, 1711-1712, HT 846; see also, exh. 54.) Without testimony from Collette or a police report, there was no mechanism by which Black could have been impeached. Nor was there any evidence adduced at the hearing that the prosecutor would have tried to impeach Black or even knew of this supposed conversation between her and Collette. The evidence upon which the Referee relies is

¹²⁵ Elizabeth Black corroborated Collette's testimony on this point. (HT 1323-1324.)

merely a piece of paper whose author cannot explain the circumstances of its creation and who is troubled by its very existence, and the contents of which are disputed by the persons mentioned therein. Finally, the note contains nothing that was relevant to impeaching Gloria Burton, had she testified at trial.

Second, the Referee's Report states there was "evidence available to Mr. Slick which put Petitioner together with Otis Clements on the morning of February 25, 1983, i.e., Petitioner had admitted he had been with Clements when Clements attempted to borrow the pick-up truck later identified at the scene of the murder." (Report p. 21.) As shown below, however, the Referee's finding that the information was potential prosecution rebuttal or impeachment is not supported by substantial evidence.

Petitioner did tell Kleinbauer that he very briefly left Myrtle Street with Clements after Elizabeth went to school and while Ora Trimble and Hope Black were out getting cheese and butter. Petitioner, who apparently first encountered Clements in Norwalk, had seen him around town, but did not really know Clements. Clements drove by in a brown Grand Prix and approached petitioner. Clements persuaded petitioner to go with him to see if Clements could borrow a truck from his uncle. After Clements' uncle refused to loan the truck, petitioner had Clements immediately return him to the Myrtle Street apartment. He returned before Hope Black got back from the park with butter and cheese. (Exh. 1.)¹²⁶

¹²⁶ Kleinbauer's report states: "Penny's sister, Hopey, left with her mother for the cheese and butter, and Andre started to clean up. When he opened the door he saw Otis Clements in a brown Grand Prix. [¶] Andre says he saw Otis once in Norwalk and has seen him around and spoke to

The Referee's Report fails to recognize, however, that petitioner's statement to Kleinbauer, as memorialized in exhibit 1, was not discoverable and could not have been known to or presented by the prosecution. Certainly there was nothing in Slick's testimony or his trial file which indicated that he thought that the prosecution could obtain or use petitioner's statement to Kleinbauer as rebuttal or impeachment evidence.¹²⁷ (See generally, HT 504-582, 662-1154 [Slick's testimony]; exhs. I, 36, and 63.)

Moreover, the evidence adduced at the hearing indicates that the alibi witnesses did not know that petitioner had been with Clements briefly that morning (HT 1268, 1334, 1524), so Slick had no reason to believe that the prosecutor might somehow have been able to elicit it from them had they testified. Finally, petitioner's statement to Kleinbauer did not actually impeach or rebut what the alibi witnesses had told Kleinbauer, as it was not inconsistent with their recollection of events. Petitioner told Kleinbauer that he briefly left with Clements after Elizabeth Black had gone to school and while Ora Trimble and Hope Black were at the park getting butter and

him since but doesn't really know him. On that February 25, Otis stopped and parked the car when he saw Andre and asked him what he was doing. Andre said he was going to look for a job later. Otis told him his uncle had a truck they might be able to borrow to look for jobs because the Grand Prix was smoking. They went to an auto shop (Gold Coast Auto) on Atlantic and 20th, about two blocks from Penny's in the Grand Prix. There they met Otis' uncle who said he didn't have the truck keys with him and wasn't going home. So they couldn't borrow it. They left in the Grand Prix and he told Otis to drop him off back at the Myrtle Street apartment because he had left La Chante asleep." (Exh. 1.)

¹²⁷ In fact, Slick did not even recall whether petitioner had told him that he had seen Clements on February 25th. (HT 802.)

cheese. He returned to Myrtle Street before Hope, and later Trimble, did. (Exh. 1.) This is entirely consistent with Trimble’s recollection, as given to Kleinbauer, that petitioner was there when she left for the park with Hope, and that he was there when she returned to the apartment at 10:45 a.m. (Exh. 1.)¹²⁸

The failure of the Referee’s Report to explain how the prosecution might have obtained petitioner’s statement to Kleinbauer or how – if somehow obtained – it could be used to impeach the alibi witnesses demonstrates that this finding is not supported by substantial evidence.

Third, the Referee’s Report states that Slick “had evidence available to him prior to trial which suggested that Petitioner had a ‘history of confessing,’” apparently meaning that such evidence somehow could have been used by the prosecution to impeach or rebut petitioner’s alibi witnesses. (Report p. 20.) This finding is not supported by substantial evidence. The Referee is incorrect in finding that Slick had evidence available to him prior to trial suggesting that petitioner had a history of confessing, and that the purported evidence constituted potential prosecution impeachment or rebuttal evidence.

Slick testified that he had obtained and reviewed petitioner’s CYA records prior to trial. (HT 860-863.) Slick further testified that he had made some notes which represented his “thoughts or some of my thoughts on what I got out of this package [of CYA records] after reviewing it.” (HT

¹²⁸ The Referee’s Report also fails to recognize how petitioner’s statement, if somehow made known to the prosecution, could have been used to the advantage of the defense. It provides an explanation of why Clements would have falsely named petitioner as his crime partner – Clements knew from this encounter that petitioner was in the area on the day of the crimes.

862.) He explained that he had included information that had drawn his attention, along with a notation of the page number of the records on which the information was reported. (*Ibid.*) In these notes, Slick wrote that petitioner had a history of *denying* criminal activity. (HT 872, italics added; see also, exh. 32 [Slick's note from trial file].) Nothing in the notes indicated that Slick had noticed, much less relied upon, a history or pattern of petitioner *admitting* culpability.

Nonetheless, respondent later confronted Slick with one document from the voluminous CYA file, a Long Beach Police Department arrest report relating to an armed robbery that occurred on June 12, 1978, which, according to respondent, indicated that petitioner had confessed to the offense. (HT 872-879.) When asked whether the robbery report was significant in assessing whether petitioner had confessed in the instant case (HT 879), Slick stated that petitioner was erratic and had a history of confessing. (HT 880; see Report p. 21.) Slick had prefaced this testimony, however, with an acknowledgment that he could not say whether his recall of the contents of the CYA file was from the time of trial or from a later review of the material. (HT 880; see also, HT 904-905, HT 1149 [Referee observed that Slick did not have a memory of documents in the CYA file "other than he took them generally into account"].) The evidence thus shows that although Slick did state that believed petitioner had a history of confessing, his recollection of what he knew at the time of trial was admittedly very poor and his notations made while reviewing the file prior to trial demonstrated that Slick noticed petitioner had a history of denying, rather than admitting, culpability.

In fact, respondent's examination of Slick reveals that there was no "history" of confessing but rather records that indicated petitioner had once

admitted participation in an offense prior to his capital trial. This one incident did not establish a pattern or history of confessing, however, and Slick did not point to any additional records he had at the time of trial which indicated to him that petitioner had confessed on other occasions.

A further review of Slick's evidentiary hearing testimony reveals that the 1978 police report was not potential rebuttal or impeachment evidence since the trial prosecutor did not have the information and, in any event, could not have used it at the guilt phase of petitioner's trial. Slick believed that the prosecutor did not have the information about the 1978 offense. (HT 1125, 1144.) Slick testified that the CYA records would not have been admissible against petitioner at the guilt phase of his capital trial. (HT 1123.) He was also certain, at the time of the evidentiary hearing and at trial, that the prosecutor would not have attempted to introduce evidence that petitioner had confessed to a 1978 offense even if he had such information. (HT 1125, 1144.)

During the hearing, the Referee shared Slick's assessment of the inadmissibility of any prior confessions. When respondent later sought to introduce records not known to Slick or petitioner's trial prosecutor that respondent asserted established a history of confessing, the Referee indicated that he would be "stunned" to read a case holding that a prosecutor may introduce evidence of a criminal defendant's habit and custom of confessing to show that the accused had confessed to the offense being tried. (HT 2240.)¹²⁹

¹²⁹ During Slick's hearing testimony, respondent indicated that he planned to introduce records relating to four prior criminal incidents involving petitioner (including the 1978 robbery), alleging that petitioner had confessed to three of them. The records would, respondent claimed,

Finally, the Report fails to explain how Slick's knowledge that petitioner had *once* confessed to a burglary five years before his capital trial constituted potential prosecution rebuttal or impeachment of several witnesses who could have told petitioner's capital jury that he was with them when the charged crimes were committed.¹³⁰

In sum, the Referee's findings regarding potential impeachment or rebuttal evidence are not supported by substantial evidence. In fact, the weight of the evidence is that Slick was not aware of any such evidence.

2. . . . Did Slick have reason to believe that those witnesses would not be credible?

The Referee concluded that "Mr. Slick had reasonable and valid reasons to believe that these witnesses would not have been credible." (Report p. 22.) This Court should reject this finding because, as petitioner

show petitioner's propensity to confess. (HT 1144-1146.) The Referee found this theory remote and irrelevant. (HT 1145-1146.) Respondent later marked the documents as exhibits V-1, AA, BB and CC (HT 2068, 2074-2075) and sought to admit them into evidence (HT 2134-2140, 2222). Respondent asserted that these records, although not known to Slick or the trial prosecutor, existed in 1983 and therefore were relevant to establish that petitioner had a habit and custom of confessing. (HT 2238-2240.) Finding that the use of the priors as evidence that petitioner had confessed in the capital case would raise "a whole host of due process and Fifth Amendment and other issues," the Referee refused to admit the exhibits. (HT 2241-2243.) Petitioner was therefore not on notice that the Referee would take the opposite stance in issuing his findings.

¹³⁰ It is worth noting that Slick's testimony relating to the supposed history of confessing was related to his thinking about whether petitioner had actually confessed to shooting the Khwajas, not to whether there was evidence to impeach or rebut the potential alibi witnesses. (See, e.g., HT 875, 879.)

demonstrates herein, there are fatal flaws in the Referee's analysis of the evidence.

First, the Referee has inappropriately focused on whether Slick's strategic assessment of the credibility of these witnesses was supportable, rather than on an objective determination as to whether there existed reason to believe the witnesses would not be credible. (See also, Exceptions, sec. C.5., *post.*) Moreover, Slick's assessment of the witnesses' credibility, which the Referee accepts, is based on the attorney's view of the strength of the prosecution's evidence and that which could have been presented in petitioner's defense. As addressed in depth later, petitioner was prevented by the Referee from introducing a range of evidence which would have demonstrated that Slick's view of the evidence was erroneous. Had he been permitted to do so, petitioner could have proven that the prosecutor did not have the airtight case Slick seemed to think it did and that, had Slick adequately investigated, he would have uncovered additional evidence to support petitioner's claim of innocence. (See Exceptions, sec. C.3., *post.*)

Next, the Referee has misconstrued the type of credibility assessment called for by *People v. Frierson* and this Court's reference questions. Rather than evaluating whether a reasonable juror could have given weight to evidence presented by petitioner as part of a guilt phase defense, the Referee instead substitutes his personal judgment for that of a jury. The evidentiary hearing in this case was never meant to substitute for the jury trial of guilt that was denied to petitioner.¹³¹ In fact, the Referee has erred

¹³¹ As petitioner sets forth later in this brief, the Referee repeatedly stated that he would not be independently determining whether he viewed the defense as credible 20 years after the fact. (See Exceptions, sec. C.1., *post.*)

by assessing the credibility of the potential defense witnesses in an overly broad manner. In *People v. Frierson, supra*, 39 Cal.3d 803, this Court held that a defendant is entitled to present a defense at the guilt stage of his capital trial if that defense is supported by some credible evidence. (39 Cal.3d at pp. 812, 817-818; see also, HT 502 [Referee recognizes “some credible evidence” is a “pretty low threshold”].)

In *Frierson*, this Court did not determine whether some credible evidence existed by making its own assessment of whether the witnesses who could have been called in the guilt phase to support the diminished capacity defense Frierson wanted to present were credible, nor did it assess their credibility by asking whether juries tend to accept such defenses or whether the prosecutor’s evidence was more compelling. Certainly, *Frierson* does *not* stand for the proposition that the right to defend exists only if it is more likely than not the defense would succeed. Although not articulated in these terms, *Frierson* demands only that a juror might accept the evidence as credible. This leads petitioner to believe that when this Court asks in his case whether there was reason to believe that the potential defense witnesses would not be credible, this Court is inquiring about information specific to each witness, rather than about a broad assessment of the case. Thus, it is inappropriate to conclude in the instant case that detective Collette’s claim that petitioner had confessed, or that Slick’s views about alibi defenses, for example, were reasons to believe that the potential defense witnesses would not be credible.

Because the Referee has assessed the credibility of potential witnesses in a way that requires a reviewing court to determine whether he applied the correct legal standard, it is a mixed question of law and fact. His resolution of this issue is therefore not entitled to deference by this

Court. (See *In re Lucas*, *supra*, 33 Cal.4th at p. 694.) In fact, the Referee has used an incorrect standard to assess whether the witnesses were credible and his findings regarding the second part of Reference Question 2 should be rejected.

Finally, even if this Court determines that it is appropriate to consider Slick's general views as they relate to witness credibility, the Referee's finding in response to the second half of Reference Question 3 is not supported by substantial evidence. This part of the Report is largely a recitation of Slick's testimony as to why he believed the alibi witnesses were not credible. (Referee's Report p. 21.) Yet the Report contains no meaningful analysis of this testimony and the other evidence which bears on the credibility of Slick's claims. As petitioner shows below, Slick's testimony in this regard was not credible and should have been rejected.¹³²

Many of Slick's reasons for concluding that the alibi witnesses would not have been credible, as set forth in the Referee's Report, relate to petitioner's disputed, unrecorded confession. (Report p. 21.) Slick's testimony about the alleged confession, however, is undermined by the record evidence.

The Referee relied on Slick's testimony that petitioner had waived his rights in writing. (Report p. 21, citing HT 737.) Slick indicated that the fact that petitioner signed a *Miranda* waiver form entered into his assessment of the case. (HT 738, 743.) Slick's reliance on petitioner's waiver of rights is misplaced, however. Petitioner acknowledged in open

¹³² As petitioner has shown throughout this pleading, Slick was a biased and incredible witness whose testimony was impeached on key points. (See, e.g., Statement of Facts, sec. B.1.e.; see also, Brief, sec. B.2.3.; Exceptions, Question 1, *ante*.)

court that he had waived his rights and talked to Collette and Miller, but he told them he was innocent. (Exh. 5; RT 18.) His signature on the waiver of rights form did not therefore tend to prove that petitioner had confessed. The waiver form did not give Slick reason to believe that the alibi witnesses were not credible.

The Referee also cites Slick's testimony that petitioner had confessed in "substantial detail." (Report p. 21.) However, as petitioner has demonstrated *ante*, after the police interrogated Otis Clements they had all the information necessary to create an inculpatory statement they could attribute to petitioner. (See Exceptions, Question 2.) Given petitioner's claim that the officers fabricated the confession, the fact that no recording of the supposed confession existed, and the lack of an inculpatory statement signed by petitioner, it was unreasonable for Slick to have assumed that the confession was authentic and that the alibi witnesses were therefore not credible.

The Referee further relied on Slick's consideration that petitioner failed a lie detector test. (Report p. 21; see also, HT 738.) As explained in response to Reference Question 2, however, there was no evidence that petitioner failed a polygraph examination other than detective Collette's report that he had. The polygraph examiner, Michael Pella, did not prepare a report and the results of the exam were never provided to the defense. Petitioner told Kleinbauer that he took a polygraph but that the results were not discussed in front of him, as Collette claimed they had been. There is nothing to suggest that Slick investigated the circumstances of the polygraph to determine whether petitioner's denial of involvement showed deception. (See Exceptions, Question 2., *ante*.) Without at least investigating the matter, Slick was in no position to rely on Collette's

unsupported claim that petitioner failed a lie detector test to conclude that the alibi witnesses were not credible.

The Referee also apparently credits Slick's testimony that petitioner told him he would not testify. (Report p. 21.) Slick's testimony on this point is a red herring. Whether petitioner wanted to testify or not has no bearing on the credibility of potential defense witnesses. Moreover, petitioner's trial attorney should not be permitted to justify his failure to defend in this manner. Every criminal defendant has a constitutional right not to testify. (U.S. Const., 5th Amend.) It would be outrageous to conclude that a defense attorney can prevent his client from exercising his constitutional right to present a defense because that defendant also wishes to exercise his right not to testify.¹³³ Finally, petitioner asserts that whether he wanted to testify is an issue outside the scope of the reference order. Petitioner has never put the question of whether he wished to take the stand at his trial at issue and there is nothing in the reference questions which call for a resolution of this question.¹³⁴

¹³³ If Slick truly believed that petitioner's testimony was essential in combating the purported confession, then he could have called petitioner for the limited purpose of having him deny that he made an inculpatory statement to Long Beach police. (See *People v. Tealer* (1975) 48 Cal.App.3d 598 [defendant's testimony that he did not tell police he had committed the charged crime did not place in issue the truth of the alleged admission and thereby prevented prosecution from cross-examining him upon the case generally].) Slick admitted, however, that he probably told petitioner that he had no chance of winning even if he testified at trial. (HT 769.) Thus, it is hard to understand how Slick could have relied on petitioner's alleged unwillingness to testify to conclude that the alibi witnesses were not credible.

¹³⁴ At the evidentiary hearing, petitioner's counsel did not question him as to whether he wanted to testify at trial because that issue

The Referee's reliance on Slick's testimony that it was "ludicrous" that the police were making up his confession (Report p. 21) is also unjustified. Petitioner's discussion of the evidence in response to Reference Question 2, *ante*, demonstrates that the possibility the confession was not authentic was not ludicrous and that there was reason to question the credibility of the detectives who claimed that petitioner had inculpated himself.

Moreover, a recent spate of cases amply demonstrates that it is not ludicrous to suspect the Long Beach police department of serious misconduct. In *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, the Ninth Circuit reversed Leif Taylor's first-degree murder conviction because Long Beach detectives violated his *Miranda* rights and coerced an involuntary confession from him. The detectives ignored the then-16-year-old defendant's repeated requests to call his mother and an attorney. (*Id.* at pp. 1014-1015.) In holding that the confession – which Taylor claimed he made falsely in hopes of ending the interrogation – was involuntary the appellate court found, inter alia, that one of the detectives had threatened Taylor by jabbing a ring with "187" on it into his face and by using a diagram to inform the youth that a grim future awaited if he did not confess. (*Id.* at pp. 1015-1016.) The court stated, "These detectives simply were not

was outside the scope of the reference order. However, as petitioner repeatedly indicated prior to and during trial, Slick was not adequately communicating with him. (See Statement of Facts, sec. A.1., *ante*.) Thus, he was in no position to make an informed decision whether to take the stand in his own defense. Should this Court order additional evidentiary proceedings, petitioner will prove that Slick never advised him of the advantages and disadvantages of testifying, and that as a result petitioner neither demanded nor refused to testify.

going to play by the rules.” (*Id.* at p. 1016.)¹³⁵ Judge Kozinski, who wrote the *Taylor* opinion, recognized that the misconduct in that case was not an isolated incident:

We note in passing that police misconduct is not unknown in the Long Beach Police Department. We recently affirmed the grant of habeas relief to petitioner Thomas Goldstein, who was convicted in 1980 of first-degree murder. *See* Judgment & Order, No. CV 98-5035-DT (C.D. Cal. Dec. 27, 2002), *aff’d* 82 Fed. Appx. 592 (9th Cir. 2003). Habeas relief was granted because the prosecution failed to disclose to Goldstein that Long Beach officers had struck a deal with an informant, who provided critical testimony against Goldstein at trial; that they were impermissibly suggestive in handling the photographic identification of Goldstein by the only eyewitness to the murder, and that they advised the eyewitness not to retake the stand after he had misgivings about his recognition of Goldstein. . . .

(366 F.3d at p. 1014, n. 17.) Judge Kozinski pointed out that among the officers investigating *Goldstein* was William MacLyman, the same detective who thrust the “187” ring into Taylor’s face. (*Ibid.*) Although MacLyman was involved in *Goldstein* – which involved a 1979 homicide and a 1980 trial – the primary officers in charge of that investigation were John Miller and William Collette, the same detectives who investigated petitioner’s case. (See Report and Recommendation Of United States Magistrate Judge, Case No. CV 98-5035-DT, filed Nov. 6, 2002 at pp. 2, 5, 21.)¹³⁶

¹³⁵ The circuit court recognized that there was ample basis in the record to conclude that the detective who testified at Taylor’s 402 hearing perjured himself, although it declined to make an express finding on this question. (366 F.3d at p. 1010.)

¹³⁶ Officer Michael Pella, who administered a polygraph examination to petitioner, was also involved in the *Goldstein* case. (See

In addition to *Taylor* and *Goldstein*, a third recently decided case raises issues of serious misconduct by the Long Beach police. In *Murdoch v. Castro* (9th Cir. 2004) 365 F.3d 699, defendant Charles Murdoch claimed that he was denied his Sixth Amendment confrontation rights when the trial judge refused to disclose to him a letter written by his alleged co-perpetrator exonerating him. Judge Trott, writing for the circuit court, remanded the case to the district court, directing it to obtain a copy of the letter so it could determine whether Murdoch's federal constitutional rights had been violated. (*Id.* at p. 706.) Murdoch had been convicted in Long Beach of first-degree murder largely on the basis of the testimony of Dino Dinardo, an admitted participant in the charged homicides who initially claimed that Murdoch was one of his accomplices. (*Id.* at p. 701.) In the letter at issue, however, Dinardo apparently admitted that Murdoch had not been involved and indicated that his statements to the contrary had been coerced by Long Beach police. (*Id.* at p. 702.)¹³⁷

These cases demonstrate that Slick's belief that it was ludicrous that police officers would lie about whether petitioner had confessed was not well-founded. In fact, the cases have many striking similarities to petitioner's. In each of these cases, the police had no hard evidence connecting the defendant to the charged murder or murders such as the weapon used, fingerprint or other physical evidence. In each, the police had particularly questionable eyewitness identification evidence or none at all. In each of these cases a conviction was obtained only by the use of

Report And Recommendation at pp. 16, 18.)

¹³⁷ The appellate court's opinion does not indicate which Long Beach police officers were involved in *Murdoch*.

inculpatory statements by the defendant himself, an informant or alleged co-perpetrator – evidence that was later shown to have been or alleged to have been coerced and/or false. (See *Taylor v. Maddox*, *supra*, 366 F.3d at pp. 1016-1017; *Goldstein v. Harris* (9th Cir. 2003) 82 Fed.Appx. 592, 594; *Murdoch v. Castro*, *supra*, 365 F.3d at p. 701.)¹³⁸ Obviously, the allegations of serious misconduct by the Long Beach Police Department were not “ludicrous” in *Taylor*, *Goldstein* and *Murdoch*. Accordingly, the Referee’s reliance on Slick’s flippant dismissal of petitioner’s claim of police misconduct in his case is unfounded.

In addition to Slick’s testimony concerning the disputed confession,

¹³⁸ In *Goldstein*, the misconduct committed by the detectives in their dealings with eyewitness Loran Campbell was disturbingly similar to what petitioner has alleged occurred in his case. At an evidentiary hearing, Campbell testified that initially he did not recognize the perpetrator in the photographs he was shown by Long Beach detectives. Then, one of the officers selected Goldstein’s photograph from the group and asked if he could have been the person Campbell saw the night in question. After Campbell told the police officer that it was possible, but that he was not sure, the officer told the witness that the person in the photograph was the suspect. The officers later told Campbell that Goldstein had been identified by one other witness and had failed a lie detector test and that they believed he definitely was the person who had committed the murder. (Report And Recommendation at p. 19.) The magistrate found that Campbell’s testimony was “entirely credible.” (*Id.* at p. 42.) Although the magistrate made no express findings as to which detective(s) Campbell had dealt with, it is reasonable to assume that Miller and/or Collette, the investigating officers, were involved.

In petitioner’s case, he proffered that eyewitness Robert Cordova would testify that a detective (again, presumably either Collette or Miller) showed him a picture of petitioner prior to Cordova’s in-court identification and told him “this is the guy we think you saw running.” (Exh. 47 [marked for identification only].) The Referee refused to hear from Cordova, however. (HT 1624.)

the Referee relied on trial counsel's assertion that a "number" of witnesses had identified petitioner in determining that the potential defense witnesses were not credible. (Report p. 21; see also, HT 740.) Slick's testimony on this point was not credible, however. Only two eyewitnesses from E. Pleasant Street identified petitioner: Robert Cordova and Anwar Khwaja. Significantly, both of these identifications were suspect for a number of reasons including, inter alia, that both Cordova and Khwaja had very poor opportunities to view the perpetrator and that both identified petitioner for the first time in the highly prejudicial setting of a courtroom. (See Exceptions, Questions 7 and 9, *post.*) Because these very weak identifications of petitioner could not have given Slick reason to conclude that the alibi witness were not credible, the Referee's reliance on Slick's testimony was unwarranted.

The Referee also pointed to Slick's testimony that he relied on statements petitioner allegedly made to his jailors in determining that the alibi witnesses were not credible. (Report p. 21.) Slick's testimony on this point was undercut, however, by his admission that petitioner told him he had not made these statements (HT 740) and by his acknowledgment that the purported statements were "funny," "strange" or "kind of weird" because they were factually inaccurate and did not match petitioner's alleged unrecorded confession to homicide detectives. (HT 72-763.) The Referee failed even to mention this testimony by Slick that disparaged the significance of the purported statements. In fact, Slick was correct in recognizing that what the jailors reported petitioner told them varied dramatically from the known facts and from what Collette reported that petitioner had told them. Most notably, the jailors reported petitioner told them he robbed a Cambodian man of three money bags containing \$150,000

(exh. K. pp. 59-61), although these statements were demonstrably incorrect. Rather than convincing Slick that the alibi witnesses were not credible, the jailors' reports should have convinced petitioner's attorney that the circumstances under which the purported statements were made needed to be investigated fully. Yet there is nothing to indicate that Slick interviewed either of the jail officers or otherwise investigated. (See generally, HT 504-582, 662-1154 [Slick's testimony]; exhs. I, 36 and 63.)¹³⁹

The Referee also relies upon Slick's testimony that the alibi witnesses were inconsistent and did not cover the relevant time period. (Report p. 21.) As petitioner shows later in this brief, Slick was mistaken. (See Exceptions, Question 9, *post*.) The alibi witnesses were materially consistent (*id.*), which provided an indicia of reliability to the recollections of each of them. The minor differences in the details each witness remembered actually enhanced, rather than detracted from, their credibility. If each had given testimony identical to that of the others, Slick would undoubtedly now be claiming that they had colluded in fabricating an alibi for petitioner *because* their stories were exactly the same.¹⁴⁰

¹³⁹ The Referee denied petitioner a full and fair hearing by relying on the reports of jailers Stephen Borst and Leon Norman. When petitioner sought *Pitchess* materials relating to these officers, the Referee denied the request because he found that the credibility of these two officers was not relevant under this Court's reference order. For the Referee to then rely on their reports to find that the alibi witnesses were not credible is unfair. (See Exceptions, sec. C.1., *post*.)

¹⁴⁰ It is well recognized that minor differences in the testimony of witnesses does not render the evidence valueless. In fact, CALJIC No. 2.21.1 (7th ed.) instructs jurors: "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not

The Referee further cites Slick’s claim that because the potential alibi witnesses were “four family members” they would not have been believed by a jury. (Report p. 21.) Slick’s assessment of the potential alibi witnesses was off base, however. Not all of the four potential alibi witnesses interviewed by Kristina Kleinbauer had a close relationship with petitioner. As respondent conceded in post-hearing briefing, Ora Trimble, who was not related to petitioner, would not have been particularly vulnerable to a claim of bias (see Respondent’s Reference Hearing Brief, p. 111, n. 91; see also, p. 121, n. 100) and “may have been credible” (*id.* p. 101). Hope Black, who petitioner named as a possible witness but was not interviewed prior to trial (HT 1570; see also, exh. 1), was also sufficiently removed from petitioner that she would not have been suspected of bias.

Moreover, Slick’s belief that family members of a defendant are inherently incredible as witnesses is unfounded. This Court is certainly aware that family members of victims (or plaintiffs) and defendants alike are frequently witnesses in both civil and criminal cases, for the simple reason that family members are often present in one another’s lives. While jurors are often asked to weigh the extent to which a particular family member or associate might have reasons to be inaccurate in testimony, a blanket rejection of such evidence would be both profoundly unfair to litigants and seriously at odds with the foundations of the adversarial system.

The Ninth Circuit has rejected the notion that testimony by a

uncommon. Two persons witnessing an incident or transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial.” An instruction similar to this was given to petitioner’s jury. (CT 127.)

defendant's family would automatically be rejected by a jury. In *Luna v. Cambra* (2002) 306 F.3d 954, 957-958, as amended by 311 F.3d 928, the appellate court found that trial counsel in that case had provided ineffective assistance by failing to interview and present the defendant's mother and sister to testify that Luna was home asleep at the time of the charged crime. The circuit court disagreed with the district court's conclusion that it was extremely unlikely that the jury would have given the alibi testimony significant weight due to the "obvious bias" of Luna's mother and sister as family members. (*Id.* at p. 961.) In fact, the reviewing court determined that there was a reasonable probability that the fact-finder would have entertained a reasonable doubt about Luna's guilt if it had heard from the two witnesses. (*Id.* at p. 962.)¹⁴¹ *Luna* illustrates that the Referee's reliance on this part of Slick's testimony was unjustified.¹⁴²

Finally, the Referee states that Slick's testimony is corroborated by exhibit 33, a note found in Slick's files purporting to memorialize his

¹⁴¹ Of course petitioner need not show here that there is a reasonable probability that the jury would have entertained a reasonable doubt about his guilt if the alibi and mistaken identity witnesses had been presented. His claim is not ineffective assistance of counsel but the denial of his constitutional right to present a defense, which requires only a showing that some credible evidence existed to support his desired defense. (See *People v. Frierson*, *supra*, 39 Cal.3d 803.)

¹⁴² Slick also testified that "alibi defenses don't work . . . in the face of an unchallenged confession." (Referee's Report p. 21, citing HT 793.) Slick's analysis is faulty. It was he who decided not to contest the prosecution's evidence claiming petitioner had made an unrecorded inculpatory statement. Slick's use of his tactical decision not to challenge the authenticity of the confession as a basis for concluding that the alibi witnesses were not credible therefore is circular, self-protective reasoning. The Referee thus erred in relying on Slick's testimony on this point.

decision not to call Elizabeth Black and Gloria Burton to testify. (Referee's Report p. 21.)¹⁴³ The Referee's reliance on this piece of paper is entirely unwarranted, for several reasons. First, the Referee simply ignored the fact that Slick was unable to recall anything about the note's creation or having received the information he purported to document in it. The Referee also dismissed testimony by William Collette and Elizabeth Black denying they had made the statements the note claims they did. (See Exceptions, Question 10, *post*.) To place so much weight on the note, given this evidence, is inappropriate.¹⁴⁴

Second, exhibit 33 does not actually "corroborate" Slick's testimony as to why he determined that the alibi witnesses were not credible. Most of the reasons Slick asserted during the hearing had led him to believe the alibi

¹⁴³ The note states, in relevant part: "I am not going to put on Penny or Gloria Burton because 1. destroy my credibility 2. the people have 2 additional eye witnesses that in my opinion would be good witnesses 3. Bill Collette told me that Penny's mother called him and said Andre wants her to lie for him and she will not do it, 4. other wits have said they cannot make any kind of ID." (Exh. 33.) Slick produced this note only after the order to show cause issued, as he was assisting respondent prepare its return.

¹⁴⁴ The Referee's reliance on exhibit 33 is particularly frustrating because petitioner has done everything possible to establish the inaccuracy of the note's contents. As noted, he elicited testimony from Collette and Black that the alleged statements were not made. He elicited similar testimony from Ora Trimble. He established that Slick was troubled by the note. However, Slick's inability to recall making the note or any of the events it purported to memorialize in effect insulated him from any additional examination which might have further discredited the information contained in the document.

witnesses were not credible were not memorialized in the note.¹⁴⁵ The alleged two additional “good” witnesses for the state were not identified, Slick could not recall who they were, the police reports do not indicate additional eyewitness identifications, and eyewitnesses contacted by the defense investigator would have been helpful in demonstrating that petitioner was not the perpetrator.

Third, the justifications Slick did write down in exhibit 33 are not supported by the evidence or are irrelevant. As petitioner has repeatedly indicated, Slick’s strategic decision to save his “credibility” is irrelevant under *Frierson*. (See Exceptions, Question 7, *post.*) In any event, the idea that Slick needed to save his credibility because he determined petitioner would be better served by the pathetic penalty phase presentation he made is ridiculous. (See Statement of Facts, sec. A.4., *ante*; Exceptions, Question 7, *post.*) The note’s claim that Collette told Slick that petitioner had asked Ora Trimble to lie for him was completely undercut by testimony from both Collette and Trimble to the contrary and by the lack of a police report documenting this supposed effort by petitioner to create false evidence. (See Exceptions, Question 10, subsections (c) - (d), *post.*)¹⁴⁶

¹⁴⁵ This includes Slick’s testimony that the alibi witnesses were inconsistent and unable to cover the relevant time period; that family members would not be believed by the jury; that petitioner had waived his rights in writing; that petitioner had confessed in substantial detail; that petitioner failed a lie detector test; that it was ludicrous to think Long Beach detectives would fabricate the confession; and that petitioner made admissions to two jailors.

¹⁴⁶ It should be noted that Slick indicated that he did not believe the alibi witnesses were lying. Slick was asked, “And did you have in mind the possibility that not just being found possibly mistaken, that they may be found to have deliberately lied in an effort to save Mr. Burton?” He

Also unpersuasive is the statement in the note that other witnesses could not make a positive identification of the perpetrator. As the hearing evidence showed, the descriptions provided by both Michael Stewart and Susana Camacho varied so dramatically from petitioner's appearance at the time of the crimes that it was very likely that both would have excluded him as the man they saw on East Pleasant Street. The testimony from an eyewitness who can exclude a defendant as the perpetrator may be as or even more powerful than testimony from a witness purporting to make a positive identification. (See Exceptions, Question 9, *post.*) Thus, the evidence contradicts each of the four reasons given in exhibit 33 for not calling Elizabeth Black and Gloria Burton.¹⁴⁷

Petitioner has shown above that the Referee unjustifiably relied on Slick's factually unsupported testimony that he had reason to believe the alibi witnesses were not credible. In addition to this failing, the Referee has ignored the testimony of Slick's investigator, Kristina Kleinbauer, on the issue of the witnesses' credibility.¹⁴⁸ Unlike Slick, Kleinbauer personally

replied, "No." (HT 921.)

¹⁴⁷ Curiously, exhibit 33 purports to justify Slick's decision not to call Elizabeth Black and Gloria Burton but not Denise Burton or Ora Trimble. In fact, because Slick neglected to speak to the latter two witness personally, he was not in a position to offer any excuses for not calling them. Moreover, if he had doubts about Denise Burton's version of events, he could have easily tested her credibility by checking with the Trade Tech school to see if she had been a student in February 1983 and if so, whether she was in class on the 25th. He did not, however, see that such investigation was done nor did he seek to interview teachers or fellow students for corroboration of her story.

¹⁴⁸ The fact-finding process is undermined where the fact-finder ignores evidence before him which supports a petitioner's claim. (*Taylor v.*

spoke to each of the alibi witnesses contacted by the defense prior to trial (Ora Trimble, Elizabeth Black, Gloria Burton and Denise Burton). She believed that they would make good, credible witnesses and be helpful to petitioner's defense, and she informed Slick of her assessment. (HT 366-367; see also, HT 469.) Her conclusion was supported by the evidence. Testimony from the alibi witnesses would have provided powerful evidence that petitioner was not at either the K-Mart or Khwaja crimes scenes. As noted above, the accounts of each were materially consistent with the others, which tended to establish their credibility. The witnesses' ability to tie their recollection of events to particular notable events further enhanced their credibility. Petitioner's arrest and the searches of the Myrtle Street apartment and Gloria Burton's home on February 26, 1983 were undoubtedly startling events which gave the witnesses a benchmark to use in recalling what occurred on February 25th, the previous day. The giveaway of free cheese and butter on the morning of February 25th also provided a reference point for recalling events later in the day,¹⁴⁹ as did the Trade Tech school schedule.¹⁵⁰ Their credibility was also supported by the accounts of the potential mistaken identity witnesses, including Michael Stewart.

The Referee dismissed petitioner's argument that the testimony of each of the four alibi witnesses would have corroborated that of the others

Maddox, supra, 366 F.3d at p. 1001.)

¹⁴⁹ Ora Trimble, Gloria Burton and petitioner each told Kleinbauer about the butter and cheese giveaway. (Exh. 1.)

¹⁵⁰ Elizabeth Black told Kleinbauer that she recalled being dismissed from class earlier than usual because the regular teacher was not there. (Exh. 1.)

by stating, “that does not answer the reasoned decision of an experienced trial attorney who is familiar with jurors’ reluctance to credit such ‘family testimony.’” (Referee’s Report p. 21.)¹⁵¹ Here, the Referee was plainly not making a factual finding responsive to the reference question. Instead, he imported the notion that a tactical decision may justify an attorney’s acts or omissions from an entirely different type of legal claim, ineffective assistance of counsel. Because the order to show cause did not issue on that ground and because the reference questions did not address tactical justifications (which are outside the realm of the right to defend), petitioner did not have an opportunity to demonstrate that reasonably competent capital trial lawyers would not behave in the way Mr. Slick behaved at petitioner’s trial.

Moreover, as petitioner has shown above, it is unreasonable to reject the testimony of family members simply because of their relationship to a defendant. And, Ora Trimble was not a family member.

Finally, the Referee has made findings about the credibility of the alibi witnesses as they testified at petitioner’s evidentiary hearing but these findings are not supported by the evidence. The Referee’s statement that Ora Trimble had no real memory of events in 1983 (Report p. 22) is simply erroneous. Her testimony disclosed that her recall was quite good. For example, Trimble recalled that she had taken over the apartment at 1991 Myrtle from a friend of hers who was leaving town. (HT 1240.) She recalled the police search of her home and petitioner’s arrest. (HT 1242-1243.) Trimble recognized detectives Miller and Collette and remembered

¹⁵¹ The logical upshot of this faulty reasoning is that no defendant possesses a constitutional right to defend if his trial lawyer holds particular beliefs about how jurors behave.

that one of them told her the newspaper would say he was arrested at his mother's home instead of hers. (HT 1243-1245.) Her recollection on this point was corroborated by the newspaper. (Exh. 52.) Trimble also was sure that she had had no contact with petitioner after his arrest and that he had never asked her to lie for him. Further, Trimble did not tell Collette that petitioner had. (HT 1258-1260.) Trimble also remembered being interviewed by Kleinbauer. (HT 1246-1247.)

Although Trimble did need to refer to Kleinbauer's report to help her recall some details of what occurred on February 25, 1983 (see, e.g., HT 1248-1258), she gave Kleinbauer her best recollection prior to trial (HT 1262, see also, HT 1248-1249). Given the fact that the events at issue occurred 20 years earlier, it is not surprising that Trimble needed to refer to Kleinbauer's report to refresh her recollection.¹⁵² The Referee in effect recognized during the hearing, however, that Trimble's recollection had been refreshed by the report. When respondent tried to question Trimble about a declaration signed by Trimble's daughter Elizabeth Black, petitioner's counsel objected that Trimble had not indicated that her recollection, as refreshed by Kleinbauer's report, needed to be further refreshed by reference to another witness' statement. (HT 1288.) The Referee agreed, stating: "I think that's a valid point. You can lay a

¹⁵² In fact, every witness who testified at petitioner's evidentiary needed to refer to past reports, transcripts, etc. to refresh his or her recollection. It is worth noting that even with voluminous records at his disposal, Slick rarely had his recollection refreshed and in fact had an extremely poor memory of events. (See Statement of Facts, sec. B.1.e.) Yet the Referee chose to credit virtually all of his testimony. This differing treatment of the witnesses further undermines the validity of the Referee's findings and has deprived petitioner of a full and fair hearing. (See Exceptions, sec. C.8., *post.*)

foundation, if you're able, Mr. Kelberg, that she has some doubt or concern about her memory of the timing having previously refreshed by her own statement." (*Ibid.*) Respondent was unsuccessful at laying such a foundation. Trimble was clear that she remembered the order in which people arrived at her home on February 25, 1983. She simply could not remember exactly what time they did. (HT 1291; see also, HT 1299.) Trimble's inability to recall precise times after 20 years hardly makes her an incredible witness, however. The Referee also ignored the fact that Trimble had no reason to come to court in 2003 and lie for petitioner.

Regarding the credibility of Elizabeth Black at the hearing, the Referee's findings are not supported by substantial evidence. The Referee points to Black's status as a convicted felon. (Referee's Report p. 22.) However, the Referee neglects to acknowledge that Black's two felony convictions in 1989 and 1996 related to a drug problem she had developed after petitioner's trial occurred. (HT 1305, 1337.) The fact that Black had been working for two years prior to the hearing as a substance abuse counselor and was attending school to obtain a counselor certificate (HT 1304) tends to show that she had conquered her drug problem and diminishes the significance of the convictions in terms of showing any proclivity toward dishonesty.¹⁵³

The Referee also takes a statement made by Black at the hearing out of context. Black did not actually state that she was still in love with petitioner. The comment in question came while respondent was attempting, unsuccessfully, to show that Black and petitioner were in

¹⁵³ Of course Black's post-trial convictions could not have affected her credibility at petitioner's 1983 trial.

regular contact. After Black indicated that she had sent a card to petitioner two or three times in the past five years (HT 1357-1358, see also, HT 1359), respondent asked, “Have you ever fallen out of love with Mr. Burton since that time” (HT 1358). Although Black responded, “No,” (*id.*), it was an awkward question to answer and any inference that she was still involved with petitioner was dispelled by the fact she had not spoken to petitioner in 20 years (HT 1359, 1365) and that she would not lie for him in any event (HT 1365). The alleged inconsistency between Black’s statement in 1993 that petitioner and Clements had a “grudge” against each other (Report p. 22; see HT 1342; see also, exh. 40 [marked for identification only]) and petitioner’s to Kleinbauer that he went briefly with Clements to an auto shop is tenuous at best. It hardly provided a basis for finding the Black was not credible at the evidentiary hearing in 2003.

The Referee states that Denise Burton is also a convicted felon and that her demeanor at the hearing showed a continuing love for her brother. (Referee’s Report p. 22.)¹⁵⁴ The fact that Denise Burton still loves her brother hardly makes her an incredible witness. (See, e.g., *Luna v. Cambra*, *supra*, 306 F.3d 954.) Moreover, the Referee ignored the fact that she had not seen or spoken with petitioner for 20 years, since his arrest in 1983. (HT 1506-1507.) Thus, while Denise Burton still loved her brother, they did not have the kind of close relationship which would lead a reasonable fact-finder to conclude she would lie on his behalf. While she did incur a felony conviction almost 10 years after petitioner’s trial (HT 1515), this conviction was over 10 years old and therefore remote by the time of the

¹⁵⁴ The Referee also relies on exhibit T, a declaration by Denise Burton, in support of his conclusion. (Report p. 22.) Exhibit T was not admitted into evidence, however. (HT 2133.)

evidentiary hearing. More importantly, the Referee neglected to acknowledge that the information Denise Burton gave to Kleinbauer in 1983 was corroborated by that of the other witnesses. (See exh. 1.)

As for Hope Black, the Referee found that she had two felony convictions and that she was not questioned about the events of February 1983 until almost 19 years later. (Referee's Report p. 22.) Hope did not have any felony convictions at the time of petitioner's trial, however. (HT 1573.) And the fact that she was not interviewed previously in no way diminishes her credibility. It was Slick's fault that Hope was not interviewed prior to trial, for he was on notice that she was a potential alibi witness. (Exh. 1.) Given the passage of so many years, Hope's ability to recall key events enhanced her credibility. She could recall February 25, 1983, because it was the day before the police search of her home and petitioner's arrest there. (HT 1566-1567, 1585-1586.) She remembered her employment and school schedule, which allowed her to recall that it was between 1:30 and 2:00 p.m. when she arrived home and saw both her sister Elizabeth and petitioner there. (HT 1566-1569.) The Referee has also ignored the fact that Hope came to court almost 20 years after the events in question, although she had nothing to gain from doing so. In short, there is no reason to question her credibility in 1983 or 2003.

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QUESTION 4:

Did Slick keep petitioner informed of Slick's trial plans and/or discuss trial strategy with petitioner and, in particular, did he tell petitioner that Slick did not intend to call witnesses or put on a guilt phase defense because Slick believed that a guilt phase defense likely would be unsuccessful and would make the penalty phase less credible? If so, when and in what circumstances did Slick advise petitioner of this? If not, did Slick discuss his planned guilt phase defense with petitioner, when did he do so, and what did he tell petitioner?

Petitioner objects to the Report's findings on Question 4, which are as follows:

Based on the contemporaneous record, and having in mind the demeanor of the witnesses while they testified in the Reference Hearing, this court concludes that Mr. Slick did advise Petitioner of the trial strategy he planned to employ. Petitioner conceded during the Reference Hearing that he had several pre-trial meetings with Mr. Slick and Petitioner cannot posit a credible reason for Mr. Slick not advising him of the trial strategy at one or more of those meetings.

(Report at 23). These findings are not supported by substantial evidence.

The Referee acknowledged that the evidence as to whether Slick informed petitioner he would not defend is in conflict. (Report at 22.) Petitioner testified that Slick did not tell him that he was not going to put on a defense. (HT 1861.) Slick testified that he did inform petitioner he would not call any witnesses at guilt phase. (HT 763.) Slick admitted, however, that he could not recall the details of the discussion and he was unable to state when or under what circumstances he so advised petitioner. He had no notes of the conversation. Slick was also unable to say how petitioner, who steadfastly maintained his innocence, reacted when Slick informed him he would present no defense. (HT 763-65.)

The Referee chooses to credit Slick's testimony over petitioner's, but in so doing erroneously characterizes the evidence adduced and inappropriately discounts the substantial evidence that corroborates petitioner's testimony.

The Referee relies upon the fact that "on August 17, 1983 (*when the evidence in the trial was closed*), Petitioner addressed the trial judge and did not advise that Mr. Slick was disregarding his request to put on a defense. (H.T. 1935-42)." (Report at 22; emphasis added.) However, evidence was not "closed" at the time petitioner addressed the court on August 17, 1983.¹⁵⁵ The prosecution rested on August 16. (RT 389.) At that time, Slick informed the court that he would not be prepared to proceed until the next morning, because "I could have two witnesses that will be here [then]. *I plan on interviewing them personally before I decide whether or not I will call them as witnesses, but they will not be here until tomorrow morning.*" (*Id.*, at 389-90; emphasis supplied.) Slick told the court these two that these two witnesses would be in court at 9:00 a.m. on August 17; he asked that the trial start at 9:30 a.m., but the court adjourned the case until 10:00 a.m. to "give [Slick] time to interview them."¹⁵⁶ (*Id.*, at 390-91.) After the

¹⁵⁵ On August 17, 1983, Slick informed the trial judge that petitioner wished to represent himself and had asked him to prepare written papers for him to do so; Slick declined to prepare a motion. (HT 393.) The trial court referenced its prior rulings that petitioner would not be allowed to represent himself because he was not ready to proceed with trial and declined to "go[] through the same conversation again." (*Ibid.*)

¹⁵⁶ Slick's file contains August 17, 1983 subpoenas for two witnesses, Elizabeth (Penny) Black and Gloria Burton. In addition, on August 15, the trial court ordered Gloria Burton to return on August 17 at 9:00 a.m. (CT 111.)

jurors were excused for the day, petitioner made his third *Faretta* motion. (*Id.*, at 391-92.)

At 9:26 a.m. on August 17, petitioner made his fourth *Faretta* motion. (RT 393.) The trial court denied this motion (HT 390-91), and Slick told the court he was ready to go forward (*id.*, at 394). The jurors then entered the courtroom. It was at this point that Slick announced “[a]t this time I will rest.” (*Ibid.*)¹⁵⁷ At the reference hearing, Slick testified to what the trial record clearly shows: petitioner made his final *Faretta* motion before Slick rested. (HT 574-76; see also, exh. 13; HT 573-74.)

The Referee misunderstands the facts as to petitioner’s fourth *Faretta* motion. (See *Taylor v. Maddox*, *supra*, 366 F.3d 992, 1008 [where state court plainly misapprehends the record regarding a material fact, the resulting finding of fact may be unreasonable].) The evidence was *not* closed at the time of the motion; Slick had *not* rested without putting on a defense; and the Referee unfairly faults petitioner for not advising the trial court of something that had not yet occurred.

The Referee also claims that “there were no contemporaneous notes generated by Mr. Slick which reflect that he had advised Petitioner of the trial strategy. Nor is there any contemporaneous writing or statement by Petitioner which complained of Mr. Slick’s failure to advise of the decision not to put on witnesses for the defense at trial.” (Report at 23.) This

¹⁵⁷ Slick’s language is curious, and telling. He did not announce that “the defense” rested, as is customary, but instead distanced himself from his client – and his client’s desires – by announcing that he personally would rest.

finding is correct only as to Slick.¹⁵⁸ As explained above, the record of the proceedings on August 16 and 17, as well as the complaints voiced by petitioner in moving to represent himself, show that he did not know Slick would rest without calling witnesses until the moment Slick made that announcement in open court, before the jury. Petitioner's statements in support of his motion for self-representation were completely consistent with his not knowing that Slick would not defend. His repeated complaints that his trial attorney had failed to adequately communicate with him about the case was the functional equivalent of informing the trial court that Slick had not advised him of his intended trial strategy. (See Exceptions, Question 5, *post.*) The Referee has thus erred in failing to recognize that there were contemporaneous statements by petitioner concerning Slick's failure to advise him of his intended strategy.

In choosing to credit Slick's testimony over petitioner's, the Referee also relies on the supposed lack of complaint by petitioner that Slick failed to advise him of the defense trial strategy in two documents, a letter petitioner wrote to Slick (exhibit 15), and a declaration petitioner signed dated April 4, 1985 (exhibit D). (Referee's Report at 23.) This reliance is unwarranted. In fact, as petitioner shows below, the more logical inference to draw from each is that petitioner wanted to defend and did not know that his attorney would rest without calling witnesses on his behalf.

Petitioner wrote exhibit 15 seeking Slick's attention; he wanted to see Slick, to communicate face-to-face. (HT 1918-19.) He expressed his

¹⁵⁸ Significantly, one would expect that Slick, an attorney representing an accused facing the death penalty, would have kept notes about important discussions with his client, such as the decision to effectively concede guilt.

desire to work with Slick to develop and present a defense. Petitioner said that he was not guilty and was at home with his family at the time of the crimes. He asked Slick to help him prove his innocence: “After all, as you can look into it you will see that I’m not the one who commit this crime and I’m looking to you to help me win, - and we can win” (Exh. 15; HT 556.) Petitioner also pointed out the weaknesses in the state’s identification case. Petitioner noted that preliminary hearing witness [Robert Cordova] admitted that he saw the perpetrator’s face only from a side view; that the “main witness” [Zarina Khwaja] testified that she had never seen him before; that he was never in a live line-up for the K-Mart victims; and that Lisa Searcy and Margetta Heimann identified him at the preliminary hearing based on his dark skin tone rather than a true recall of their assailant’s facial features. (Exh. 15; HT 557.)¹⁵⁹ Petitioner told Slick that the police were trying to “frame” him for the crimes by claiming that he confessed, when he had not. Petitioner asked for Slick’s help in proving that the police accusations were contrived, and expressed his belief that if Slick could get a “highly educated group” of jurors, they could show them that he was not responsible for the crimes. (Exh. 15; HT 559.)

The content and tenor of exhibit 15 evinces petitioner’s desire to put on a defense at guilt phase and shows that when he wrote the letter he did not know that Slick was not going to defend. However, the Referee apparently believes it is significant that petitioner did not also complain in

¹⁵⁹ Petitioner wrote: “And reading about the two ladies at the K-Mart store is way out the picture for if there was a person coming in the court room not being Andre Burton and as dark as me they would have got pick him out too” (Exh. 15; HT 557.) This comment is a layman’s attempt to raise the suggestive nature of an in-court identification.

the letter that Slick had not advised petitioner of his intended trial strategy. (Referee's Report at 23.) The evidence does not support this inference. This letter by petitioner was written so early in Slick's representation of him it is ridiculous to expect that petitioner would have complained therein that Slick had failed to advise him of his trial strategy. In another part of his findings, the Referee acknowledges that the undated letter was likely written prior to August, 1983. (Report at 16.) In fact, one can infer it was written prior to Slick's one and only jail visit with petitioner on July 1, 1983, as in the letter petitioner asks Slick to come see him to discuss the case. Obviously petitioner sought by the letter to provoke a discussion with his counsel about trial strategy; petitioner did not expect that his attorney would have already adopted a strategy before learning his client's version of the facts. Thus, it would have been severely premature – and likely counter productive – for petitioner to complain prior to July 1985 that Slick had failed to advise him of his intended strategy. The Referee's conclusion to the contrary is not supported by the evidence.

Exhibit D is petitioner's declaration dated April 4, 1985, filed by Jeffrey Brodey in support of a motion for a new trial. The Referee characterizes the declaration as "focus[ing] extensively on the issue of how quickly Petitioner's case was going to trial . . . that [Petitioner] did not feel that the case was prepared sufficiently and that Mr. Slick had a 'total lack of interest.'" (Report at 23.) Although the Report acknowledges "one statement in paragraph 7 of Exh. D from which it can be inferred that there was a disagreement between Mr. Slick and Petitioner about whether or not to call a witness, who may have been Mr. Stewart or Ms. Camacho" (*id.*, at 23), it concludes that this "brief reference" does not indicate "the overall failure by Mr. Slick to keep Petitioner advised of the trial strategy." (*Id.*)

The finding as to exhibit D is not supported by substantial evidence. It flies in the face of the testimony at the reference hearing regarding that declaration. It was prepared by Jeffrey Brodey, who included what he [Brodey] thought was significant to the new trial motion. (HT 1207.) In moving for a new trial, Mr. Brodey did not raise - - or even have in mind - - the issue of whether petitioner specifically asked to call certain witnesses; indeed, *Frierson* had not even been decided at that time. (*Id.* at 1216.) Brodey was, instead, focused on Slick's ineffectiveness. Thus, it is not appropriate to use exhibit D as evidence that Slick advised Petitioner of his plan not to defend.

The Referee simply ignores evidence which corroborates petitioner's testimony and undermines Slick's. Petitioner's hearing testimony that he wanted to defend and that Slick did not tell him that he was not going to defend (HT 1861) is supported by the trial record of August 16 and 17. His mother, Gloria Burton, had been ordered to appear on August 17 at 9:00 a.m. (CT 111.) Slick told the court that two defense witnesses would be in court on August 17 at 9:00 a.m. and that he was going to interview those witnesses before the trial started at 10:00 a.m. (RT 390-91.) Slick's August 16, request for a continuance tends to establish that he knew petitioner wanted to defend, because there would be no point in interviewing witnesses if Slick had already decided – and petitioner had agreed – that no defense would be presented. On August 17, the trial started at 9:26 a.m.. If Slick did not decide not to call witnesses until after 9:00 a.m. on August 17 and trial started at 9:26 a.m., there was little time to advise petitioner that there would be no defense. These facts also contradicts Slick's testimony that he discussed with petitioner his decision not to present witnesses more than once. (HT 768.) If Slick did not decide not to defend

until August 17th, he could not have had multiple conversations about his plan with petitioner.¹⁶⁰ And, if petitioner had known of Slick's intent, this would have been discussed in his August 17 *Faretta* motion.

Petitioner's testimony is further corroborated by the fact that when he spoke to defense investigator Kristina Kleinbauer about his dissatisfaction with Slick's representation, he did not complain that Slick was not going to present a defense, but rather that the case was not ready to go to trial because the investigation had not been completed and that Slick had not adequately communicated with him. (HT 280, 1925, 1933.) Petitioner never told Kleinbauer that he had agreed with Slick not to present a defense at the guilt phase. (HT 319-320, 436.) If petitioner had known about and agreed with Slick's planned strategy, his meetings with Kleinbauer undoubtedly would have been very different than they were.

Petitioner's *Faretta* motions support the testimony of petitioner and Kleinbauer that he wanted to defend, because the concerns upon which those motions were based - - Slick's failure to communicate with petitioner and incomplete investigation - - are matters of great importance to someone who wanted to defend, but would have been irrelevant if petitioner had agreed to present no defense.

In contrast to petitioner's well-corroborated testimony is Slick's completely unsupported testimony. Slick's memory was extremely poor.¹⁶¹

¹⁶⁰ When asked whether he told petitioner that he was not going to call any witnesses at the guilt phase, Slick stated: "The topic, I'm sure, came up more than one time. The topic was a - was always there." (HT 768.)

¹⁶¹ See, e.g., HT 512-513, 515, 516, 519, 523, 525, 527, 528, 532-535, 540, 542-543, 544-546, 549-550, 560, 672, 689-690, 714, 719-721, 726, 764-765, 766, 769-770, 829-820, 880; see also, Statement of

He had no notes or memoranda purporting to memorialize a conversation in which he informed petitioner of the most important strategy decision of the trial.¹⁶² Moreover, he believed that it was his decision alone whether to defend, which makes it less likely he would feel obligated to discuss his strategy with his client in advance. (See Exceptions, Question 1, *ante*, and Question 5, *post*.) The Referee, nonetheless, chooses to rely on Slick’s uncorroborated 20-year old memory.

Although the Referee repeatedly draws negative inferences from what he believes *petitioner* failed to say during trial, he chooses not to consider what *Slick* did not say. As petitioner explains more fully in his Exceptions to Reference Question 5, *post*, Slick had repeated opportunities during the *Faretta* hearings to tell the trial court that he had informed petitioner of his trial strategy and that petitioner had agreed with it. Such a statement would have been the logical response to petitioner’s repeated complaints that his attorney had failed to investigate and had failed to communicate with him. The Referee’s failure to acknowledge this significantly undermines his reliance on Slick’s testimony. (See *Taylor v. Maddox, supra*, 366 F.3d at pp. 1007-1008.)

Finally, the Referee relies on petitioner’s “concession” that he had several pre-trial meetings with Slick and a supposed inability to “posit a credible reason” that Slick would not have advised him of his intended trial strategy therein. (Referee’s Report at 23.) The inference the Referee draws from the evidence is not supported by the evidence. It is undisputed that

Facts, sec. B.1.e., and Brief, sections B.3.c. and B.3.d., *ante*.

¹⁶² Petitioner notes that Slick’s recall was rarely, in any event, refreshed by documents, trial transcripts, or other written materials. (See, e.g., Statement of Facts, sec. B.1.e., *ante*.)

Slick visited petitioner only once in the county jail, on July 1, 1983. (HT 530, 1857-1858; exh. 13.) If Slick had decided on a strategy to call no witnesses at this time – before he had received any investigative reports or had spoken to any potential witnesses¹⁶³ – he should be disbarred. Petitioner testified that he also met with Slick when he was brought to court. (HT 1857-1858.) This testimony presumably is the basis for the concession found by the Referee. However, the Referee disregards the entirety of petitioner’s testimony on this point. He explained that these meetings were very brief, lasting only five to ten minutes. (*Ibid.*) In one of the *Faretta* hearings, petitioner informed the court that his contact with Slick was insufficient: “I haven’t spent or had enough time to communicate with my lawyer because he haven’t given me the time” (RT 1 [Aug. 10, 1983].) In the next *Faretta* hearing he added: “I see Ron Slick every time I come to court and I am tellin’ him the real, but all I am gettin’ is the fake, the frame. And I know for sure that I shouldn’t take the fall in this case.” (RT 10 [Aug. 11, 1983].) These remarks by petitioner militate against a finding that Slick had informed petitioner during one of the brief conversations that he was presenting no defense, that petitioner had acquiesced in this decision.

As for why Slick would not bother to tell his client that he would be presenting no defense, there are a number of plausible reasons. First, as petitioner as explained, Slick did not think that his client was an integral part of the decision, so he likely felt no need to share it with him. (See

¹⁶³ Kleinbauer testified that she gave Slick reports of her interviews with petitioner and the alibi witnesses on July 15th. (HT 266.) She conducted her interviews of Camacho and Stewart well after the July 1 jail visit. (See exh. 1.)

Exceptions, Question 1, *ante*, and Question 5, *post*.) Second, Slick had a habit and custom of not sharing such information.¹⁶⁴ (See the Court of Appeal's unpublished decision in *People v. Glover* (Exh. 56-A); and United States District Judge David Kenyon's Memorandum Decision in *Charles Edward Moore, Jr. v. Arthur Calderon* (Exh. 60).)

Slick was appointed to represent Robert Glover on a charge of first degree murder under a conspiracy theory on May 2, 1988; the trial began on July 21, 1988. The jury returned a guilty verdict the next day, July 22. Slick had one pretrial meeting with Glover at the county jail, which lasted approximately 45 minutes. The only case-related paperwork Slick gave to his client was a report about his alleged statements to the police disclosed the day before trial started. Other than the one jailhouse visit, Slick's contacts with Glover were at the courthouse, and never lasted more than 10 minutes. Glover gave Slick with the names of persons helpful to his defense, but Slick failed to interview them. Glover told Slick that he wanted to tell his side of the story in court, and Slick led Glover to believe that he would call him as a witness for the defense. However, after the prosecution rested its case, Slick told his client that he would present no

¹⁶⁴ As a result of Slick's extremely limited ability to recall anything about this case, respondent repeatedly invoked his habit and custom. In an effort to fill the cavernous holes in Slick's memory, he was allowed on numerous occasions to testify to his custom and practice in representing defendants charged with serious crimes. Slick's cursory preparation in *Glover*, his refusal to permit his client to testify despite the fact that it was the client's decision whether to do so, and the breakdown in the attorney-client relationship, are all relevant to Slick's actions and inactions in this case and the credibility of his assertion that, despite all other evidence to the contrary, petitioner did not demand a defense and acquiesced in his decision not to defend.

defense, that he would lose the case if testified, and also led Glover to believe that it was Slick's decision as to whether the client would testify.

In a hearing on Glover's motion for a new trial, Slick testified that Glover had never expressed any dissatisfaction with Slick's representation, denied that Glover complained about Slick's failure to visit him at the jail, lack of interest in the case, and failure to keep him informed about what was happening. Slick had no notes of any conversation with Glover. Slick testified that Glover voluntarily decided he would not testify and denied telling him that nothing he said would be believed by the jury.

The trial court granted Glover's motion for a new trial, based on Slick's failure to conduct himself in a manner to be expected of a reasonably competent attorney, in that he was not adequately prepared for trial and Glover was thereby deprived of a fair hearing. The Court of Appeal affirmed. (*People v. Glover* (1990) 272 Cal. Rptr. 510, 515.)

The facts of *Glover* resonate in this case. In both cases, Slick testified that his clients never expressed any dissatisfaction about the way he was handling their cases. In both cases, Slick visited his client at the county jail on one occasion for a brief period of time. Both Mr. Glover and petitioner complained that Slick was not interested in their case and was not keeping them informed about what was happening. In each case, Slick's post-trial testimony about his conversations with his clients was supported by no contemporaneous written documentation. Petitioner's trial, like that of Mr. Glover, involved a one-day guilt phase at which no defense was presented. Mr. Glover's case, like petitioner's, proceeded swiftly to trial. Petitioner, like Mr. Glover received a "shabby defense."

There are striking similarities between petitioner's case and *Charles Moore v. Calderon*, CV 91-5976 KN (C.D. Ca. 1995). Moore, like

petitioner, was represented by Slick in a capital case. Slick was appointed on July 22, 1983. He met with Mr. Moore for only a few times before May 5, 1984, the scheduled first day of the trial, and each of these meetings lasted less than 15 minutes. Slick refused to tell Moore his proposed plan of defense during any of their meetings. When Moore told Slick that he was dissatisfied with his representation and wanted another attorney appointed or to represent himself, Slick failed to inform the judge and failed to insure that Moore was brought to court so that he could request a new attorney. Mr. Moore's request for self representation, like petitioner's was denied as untimely because he was not prepared to begin trial on the date scheduled. In Moore's case, Slick presented no defense and failed to adequately cross-examine a key prosecution witness. Moore's trial, including jury selection, lasted one week, as did petitioner's trial. Like petitioner, Moore was convicted and sentenced to death.

Judge Kenyon granted Moore's habeas corpus petition on the ground he had been denied his right to represent himself under *Faretta*. His Memorandum Decision finds that Moore's strong personal belief that Slick was not exerting his best effort was not objectively unreasonable; that Slick failed to discuss his preparation and investigation with Moore until shortly before the trial started and even then, failed to discuss more than part of one witness' expected testimony; that Slick refused to make arguments desired by Moore, although the trial court repeatedly confirmed that they were legitimate and likely to be presented by Slick. The court also noted that Moore was a cooperative and respectful litigant who was primarily concerned with Slick's degree of preparation.

The facts of *Moore* also resonate in petitioner's case. In both, Slick's meetings with his clients were infrequent and brief. In *Moore*, Slick

refused to tell his client about his proposed strategy for defending the case; petitioner has testified that Slick never told him that he did not plan to present a defense. Both petitioner and Moore languished in lockup after expressing their dissatisfaction with Slick's representation. There was no defense presented in *Moore*, just as there was no defense presented at petitioner's trial. The trial in *Moore* ended quickly with a conviction and death sentence, as petitioner's trial. Both Moore and petitioner questioned Slick's dedication to their defense; petitioner's contemporaneous expressions of concern about Slick's degree of preparation are the same concerns expressed by Mr. Moore and found objectively reasonable by Judge Kenyon. Finally, Moore, like petitioner, was a cooperative and respectful litigant whose primary concern was with Slick's degree of preparation.

In summary, the Referee's decision to rely upon Slick's testimony rather than petitioner's defies all logic as well as the weight of the evidence. Because the Referee's finding in response to Reference Question 4 is not supported by substantial evidence, this Court should reject it and find instead that Slick never informed his client that he would not present any witnesses at the guilt phase of trial.

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Reference Question 5:

If Slick discussed a planned guilt phase strategy of presenting no defense with petitioner, did petitioner then or thereafter object (other than in open court during or before trial) and tell Slick that, notwithstanding Slick's conclusion about presenting a guilt phase defense, petitioner wanted a guilt phase defense presented? If so, when did petitioner do so and what was Slick's response?

The Referee does not answer Reference Question 5 directly, perhaps because Slick admitted in his testimony that he could not say what petitioner's reaction was when he informed him that Slick would not present a guilt phase defense – or for that matter, when or where that alleged conversation occurred. (HT 764.) The Referee appears to credit Slick's testimony that petitioner did not thereafter request him to present a guilt phase defense. (Referee's Report at 24.) Petitioner has demonstrated, however, that the Referee's determination that petitioner did not request a defense is not supported by substantial evidence, and is, in fact, contradicted by the facts of this case. (See Exceptions, Question 1, *ante*.)

Assuming for the sake of argument that Slick did advise petitioner sometime of his intended "strategy" of not defending, and assuming for the sake of argument that he believed petitioner acquiesced (neither event is documented in Slick's files), there is *no evidence* that petitioner agreed to such a strategy when his case went to trial.

Indeed, it is difficult to imagine when Slick might have obtained an acquiescence that would excuse his refusal to defend. If it was during his one jail visit, neither the state nor the Referee offers any reason why petitioner should be bound some weeks later, when he went to trial with no defense. If petitioner allegedly agreed to no defense close to the time of trial, Slick inexplicably failed to put that on the record on the motions to

relieve Slick of his representation. Furthermore, just the day before Slick began and promptly ended his guilt case, he informed the trial court he needed to interview witnesses before deciding whether to present them. (RT 389-390.) There is no indication Slick and petitioner conferred, much less that petitioner agreed to not defend, on the critical date that Slick announced the defense rested, without presenting any evidence.

Because petitioner testified that Slick never advised him of his trial strategy of effectively conceding guilt (see Report at 24), he obviously was unable to say how he responded to hearing Slick's plan. The Referee thus refers to random other parts of petitioner's testimony and then concludes that "Petitioner did not seem very persuasive in his Reference Hearing testimony." (Report at 24.) The Referee goes on to state that "[i]f, as [Petitioner] now says, his attorney did not keep him advised of the defense strategy, one would expect that there would have been many heated – and remembered – conversations" as well as "contemporaneous letters or declarations setting forth this serious issue." (Report at 24.) Because "there were none" the Referee finds that Slick discussed defense strategy with petitioner. (*Ibid.*) These findings are not supported by substantial evidence, however.

What the Report ignores is that petitioner repeatedly complained that Slick was failing to communicate with him adequately about his case. These complaints were consistent with, and corroborate, his claim that he did not know Slick would not defend.

Petitioner first expressed dissatisfaction with Slick's failure to communicate adequately to defense investigator Kristina Kleinbauer. Petitioner told Kleinbauer that he was concerned that the investigation into his innocence had not been completed prior to trial and that Slick had not come

to see him in jail. (HT 280.) Kleinbauer testified that petitioner was very open with her. (HT 264.) If Slick had advised petitioner he would not defend, petitioner certainly would have told this to Kleinbauer. Also, if petitioner knew of Slick's plan and acceded to it, he would have no reason to discuss with Kleinbauer his concerns of incomplete investigation and lack of communication. Kleinbauer, however, did not know that Slick had decided not to defend. (See HT 269, 273-274, 277-278.)¹⁶⁵

Petitioner also repeatedly informed the trial court that his attorney was failing to adequately communicate with him. On four occasions, petitioner asked the trial court to grant him self-representation because he was innocent, because Slick had not adequately investigated his innocence, and because Slick had not spent enough time communicating with petitioner about the case. (See Exceptions, Question 6, *post*; see also, Statement of Facts, sec. A.1., *ante*.) It would have been pointless for petitioner to make these complaints to the trial court, and particularly to complain about the lack of communication, if he already knew that Slick planned to present no defense and if he had acquiesced to this plan. Thus, petitioner's comments before the trial court were perfectly consistent with his later testimony at the evidentiary hearing that he did not know Slick would not defend. His *Faretta* hearing statements are inconsistent, however, with Slick's

¹⁶⁵ Kleinbauer met with Slick on August 10, 1983, the day before trial began, and was not informed that further investigation was unnecessary. She was surprised when she later learned that the trial had started, because the investigation was not complete. Slick's failure to inform Kleinbauer that a defense would not be presented, despite his having met with her the day before trial commenced, has some tendency in reason to corroborate petitioner's testimony that he was not informed there would be no defense.

testimony that petitioner knew what Slick had in mind and did not object.

Despite petitioner's repeated complaints that Slick was not adequately communicating with him, the Referee's Report seems to suggest that petitioner should have been more precise and told the trial court specifically that Slick had "failed to keep him advised of the defense strategy." It is patently unreasonable, however, to expect petitioner, a young defendant with significant cognitive limitations¹⁶⁶ who had never gone through a jury trial before (HT 1953), to be more specific than he was. Under the circumstances of this case, it is clear that petitioner's complaints about inadequate communication with his counsel were the functional equivalent of protesting that Slick had failed to keep him advised of trial strategy.

The Referee also errs in expecting "many heated conversations" and "contemporaneous letters or declarations" regarding Slick's failure to keep petitioner informed. As to the lack of heated conversations, there was little opportunity for many conversations, heated or otherwise. Petitioner has demonstrated that there was very limited contact between Slick and petitioner during the proceedings. It is uncontested that Slick visited petitioner only once in jail, on July 1, 1983, prior to trial (exh. 13), a shocking occurrence in a capital case. After this visit, Slick had only a few additional contacts with petitioner, at the courthouse. (HT 1857-1858.)¹⁶⁷

¹⁶⁶ The CYA records Slick reviewed prior to trial indicated that when tested at sixteen years of age, petitioner was functioning at the third to fifth grade level academically. (Exh. B; see also, Referee's Report at p. 16 [petitioner was 19 at the time of trial and not very sophisticated].)

¹⁶⁷ Slick first met petitioner at his arraignment on March 1, 1983. Any discussion with petitioner was brief. (HT 510.) Slick next saw

petitioner at a continuance of the preliminary hearing on March 11, 1983. (HT 512.) He billed for a one hour interview on that date, but does not recall who he interviewed, has no notes of any interview and, if he interviewed petitioner, does not recall what was discussed. (HT 512, 524.) The preliminary hearing was held March 13, 1983. Slick did not bill for an interview of petitioner, does not recall an interview with petitioner, and has no notes of any interview. (HT 515.)

Slick saw petitioner at his arraignment in Superior Court on March 28. He did not bill for an interview of petitioner, does not recall whether he spoke to petitioner on that date, and his file contains no notes of any interview. (HT 515-16.) Slick cannot remember if petitioner was in court for a pretrial hearing on April 25, 1983, does not recall if he interviewed petitioner, did not bill for an interview of petitioner, and has no notes of any interview (HT 524-26; exh. 13, p. 1.) The minute order shows petitioner was not in the courtroom on this hearing. (I CT 71.) On May 9, 1983, trial was continued. (I CT 103.) Slick does not remember if he interviewed petitioner that day. He did not bill for an interview and has no notes of an interview. (Exh. 13, p. 1; HT 527.)

On July 1, 1983, Slick billed 1.5 hours for “interview[ing] the client at L.A. County Jail,” but he does not know whether this included the time he waited for petitioner to come down to the attorney room, he has no notes of this interview and does not recall making such notes. (Exh. 13, p. 3; HT 528-30; HT 1857-58.)

Slick announced ready for trial on July 26, 1983. He does not recall if he had any contact with petitioner on that date, has no notes of any interview, and he did not bill for an interview. (HT 540-41; exh. 13, pp. 1, 4.) From August 3 to August 9, 1983, the case was trailing. The minute order for the period of August 3 to 9, 1983 does not indicate petitioner was present in court. (I CT 106.) Slick billed a total of one hour for trailing. (Exhibit 13, page 1.) He does not remember if he had any contact with petitioner from August 3 to 9, 1983. His billing does not show that he interviewed petitioner and there are no notes of any interview in his file. (HT 534-44; exh. 13, p. 1.)

On August 10, 1983, one day before trial started, pretrial motions were heard. Slick billed two hours that day for a “[c]onference with investigator and client.” He cannot say how much of this time was spent with the client and

These contacts were brief, lasting only five to ten minutes (HT 1858, 1930), although petitioner sought more time with his attorney. Petitioner testified, “I would see Slick coming to court. He would come in, say we’re going to court, and I say can we spend some time. He said I got some things to do, we’ll talk later, and he’ll be gone.” (HT 1929.) It is extremely unfair for the Referee to penalize petitioner for choosing to request – in a respectful manner – that his attorney spend more time with him (see exh. 15) and then to alert the trial court to the inadequacy of their communication (the *Faretta* hearings) instead of engaging in heated arguments with his attorney, which would have accomplished nothing. Under the circumstances, the lack of heated conversations creates no inference that Slick kept petitioner informed of his trial strategy. Indeed, it is hard to even speculate about when a heated conversation could have taken place, given the extraordinarily limited contact between Slick and petitioner.

There is also no basis for the Referee to find that petitioner’s failure to prepare “contemporaneous letters and declarations” setting forth Slick’s failure to advise him of the defense strategy speaks to, much less undermines, petitioner’s testimony on the issue. Petitioner wrote at least one letter to Slick, advising him, inter alia, that he was innocent, that he was with his family and others at the time of the crimes, and that he believed the eyewitness identification evidence presented by the state at the preliminary hearing was unsound. Petitioner also asked Slick to communicate with him. (Exh. 15.) Slick did not respond to petitioner’s letter in writing. (HT 560.) After sending this letter, petitioner spoke with his investigator (retained by

how much was spent with the investigator. He has no notes of a conference with either petitioner or the investigator. (HT 544, 546; exh. 13, pp. 1, 4.)

Slick) about evidence supporting his defense as well as his concerns about Slick's representation, and petitioner complained repeatedly in open court that Slick was failing to communicate adequately with him about the case. Slick was present in court and heard these complaints. (See e.g., RT 1, 10.) The Referee fails to explain why petitioner would or should have written additional letters to his attorney or to the trial judge when his previous efforts to bring about more communication with Slick achieved virtually nothing.

In addition, the Referee fails to acknowledge petitioner's reasonably contemporaneous complaints about Slick's lack of communication and Slick's failure to inform him of trial strategy, in a declaration filed by attorney Jeffrey Brodey in support of a new trial motion. In this 1985 declaration, petitioner asserted that Slick had visited him only once in jail, for 15 minutes, and that the other capital defendants in jail had much more contact with their attorneys than petitioner had had with Slick. (Exh. D.) In addition, petitioner stated: "I told MR. SLICK on the first day that we appeared in court that I did not feel the case was prepared sufficiently to go to trial. First of all, *I did not know what was happening, because MR. SLICK did not communicate with me. . . .*" (*Ibid.*; italics added.) This statement strongly supports petitioner's testimony that Slick did not keep him informed.¹⁶⁸ There simply is no basis for the Referee to conclude that petitioner's failure to further document Slick's failure to keep him informed – over and above the many efforts he made during or shortly after trial –

¹⁶⁸ While this declaration might have included more detail about Slick's failure to tell petitioner was happening, it was prepared by counsel, in support of an ineffective assistance of counsel claim raised in a new trial motion. *People v. Frierson* had not yet been decided.

undercuts his hearing testimony that Slick never told him he would not present witnesses.

Although the Referee makes much of what petitioner failed to say, he utterly fails to consider (or even acknowledge) what Slick did not say. Slick's failure to inform the trial court of petitioner's alleged acquiescence to his strategy of no defense at any point during petitioner's repeated complaints about him is strong evidence that this conversation never took place as Slick claims. After first moving for self-representation, on Wednesday, August 10th, petitioner told the trial court that Slick had shown a lack of interest in investigating his case and had not spent enough time communicating with petitioner about the case. (RT 1.) Although the trial court asked Slick to respond to petitioner's concerns, Slick did not tell the court that he had already advised petitioner of his intended trial strategy and that petitioner had voiced no objection. Instead, Slick merely stated that he had done investigative work and was ready to proceed. (RT 4).

On Thursday, August 11th, petitioner again requested self-representation, explaining that Slick had not done enough investigation into petitioner's innocence and that Slick had not adequately communicated with him. (RT 8-10.) When the court inquired of Slick, he did not tell the court that he and petitioner had already come to an agreement on the appropriate course of action in the trial. (RT 11-12.)

On Wednesday, August 16th, after the prosecution presented its case-in-chief – and, significantly, after Slick informed the court that he had *not yet decided* whether to present witnesses – petitioner again asked to represent himself. (RT 391.) Petitioner indicated, in layman's terms, that he and his counsel had a conflict of interest. (*Ibid.*) Despite petitioner's claim of a conflict of interest, Slick failed to tell the trial court that he and

petitioner were in agreement as to trial strategy, although if it existed, any such agreement would have put an end to questions about a conflict. (*See ibid.*)

Petitioner made his final self-representation request at the beginning of proceedings on Wednesday, August 17th (RT 394), and Slick failed to make a record that petitioner did not want to defend. This was the fourth opportunity to assure the trial court that Slick had fully informed petitioner of his strategy and that petitioner had not objected. (*See, ibid.*) Slick could not and did not say petitioner agreed to no defense; only the afternoon before, he had informed the trial court he needed time to interview two witnesses before deciding whether to present them. (See RT 389-390.)

In each of these instances, the most logical response to petitioner's complaints of inadequate investigation, and particularly of inadequate communication about the case, would have been for Slick to tell the trial court that he had already advised petitioner of the best course of action and that petitioner had acceded to that advice. Slick did not so inform the trial court, because he in fact had never advised petitioner that he would not defend.¹⁶⁹

In sum, the Referee's findings in response to Reference Question 5 are not supported by substantial evidence. The weight of the evidence shows that Slick never informed petitioner he would not present a guilt phase defense.

¹⁶⁹ Even if one were to assume that Slick had informed his client that he would present no defense, and that petitioner had acquiesced, a reasonable attorney would have concluded from petitioner's statements during the *Faretta* hearings that petitioner no longer agreed with counsel's strategy.

QUESTION 6:

Did Slick have reason to believe that petitioner's in court request to represent himself were made for the purpose of delaying trial, rather than dissatisfaction with Slick's trial strategy?

Instead of directly responding to Reference Question 6, the Referee concludes that "Petitioner tried to delay the matter by seeking to represent himself, but those requests were denied." (Report at 25). Petitioner objects; this finding is not supported by substantial evidence.

The Referee bases his finding on testimony by Ronald Slick as well as on three pieces of documentary evidence. (See Referee's Report at 24-25). As petitioner will show, Slick's testimony on this issue was not worthy of credit. And, the Referee has drawn inappropriate inferences from the documentary evidence by taking isolated statements within those documents out of context and misinterpreting them as well.

The finding as to Question 6 is based on Slick's hearing testimony that petitioner did not offer a reason why he was not ready for trial (HT 771) and did not express any dissatisfaction with Slick's trial strategy (HT 790).¹⁷⁰ Slick's testimony on these two points is contradicted by the evidence adduced at the hearing which establishes that Slick had reason to believe that petitioner's requests to represent himself were based on his desire to continue and complete investigation of guilt phase defenses and his dissatisfaction with Slick's representation.

Prior to petitioner's first in court *Faretta* motion, he told Kleinbauer

¹⁷⁰ The Referee also cited two declarations by Slick, which were marked as exhibits 18 and 23. (Report at 24.) Neither of these exhibits were admitted into evidence, however. (HT 2253.) Thus, the Referee has erred by relying on them.

that he was unhappy with Slick's representation; he did not think that Slick was ready to adequately defend him at trial because the investigation had not been completed and because he had very limited contact with Slick. (HT 280, 317-19, 1925, 1933.) Petitioner asked Kleinbauer what he could do about this situation. (*Id.* at 361.) Kleinbauer could not answer petitioner's question, so she consulted attorney Jeffrey Brodey to find out whether petitioner had any recourse, based on his dissatisfaction and lack of contact with Slick and fear that the case was proceeding to trial without having been adequately investigated. (HT 281-82, 358-60.)

Jeffrey Brodey advised Kleinbauer that petitioner could cite a 1975 decision, *Faretta*,¹⁷¹ which gave him the right to represent himself; he also said that petitioner should ask the court for the right to be heard and should not accept being co-counsel. (HT 284; see also, HT 1175, 1208-09.) Kleinbauer took notes of the advice she received from Brodey; a copy of her notes is petitioner's exhibit 10. (HT 282-84.) On July 29, 1983, Kleinbauer told petitioner what she learned from Brodey. (HT 285-86, 335-36, 353-54, 454, 1883; see also, exh. 9 (entry for July 29, 1983.)) August 10, 1983, was petitioner's first appearance in court after Kleinbauer told him what Brodey had suggested, and thus it was his first opportunity to ask the trial judge for permission to represent himself.

It is uncontradicted that on August 10, Kleinbauer's investigation was not complete. (HT 308-11; *compare* exhibit 8 [memorandum from Slick to Kleinbauer outlining investigative tasks].)¹⁷²

¹⁷¹ *Faretta v. California*, *supra*, 422 U.S. 806.

¹⁷² Kleinbauer had not yet conducted an investigation of Otis Clements, as Slick had directed her to do. (HT 310-11; exh. 8.) There is no evidence indicating that Kleinbauer had interviewed the other potential alibi

Petitioner specifically raised the incomplete investigation in making his first *Faretta* motion:

Your Honor, I would like to represent myself due to the circumstances of *lack of interest as far as the investigation is concerned with my case. There isn't any of that should have been taken care of.* I haven't spent or had enough time to communicate with my lawyer because he hasn't given me the time, because he feel that to me it is not worth it to him

As far as the investigation is concerned, the investigator has been working with my case is willing to come forth to the court and work with may - with my case."

(RT 1-2 [Aug. 10, 1983]; emphasis supplied.)

The next day, when petitioner renewed his motion, he had just received case materials, including Kleinbauer's investigation report (exh. 1) and said: "*I want to investigate my case and find out about all the things, because the investigator that investigated this case told me personally that something is shaky about my case*" (RT 10 [Aug. 11, 1983]; emphasis supplied). Petitioner continued: "*I recently called and delivered addresses and stuff to continue my investigation* The investigator that investigated this report constantly was telling me all the things that were shaky about this, about wanting to be rushed into this" (*Id.* at 15.) Petitioner was "*talking about the investigation of my alibi, as far as my people was concerned, knowing where I was, and for me saying where I was and stuff like that there.*" (*Id.* at 16; see also, RT 8 ["I know for sure that we have a lack of interest and is really out of hand This is my

witnesses identified, including Hope Black, Willie Davis or Shirley Cavaness, any of the other homicide eyewitnesses, including Robert, Larry and Del Cordova, or Zarina and Anwar Khwaja, or either of the K-Mart victims.

reason for wanting to represent myself”]; RT 391 [“I also motioned to resubmit the conflict of interest motion filed verbally on Mr. Slick”].)

Contrary to the Referee’s Report - - and Slick’s testimony on this issue - - petitioner’s statements in support of the *Faretta* motions raise the incomplete state of the investigation as the basis for his dissatisfaction with Slick and request to represent himself.

On this record, the Referee’s reliance on Slick’s testimony that petitioner’s *Faretta* motions were made only to delay the trial is clearly erroneous. Slick’s assertions that petitioner had no reason for wanting to delay his trial and was not unhappy with Slick’s representation are entirely uncorroborated, and contradicted by all the other evidence. There is no notation or other writing in Slick’s file on this issue. Slick’s testimony is suspect because of his generally poor memory of petitioner’s trial. For example, Slick insists that he remembers what petitioner said to him off the record, before the first *Faretta* motion was heard, is of dubious credibility given the fact that in the next breath, Slick admitted that he had no recollection of the *Faretta* motion hearings and that his memory would not be refreshed by reading the transcripts. (RT 726, 777.) In fact, Slick’s testimony that petitioner sought delay for delay’s sake is soundly contradicted by the *Faretta* hearings.

In addition to Slick’s incredible testimony, the Referee cites exhibit D, a 1985 declaration signed by petitioner in support of a motion for a new trial filed by Jeffrey Brodey, in support of his conclusion that petitioner moved for self-representation simply to delay his trial. (See Referee’s Report at 25.) The Referee’s reliance on exhibit D is misplaced, however.

The Referee’s Report quotes part of the declaration, in which petitioner stated: “[i]n my experience in the Los Angeles County Jail,

persons with death penalty cases all tended to have their cases continued for longer periods of time” (Report at 25, citing exh. D, ¶ 6.) The Referee then concludes that “[t]his statement suggests that Petitioner was trying to delay his trial date and Mr. Slick’s failure to do so was the cause for Petitioner to be dissatisfied with Mr. Slick.” (Report at 25.) The declaration does not support a finding that petitioner was unhappy with Slick because Slick would not delay his trial. The Report cites one sentence of the declaration and ignores the rest, in the same manner it fundamentally distorts what was said at the *Faretta* hearings by citing one sentence and ignoring everything else that occurred.

Petitioner’s declaration clearly expresses that he was dissatisfied with Slick’s representation because the investigation was not complete. Petitioner states that the first opportunity he had to make a statement to the trial court about Slick’s representation was on August 10, 1983, and that at that time, petitioner “did not believe that the trial was actually going to start at that setting.” (Exh. D, ¶ 5.) Petitioner explains that he did not think his trial was going to begin because other defendants with death penalty cases took longer to prepare and “had much more contact with their counsel than I had with Mr. Slick.” (*Id.* at ¶ 6.) Petitioner specifically states that:

I told MR. SLICK on the first day that we appeared in court that I did not feel the case was prepared sufficiently to go to trial. First of all, I did not know what was happening, because MR. SLICK did not communicate with me. I did know from our investigator that a witness had been located who gave a different description of the person who did the shooting of MR. AND MRS. KHWAJA, and I wanted to know why that witness had not been subpoenaed to court.

(Exh. D, ¶ 7; see also, *id.* at ¶ 8 [Petitioner “did not feel as if anything had really been done for me in my case.”].) In short, the Referee’s

interpretation of exhibit D is not supported by the evidence.

The Referee also unreasonably relies on a sentence in Kristina Kleinbauer's two-page handwritten notes of the advice she received from Jeffrey Brodey (exh. 10) to support his findings that the *Faretta* motions were only for delay and not because petitioner was dissatisfied with Slick. The Report states: “(See also Exhibit 10, notes of Ms. Kleinbauer: ‘tell Ron [Slick] he’s not ready for trial ... too soon – next year some time.’” (Referee’s Report at 25.) This part of Kleinbauer’s notes, without more, hardly supports an inference that petitioner wished simply to delay his trial, however. This sentence is equally consistent with petitioner’s well-documented desire that his case be fully investigated before the start of his trial. And, since it is clear that the investigation was not complete at the time Kleinbauer made these notes – or at the time trial began – the latter conclusion is the more logical one. In fact, the notes must be considered in the context of Kleinbauer’s testimony at the hearing, which was that petitioner did not ask how he could delay his trial but what he could do about Slick’s disinterest in his case. These notes corroborate the investigator’s testimony that it was she, after consulting with Brodey, who told petitioner that he could seek self-representation. (See HT 356, 360.)

The Referee further finds that Dr. Maloney’s 1988 declaration (exh. E), “suggests that Petitioner was attempting to delay the trial,” because “[i]f Petitioner had been truly interested in vigorously defending his case, including calling witnesses in the guilt phase, there was no logical reason for him to have adopted this course of conduct.” (Report at 25). This declaration was admitted for a non-hearsay purpose only, however. (See HT 2131, 2137; see also, HT 2124.) Dr. Maloney did not testify at the hearing. Thus, the Referee’s reliance on exhibit E is inappropriate. In any

event, the evidence does not support this interpretation of petitioner's contact with Dr. Maloney. By late July, 1983, when Dr. Maloney went to interview petitioner, the attorney-client relationship between petitioner and Slick had broken down. Slick told petitioner he was going to lose, and Slick was proceeding to trial without adequate investigation. Petitioner declined to discuss his case with Dr. Maloney not because he had no interest in vigorously defending his case, but because "he wanted nothing to do with Mr. Slick and was representing himself." (Exh. E, ¶ 2.) The problem was that petitioner clearly did not trust Slick to mount a vigorous defense: subsequent events establish that petitioner's concerns were well-founded.

Moreover, the Referee's statement that petitioner "refused even to meet with Dr. Maloney" (Report at 25) is clearly erroneous. Exhibit E makes clear that petitioner did meet with Maloney; he simply declined to be interviewed by the psychologist. Petitioner's unwillingness to undergo a psychological interview at that point in the case was not unreasonable. He had already cooperated in an examination by Dr. Sharma, a psychiatrist hired by Slick. Petitioner told Sharma that he was innocent. Sharma reported to Slick that if petitioner's claim was true, "then I have nothing to support mental impairment either for competency or for criminal exculpation." (Exh. 2.) In light of Slick's failure to fully investigate his innocence, it is understandable that petitioner concluded a second mental health examination would not further his defense. After the guilt phase concluded, petitioner did submit to an interview with Maloney, who asked petitioner about his background but did not conduct any psychological examination or testing. (Exh. E; see also, HT 1018-1019.) Of course petitioner's cooperation with Maloney accomplished nothing, as Slick failed

to present any mental health evidence at the penalty phase. (See Statement of Facts, sec. A.4., *ante*.)

In contrast to the unsubstantiated and demonstrably erroneous testimony by Slick on this point was credible, consistent and corroborated testimony by both petitioner and Kleinbauer that petitioner sought self-representation because of his dissatisfaction with Slick. Petitioner testified that he wanted to represent himself because investigation had not been completed. (HT 1862.) As set forth above, Kleinbauer testified that petitioner expressed to her his dissatisfaction with Slick, explaining to the investigator that his attorney had not spent much time communicating with him about the case. Petitioner believed the case was not ready for trial because the investigation was not complete. (HT 280, 317-318.) Petitioner repeatedly raised his concerns about Slick's representation to Kleinbauer. (HT 356.) As a result, Kleinbauer informed him, after consulting with Brodey, that he could seek self-representation. (HT 284-285.)

The record of the *Faretta* hearings, as described above, corroborates both petitioner's and Kleinbauer's testimony. Their testimony is further corroborated by Jeffrey Brodey, who recalled that Kleinbauer contacted him during petitioner's trial (HT 1175) and by exhibit 10, the contemporaneous notes Kleinbauer made about the advice she received from Brodey.

The Referee dismisses this strong evidence that petitioner moved for self-representation because of his dissatisfaction with Slick by characterizing petitioner's testimony as self-serving and Kleinbauer's as biased. (Referee's Report at 25.) These findings are not supported by the evidence. Petitioner's testimony is no more self-serving than Slick's. Petitioner's testimony is corroborated by other evidence, however. Slick's is not. In fact, as petitioner has shown, Slick's testimony is patently

unbelievable, given all the other evidence adduced on this issue. Petitioner has already addressed the Referee's unsupported conclusion that Kleinbauer was "biased." (See Exceptions, Question 1, *ante*.) Moreover, the Referee has ignored the fact that Kleinbauer's testimony is corroborated by Jeffrey Brodey and by her contemporaneous notes of the advice she received from Brodey and related to petitioner.

The Referee goes on to fundamentally misstate the record in describing petitioner's statements at the *Faretta* hearings as "focused on Mr. Slick 'not paying attention' to him." (Referee's Report at 25.) As is shown above, petitioner's remarks in support of self-representation were specifically about Slick's failure to investigate the case adequately and his failure to communicate adequately with petitioner about the case.

The Referee's conclusion that petitioner became uncooperative with Slick because Slick accurately informed him that the prosecution's case was strong (Report at 25) is also erroneous. As petitioner has demonstrated elsewhere in this brief, the prosecution's case against him was not strong. (See Exceptions, Questions 2, 3, 7 and 9.)¹⁷³

In addition, Slick's testimony that petitioner became uncooperative after being informed of the strength of the prosecution's case was not worthy of credit. Curiously, Slick was the only person who testified at the evidentiary hearing that petitioner was uncooperative. The Referee failed to mention in his Report that others had no difficulties working with

¹⁷³ The Referee prevented petitioner from presenting evidence demonstrating how weak the People's case actually was. (See Exceptions, sec. C.3., *post*.) For the Referee to then conclude herein that a preponderance of the evidence establishes that the case against petitioner was strong denies petitioner a full and fair hearing.

petitioner. Kristina Kleinbauer testified that petitioner was very open and willing to answer any question she asked him. (HT 264.) Jeffrey Brodey described petitioner as an excellent client who was always cooperative, helpful and very friendly, which the attorney found surprising considering petitioner's situation. (HT 1170.) Even after the new trial motion Brodey filed was denied by the trial court, petitioner's easy-going demeanor toward him did not change. (HT 1228-1229.)

The Referee also ignores the fact that Slick contradicted his own testimony about whether petitioner was uncooperative. Slick – who acknowledged that he visited petitioner just once in the county jail (HT 528) – did testify that petitioner became evasive and uncooperative after being informed that he would lose (HT 766). However, Slick later admitted that he was not sure “uncooperative” was the right description. (HT 1098-1099.) Although Slick testified that he and petitioner never had a good conversation after this point (HT 765), he also testified that he had no problem communicating with petitioner (HT 1105-1107). Slick even admitted that he could not recall whether petitioner had stopped talking to him. (HT 1105.) Because the Referee fails to acknowledge Slick's contradictory testimony, his reliance on Slick's statement that petitioner was uncooperative is inappropriate.

In summary, the Referee's finding that petitioner tried to delay the matter by seeking self-representation is not supported by substantial evidence and should be rejected by this Court.

Reference Question 7

Was Slick aware of potential witnesses Elizabeth Black, Ora Trimble, Gloria Burton, Michael Stewart, Susan Camacho and Zarina Khwaja, and, as to each, if so did Slick have reason to believe the testimony of each would be incredible or insufficiently probative to justify presenting them at the guilt phase?

The Referee finds that Slick was aware of each of these potential witnesses. (Referee's Report p. 25.) This finding is supported by substantial evidence. Slick testified that he was aware of each of the above-named witnesses. (HT 791.) His testimony is corroborated by the following facts: Slick received reports from investigator Kristina Kleinbauer relating the information she received in interviews of Elizabeth Black, Ora Trimble, Gloria Burton, Michael Stewart and Susan Camacho. (HT 720; exh. 1.) Zarina Khwaja was identified in police reports (see exh. K. pp. 3-4), which Slick had read (HT 511). Ms. Khwaja also testified at the preliminary hearing. (CT 11-22.)

The Referee goes on to find by a preponderance of the evidence that Slick had reason to believe that Elizabeth Black, Ora Trimble and Gloria Burton were either incredible or insufficiently probative or both. (Referee's Report p. 26.) As petitioner has already shown, the Referee's findings that these witnesses were not credible are not supported by substantial evidence. (See Exceptions, Question 3, *ante*.) As demonstrated herein, the Referee's findings that the testimony of these witnesses would have been insufficiently probative are also unsupported by the evidence.

The testimony the alibi witnesses could have provided would have been highly probative, in that it strongly tended to establish that petitioner was at 1991 Myrtle Street at the time of the Khwaja offense. The testimony also would have accounted for petitioner's whereabouts on the afternoon of

February 25, 1983, from approximately 12:30 p.m. when petitioner met Elizabeth Black at Trade Tech school until well after the charged offenses, except for a brief period when petitioner and Black parted so that petitioner could take his bike with a flat tire to his mother's garage. Petitioner could not have met up with Clements and committed the K-Mart robbery at 1:00 p.m. and the East Pleasant Street shootings at 1:55 p.m. during this brief separation from Black.¹⁷⁴

Elizabeth Black would have testified that she saw petitioner arrive at Trade Tech school between 12:15 and 12:30 p.m.. Petitioner was there to meet her and walk with her back to her home at 1991 Myrtle Street. (Exh. 1.) Significantly, Denise Burton would have corroborated Black's testimony. Denise also attended Trade Tech, and saw petitioner there at about 12:30 p.m. (Exh. 1; HT 1510-1511.)

Elizabeth Black would have testified that she and petitioner briefly parted on the walk home so that he could put his bike with a bad tire away, and that she arrived at her Myrtle Street home at about 1:00 p.m. Petitioner came in about 15 minutes later. (Exh. 1.) Gloria Burton would have corroborated this testimony, as she was at Myrtle Street that day and remembered her son arriving shortly after Elizabeth did, at about 1:30 pm. (*Ibid.*) Ora Trimble also remembered petitioner arriving, although she put his arrival at about 2:00 p.m., (*ibid.*), a time which nonetheless tended to rule out his participation in the shootings. Hope Black also recalled that petitioner was at the Myrtle Street apartment when she arrived home

¹⁷⁴ The prosecution's theory was that petitioner committed both crimes during a continuing course of action, while he was with Otis Clements. Clements described a series of events which put petitioner and him together for at least several hours. (See exh. K, pp. 33-43.)

between 1:30 and 2:00 p.m. (HT 1567.)

The Referee ignores the probative value of this potential testimony and instead relies on Slick's flawed assessment of it. The Referee again cites Slick's belief that alibi defenses do not work, particularly when they involve family members and are presented "in the face of . . . an unchallenged confession . . ." (Referee's Report p. 25.) Petitioner has already addressed these points, establishing that Slick's strategic view of the evidence was unsound. (See Exceptions, Question 3, *ante*.)

The Referee also credits Slick's testimony that Ora Trimble and Gloria Burton did not adequately cover the relevant time period. (Referee's Report p. 26, citing HT 803-805.) A close review of Slick's hearing testimony – which Slick admitted was based on information he had recently reviewed rather than on a recollection of his thinking in 1983 (HT 816) – shows that Slick was wrong.

In his hearing testimony, Slick asserted that the testimony of the alibi witnesses would not have been sufficiently probative because although Elizabeth Black could provide petitioner with an alibi, the others could not. (HT 794-795.) Slick testified that from looking at the reports at the hearing, he could see that Ora Trimble did not adequately account for petitioner's whereabouts during the period of time between when the Khwaja crime occurred and when petitioner could have returned to 1991 Myrtle. (HT 803; see also, HT 956-957.) Slick thought it was Trimble's statement to Kleinbauer that convinced him that testimony by Trimble would not be of value. (HT 804.) Slick did not remember whether Gloria Burton provided petitioner with an alibi, although he acknowledged that she might have. (HT 805.)

Slick was incorrect in his belief that only Elizabeth Black provided

petitioner with an alibi. Black told Kleinbauer that petitioner had returned to her apartment about 15 minutes after she had, or at 1:15 p.m. (Exh. 1.) Gloria Burton put the time at a few minutes later, about 1:30 p.m. (*Ibid.*) The Khwaja shooting occurred at 1:55 p.m. (Exh. K, at p. 1.) Thus, both Black and Gloria Burton provided petitioner with an alibi for the fatal shooting. Moreover, the testimony of one would have corroborated the testimony of the other.¹⁷⁵ As explained above, the testimony of Black and Denise Burton that petitioner was at Trade Tech school at about 12:30 p.m. also tended to show that petitioner was not the person who spent the day with Otis Clements committing crimes.

This testimony would have been further corroborated by that of Ora Trimble, who told Kleinbauer that petitioner had returned to her home at about 2:00 p.m. (Exh. 1.) Slick's belief that Trimble did not "cover the time span" (HT 803) demonstrates a fundamental misunderstanding of the value of the alibi evidence. The four alibi witnesses interviewed by Kleinbauer could have provided the jury with a consistent, credible account of petitioner's whereabouts from before the K-Mart robbery until well after the Khwaja incident, despite minor differences in their recollections of the time that petitioner arrived at the Trimble/Black residence.¹⁷⁶ Trimble's account of the order of events is highly consistent with that of the other alibi witnesses, who reported that petitioner arrived at the home at an earlier

¹⁷⁵ Their recollections were also highly consistent with that of petitioner, who told Kleinbauer that he had arrived at 1991 Myrtle at about 1:20 p.m. (Exh. 1; see also, HT 859-1860.)

¹⁷⁶ Alibi testimony may be probative even if it is less than precise. (See, e.g., *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154, 1157-1158 [counsel's failure to investigate and present testimony of alibi witnesses not harmless even though their testimony was vague as to time].)

time.¹⁷⁷

Even if Ora Trimble's version of events is considered separately, she did in fact provide petitioner with an alibi.¹⁷⁸ Slick's assertion that Trimble's testimony would have lacked value is not credible. There is no evidence in the record that Slick knew that petitioner could have committed the Khwaja homicide at 1:55 p.m. and returned to 1991 Myrtle by 2:00 p.m., the time at which Trimble believed she saw petitioner. Slick testified that, according to his custom and practice, he would have determined the distance between Pleasant and Myrtle Streets and the length of time it took to drive this distance. (HT 953-954.) However, Slick could not say that he actually knew this information in 1983 (see HT 951-954) and there is

¹⁷⁷ Petitioner also notes that Denise Burton told Kleinbauer prior to trial, and would have testified that, she had arrived at 1991 Myrtle at about 2:00 p.m., or possibly later. (Exh. 1; HT 1513.) Denise arrived shortly after her mother Gloria Burton had left the Trimble/Black residence. (Exh. 1.) Because petitioner arrived before his mother left the residence (exh. 1), Denise's account tends to show that petitioner arrived prior to 2:00 p.m.

Slick testified that Denise Burton did not cover the time period "that well." (HT 816.) As petitioner has shown, however, her testimony would have been an important part of a larger account of petitioner's whereabouts which precluded his participation in the charged crimes. In addition, testimony from Denise that she saw petitioner at Trade Tech at 12:30 p.m. (exh. 1; HT 1510-1511) tends to undermine the validity of petitioner's purported confession that he was elsewhere with Otis Clements.

¹⁷⁸ The Referee notes that Slick thought he had personally spoke with Trimble (Report p. 26, citing HT 804), but there is no evidence to support this claim. Slick admitted there was no billing entry or notes in his file indicating he had met with Trimble. (HT 804.) Given Slick's extremely poor memory, it would be inappropriate to credit this recollection without some kind of corroboration.

nothing in his trial file to suggest that he measured the distance or driving time between these two locations (see exhs. 36, 63, and I [trial files]). He could not have used information he did not have in order to determine that Trimble could not have provided petitioner with an alibi.¹⁷⁹

In contrast to Slick's testimony on this point is that of his trial investigator. Kristina Kleinbauer testified that she knew in 1983 from police reports what time the Khwaja homicide had occurred. She knew from her familiarity with Long Beach where E. Pleasant and Myrtle Streets were. Indeed, she went to 1991 Myrtle during the course of her investigation. Kleinbauer, who informed Slick that the four alibi witnesses would be helpful to petitioner's defense (HT 366), had this information in mind when she interviewed the alibi witnesses (HT 405-408).¹⁸⁰ In sum, an analysis of the evidence shows that Slick's determination that only Elizabeth Black could give petitioner an alibi was incorrect.

In addition, Slick's claim that the prosecution had "two other good eyewitness" was not credible. (Referee's Report p. 25; citing HT 800.)

¹⁷⁹ Presumably in reference to Ora Trimble, Slick testified, "I mean, it's just there's a little hair there you could argue one way or the other." (HT 794.) By this testimony, Slick in effect conceded that the witnesses he refused to present would have provided, at the very least, enough evidence to argue an alibi.

¹⁸⁰ At the hearing, Kleinbauer no longer recalled how long it took to drive from E. Pleasant Street to 1991 Myrtle or the distance between those two locations. She indicated that respondent's estimates of ten minutes and 3.9 miles sounded reasonable. (HT 407-408.) Respondent's own estimate of ten minutes demonstrates that Ora Trimble could have provided petitioner with an alibi, as petitioner could not have returned after the Khwaja shooting to 1991 Myrtle by 2:00 p.m.

Slick admitted that he could not say who these two eyewitnesses were, although he had executed a declaration in 1998 stating that he knew such witnesses were available. (HT 800-802.) This testimony was also inaccurate. There were not two good eyewitnesses the prosecution could have produced. Slick thought perhaps the witnesses he had in mind were one of the Cordova brothers, and Rev. Vining. (HT 802.) However, he admitted that Vining was not an eyewitness to the Pleasant Street shooting. (HT 802.)¹⁸¹ And, Slick had no knowledge prior to trial that either Del or Larry Cordova would identify petitioner if called as a witness. There was nothing in the police reports to indicate that Del or Larry Cordova had been shown a live or photographic lineup, or had been asked to make any identification. (See, generally, exh. K.; see also, HT 692.)¹⁸² Accordingly, Slick could not have known that either would or could identify petitioner if called to testify.

As petitioner has shown, Slick's evaluation of the probative value of the alibi evidence was erroneous, and the Referee's reliance on it should be rejected by this Court as it is not supported by substantial evidence. In fact, a preponderance of the evidence shows that the potential testimony was probative and that the witnesses were credible.

The Referee also finds that Slick had reason to believe that

¹⁸¹ In addition, any identification of petitioner by Vining would have been subject to attack, since the witness had been shown only a single photograph of petitioner. (Exh. K., at p. 79.)

¹⁸² Petitioner sought to establish at the evidentiary hearing that neither Robert nor Del Cordova could have identified petitioner the person they saw running down East Pleasant Street (see exhs. 49 and 53 [marked for identification only]), but the Referee did not allow any of the Cordova brothers to testify. (HT 1623-1624, 1630, 1631.)

eyewitness Michael Stewart was insufficiently probative to justify calling him at the guilt phase of petitioner's trial. (Referee's Report pp. 26-27.) As petitioner demonstrates below, this finding is not supported by substantial evidence.

In finding that Stewart's testimony was insufficiently probative to justify calling him as a witness at trial, the Report places great reliance on a few minor differences found in the accounts Stewart has given at various times over a 20-year period. The Referee compares what Stewart told petitioner's investigator in 1983 prior to trial (exh. 1) with a declaration Stewart signed in 1990 (exh. 11), a report of a 1998 interview of Stewart prepared by respondent's investigator (exh. 17), and Stewart's 2003 evidentiary hearing testimony. (See Report pp. 26-27.) After considering these accounts, the Report stated, "[Stewart's] memory of the events of the day in question seems to have varied over the years, and it is unclear which of his several versions would have been testified to in August 1983." (Report p. 27.) There are several fundamental flaws in the Referee's analysis of what testimony Michael Stewart might have given at petitioner's 1983 trial, however.

First, as more fully explained in sections C.1. and C.2., *post*, the Report's reliance on these differences is directly at odds with the Referee's repeated statements that petitioner's evidentiary hearing would not delve into the post-trial recollections of the fact witnesses. Indeed, the Referee curtailed examination of Stewart regarding alleged inconsistencies in his post-trial recollections of the events in question as irrelevant to the proceedings. After emphasizing that any discrepancies arising from post-trial statements were obviously unknown to Slick in 1983, the Referee stated:

. . . I don't think it's one bit relevant – what this witness' memory today is of the events of 1983 or whether or not he had a 1990 declaration or a 1980 [sic] declaration or he said anything to counsel in the last few weeks or months. That isn't the issue, and we are not going to put on a mini trial here and have the People point out inconsistency after inconsistency, especially with later-prepared declarations, and then take the time to have [petitioner's counsel] try to rehabilitate the witness' present memory because that isn't what we're about.”

(HT 642; see also, Exceptions, sec. C.2., *post.*)

The Referee was correct when he recognized during the evidentiary hearing that any inconsistencies created by Michael Stewart's inability to recall details precisely over a span of 20 years could not have given Slick reason in 1983 to believe that Stewart's testimony at trial would not have been sufficiently probative. Thus, they do not support the Report's finding concerning Stewart's testimony. Moreover, because the Referee's ruling at the hearing effectively prevented petitioner from having Stewart explain the differences in his recollection over the years, the Report's reliance on them has denied petitioner his constitutional rights to a full and fair hearing. (See Exceptions, sections C.1. and C.2., *post.*)

Second, the Referee has inappropriately considered the whole of exhibit 17, a report by respondent's investigator Ilene Chase of her 1998 interview of Stewart, although most of it was not admitted into evidence. (HT 2254-2264.) In reference to that exhibit, petitioner's counsel made clear that she was moving into evidence only one paragraph of the report, as a prior consistent statement Stewart had made about the occurrence of a second showup on the day of the Khwaja shootings. (HT 2255-2256.) Accordingly, the Referee is not now free to use the remainder of the report to support his findings.

Third, even if Michael Stewart's post-trial recollections are considered, the Referee's assessment of the probative value of his potential trial testimony is not supported by substantial evidence. The evidence overwhelmingly establishes that Stewart's testimony would have been credible and probative.¹⁸³ Over 20 years, Stewart has consistently described the shooter as an older man who had a beard with gray in it. Prior to petitioner's trial, when Stewart's recollection of events was fresh, he described the gunman as a black male in his thirties who wore a beard with gray in it. (Exh. 1.) Stewart gave a similar description when he signed a declaration in 1990. (Exh. 11.) He further confirmed this description in his 2003 evidentiary hearing testimony. (HT 593, see also, HT 597.)¹⁸⁴ This description was highly probative because it excluded petitioner, who was 19 years old at the time of the charged crimes (exh. K. p. 51) and had no beard and no gray hair (exh. 20 [2/26/83 booking photo]; HT 757-758 [Black]).

Stewart could have provided other information at trial which would have tended to exclude petitioner. Stewart described the gunman as taller and heavier than petitioner was on February 25, 1983. Petitioner's arrest

¹⁸³ The Report recognizes that Slick admitted he did not have a reason to believe that Stewart was incredible. (Report p. 26.)

¹⁸⁴ The Report relies on an un-admitted portion of exhibit 17 in which Stewart said in 1998 he was no longer positive about the beard with gray. (Report p. 27.) However, the Referee neglects to mention an earlier portion of that report in which investigator Chase states that when asked by her to describe the gunman, Stewart told her the man was "6'0" or taller, 190-210 pounds, *in his mid-30s, with gray in his beard and in his hair.*" (Exh. 17, italics added.) That respondent finally managed to get a bit of hesitation out of Stewart in an out-of-court interview conducted 15 years after the crimes is truly insignificant, especially when considering that the Referee prevented the parties from examining Stewart on the minor discrepancies in his recollection over the years.

report indicated that he weighed 160 pounds and was 5'11" tall. (Exh. K. p. 51.) Although Stewart's estimate of the man's weight has varied somewhat over the years, he has consistently described someone much heavier than petitioner.¹⁸⁵ Stewart has consistently described someone six feet or taller.¹⁸⁶ Stewart also reported to police that the man he saw had a short afro hairstyle. (Exh. K. p. 22.) This information further excluded petitioner, who had a Jheri Curl on the day of the shootings. (Exh. 20; HT 1324-1325 [Black]; HT 1516 [Denise Burton]; HT 1573 [Hope Black].)

The Referee acknowledges that Michael Stewart's testimony "might have been somewhat probative as to the defense of misidentification." (Report p. 27.) However, the Referee apparently finds this probative value outweighed by the variations in Stewart's recollection of events over the years. The differences upon which the Report appears to rely concern the speed at which the man passed Stewart and how Stewart characterized his opportunity to view the man. (See Report pp. 26-27.) Stewart told Kleinbauer in 1983 that the man ran past him. (Exh. 1; Report p. 26.) This was consistent with what police reported Stewart had told them. (Exh. K. pp. 22-23.) However, in 1990, Stewart stated that the gunman had walked past him. (Exh. 11; Report. p. 26.) In his hearing testimony, Stewart recalled the man was walking very fast but not running. (HT 590.)¹⁸⁷ The Report also notes that Stewart told Kleinbauer in 1983 that he saw the man

¹⁸⁵ (Exh. K. p. 22 [220 pounds]; exh. 1 [180-190 pounds], exh. 11 [180-190]; HT 593 [180-190]; see also, exh. 17 [190-210].)

¹⁸⁶ (Exh. K. p. 22 [6'1"]; exh. 1 [at least 6'0"]; exh. 11 [at least 6'0"]; HT 593 [about 6'0"]; see also, exh. 17 [6'0" or taller].)

¹⁸⁷ See also, exh. 17 (walking quickly but not running).

very briefly. (Exh. 1; Report p. 26.) An un-admitted portion of exhibit 17 indicates that in 1998, Stewart described getting a “fair look” at the shooter. (Exh. 17; Report p. 27.)

Petitioner fails to see how these minor discrepancies could have undermined the probative value of Stewart’s testimony had he been called as a witness at petitioner’s trial. Whether the gunman ran past Stewart or walked hurriedly, it is abundantly clear that Stewart had the best opportunity of the homicide eyewitnesses to view the gunman. Stewart first saw the perpetrator as the man exited the red truck and walked down the street. (Exh. 1; exh. K. p. 12; HT 589-590.) Stewart next saw the man come back down E. Pleasant Street after the shootings. He passed right by Stewart, within a foot or two. (Exh. 1; exh. K. pp. 12, 22-23; HT 590-591.) Finally, Stewart also had an opportunity to observe the man as he fled in the red truck. (HT 592, 593; see also, exh. K. pp. 12, 23; exh. 1.) At the hearing, Stewart estimated that he had seen the gunman’s face for about 30-60 seconds. (HT 632.) Stewart believed he had seen the man sufficiently well to give an accurate description of him to police. (HT 618.)

In contrast to Stewart’s opportunity to view the gunman were the limited observations of the prosecution’s eyewitnesses. The prosecution presented two witnesses at trial who purported to identify petitioner as the gunman, Robert Cordova and Anwar Khwaja. Cordova saw the man for only five seconds (RT 367), however, and most of that was from a side view (CT 35-36). He acknowledged that he saw the man’s full face for “just a second.” (CT 36.) The gunman was “running real fast.” (CT 35.) Cordova admitted he was afraid at the time. (CT 34-35.) When Cordova

saw the man, he was perhaps 60 feet away.¹⁸⁸ Anwar Khwaja testified that the man who shot him came upon him suddenly. Khwaja did not see him approach. (RT 352.) The man immediately put a gun to Khwaja's face, demanded money and then fired twice. The man grabbed the bank bag and ran off. Khwaja lost an eye as a result of the shooting and his glasses were broken. (RT 653 [retrial].) Khwaja saw the man for a "very short period." (RT 358.) Clearly Stewart had a better opportunity than either Cordova or Khwaja to observe the suspect.

There were other factors that increased the reliability of Stewart's description of events. Stewart had been trained as a law enforcement officer (HT 588-589), a factor which courts have recognized is significant in assessing the reliability of a witness' observations. (See *People v. Yates* (1984) 150 Cal.App.3d 983, 992; *People v. Palmer* (1984) 154 Cal.App.3d 79, 84.) Stewart was the only eyewitness to have seen the gunman in a non-stressful situation, prior to the crime and there was no evidence to suggest

¹⁸⁸ Although the police diagram is less than precise, the distance appears to have been a minimum of 60 feet. Robert Cordova testified that the man was running on the sidewalk across the street from his apartment. (RT 365, 671 [retrial].) The police diagram indicates that the street is 40 feet wide. It is 14 feet from the street to the front of the building on the opposite side of the street from Cordova. (See Exh. K. p. 6.) Assuming the same is true on Cordova's side of the street, a total distance of 60 feet between the gunman and Cordova's window is a fair estimate.

Petitioner was unable at the hearing to call Robert Cordova to testify (HT 1623-1624), which petitioner has argued denied him of a full and fair hearing (see Exceptions, sec. C.3.a., *post*). Cordova would have testified that the distance was approximately 75 feet. (See Exh. 47 [declaration of Robert Cordova, marked for identification only].) Cordova would have confirmed that he saw the gunman's face for a second or two, and that he was very scared and nervous at the time. (*Ibid.*)

he was afraid at the time. (See *People v. McDonald* (1984) 37 Cal.3d 351 [fear and stress, as well as suddenness and unexpectedness of the event, are factors raising reasonable doubt about accuracy of eyewitness identification]; CALJIC No. 2.92.) Obviously, Stewart did not suffer the severe injuries that Mr. Khwaja did, which could have impaired his ability to make a reliable identification.

The accuracy of Stewart's recall of other details of the events on East Pleasant also tended to support his reliability as an eyewitness. Stewart was able to provide a partial license plate for the truck, as well as to describe its make and color. (Exh. 1; exh. K. p. 25.) He accurately recalled, when he spoke to Kleinbauer in August of 1983, that the driver had left shoe impressions in the muddy area where he was waiting for his passenger. (Exh. 1; see exh. K. p. 20.)¹⁸⁹

Given these facts, petitioner's jury would have had strong reasons to find Stewart's description of the gunman, which excluded petitioner, more compelling than the purported identifications by Cordova and Khwaja.¹⁹⁰ It is true that Stewart told Kleinbauer in August of 1983 that he did not think he could identify a second suspect because he saw the man briefly. (Exh. 1.) However, at petitioner's evidentiary hearing Stewart explained that he

¹⁸⁹ In fact, Stewart recalled that the police "took footprints." (Exh. 1.) A report which was not disclosed to the defense as part of the homicide book indicates that plaster casts were made of these impressions. (Exh. 17.) To the best of petitioner's knowledge, the casts were never analyzed to determine whether the impressions left in the mud could be linked to shoes worn by Clements or petitioner.

¹⁹⁰ For a more complete discussion of the eyewitness identification evidence, see petitioner's Exceptions to the Referee's Report, Reference Question 9, *post*.

could have made an identification of the shooter if the police had shown him the correct person immediately after the shootings. (HT 632-633.) Of course, the police did not show petitioner to Stewart either in a live lineup or a photographic one, although petitioner was arrested less than 24 hours after the shootings. Given Stewart's consistent description of the person as an older man with a beard that had gray in it, it is very likely Stewart would have eliminated petitioner as the man he had seen on East Pleasant Street. Stewart's testimony that petitioner was not the man he had seen would have been powerful, probative defense evidence. (See, e.g., *People v. McDonald, supra*, 37 Cal.3d at pp. 358-360, 375-376 [eyewitness, who was unable to affirmatively identify a suspect, excluded defendant based on his skin tone].)

In addition to finding perceived inconsistencies in Stewart's recollection over the years, the Referee concludes that Stewart might have identified petitioner as the perpetrator had he been called to testify. The Report states: "Indeed, Mr. Stewart might have come into court, seen Petitioner at counsel table and concluded that he 'looked like the shooter,' as Mr. Stewart stated in his 1998 statement." (Report p. 27.) This finding is not supported by substantial evidence. In fact, it is pure speculation and contrary to the evidence in the hearing record. As explained above, the 1998 interview report was not admitted into evidence, except for one paragraph relating to the second showup.¹⁹¹ Thus, the Referee's reliance on

¹⁹¹ Although the Referee characterizes the exhibit as Stewart's "statement," it was simply a report by respondent's investigator, Ilene Chase, of her interview with Stewart in 1998. The report was not signed by Stewart. There is no evidence that Stewart was asked in 1998 to review Chase's summary of the interview for accuracy.

it is erroneous. Furthermore, nowhere in the 1998 interview report does Stewart say that petitioner “looked like the shooter.” The Referee has apparently mis-read the interview report. (See generally, exh. 17.) The Referee has also inexplicably *ignored* Stewart’s evidentiary hearing testimony that petitioner – who was present in the courtroom when Stewart testified – did not look like the shooter. (HT 650; see also, HT 1148, 1887.) This testimony is powerful evidence that Stewart would not have identified petitioner at trial had Slick called him to testify.

The Referee’s Report apparently gives some weight to respondent’s claim that Michael Stewart would have been impeached at trial with police reports that did not include his description of a beard or gray facial or head hair, and did not reflect a second showup. (Report p. 27.)¹⁹² The Report does not explain, however, how the prosecutor could have meaningfully impeached Stewart’s testimony with police reports of such poor quality that they failed to make clear whether Stewart and/or the Cordovas had identified the driver. (See exh. K. pp. 13, 24.) Stewart spoke to a number of officers on the day of the crimes. He described what he saw four to six times to different investigators. (Exh. 1; HT 594-595.)¹⁹³ The police did not write down everything Stewart said and did not ask him to review a

¹⁹² Although Slick agreed at the hearing with respondent’s suggestion that the reports would be impeaching (HT 937-938), Slick could not say whether he had engaged in this analysis prior to petitioner’s trial (HT 942-943, 1005).

¹⁹³ Collette and Miller both spoke to Michael Stewart at the scene of the shootings (exh. K. pp. 47, 68; HT 2089), but neither prepared an interview report (see generally, exh. K; HT 2092). Collette could not recall whether he took any notes of his conversation with Stewart. (HT 2093.)

report of what he told them. (HT 612, 647.)¹⁹⁴ Despite the multiple interviews of Stewart, only one document in the homicide book included any physical description of the gunman provided by Stewart beyond the fact that the suspect was a black male. (Exh. K. p. 22; see also, *id.*, pp. 11-13, 47-48, 68-69.) Given the poor quality of reporting that occurred in petitioner's case, it is unlikely that the jury would have found the absence of information in these reports particularly impeaching of Stewart.¹⁹⁵

In contrast to the conflicting and incomplete police reports is the consistency of Michael Stewart on these two important points. Stewart has consistently stated that he told police the gunman was older, with gray in his beard. (Exh. 1 [1983]; exh. 11 p. 6 [1990]; HT 597, 646 [2003].) He has consistently reported that there was a second showup. (Exh. 1 [1983]; exh. 11 pp. 5-6 [1990]; exh. 17 p. 2 [1998, paragraph admitted into evidence]; HT 597 [2003].) The Referee's failure to acknowledge Stewart's consistency in this regard discredits his analysis of the witness' testimony.

In finding that Michael Stewart's testimony would not have been

¹⁹⁴ In fact, Long Beach Police Department did not have a practice in 1983 of having witnesses review reports of their statements for accuracy. (HT 2116.)

¹⁹⁵ In fact, Slick could have used any attempt to impeach Stewart with police reports as an opportunity to put the police investigation itself on trial. As petitioner has previously shown, the police reports were seriously incomplete and conflicting and the investigation was unobjective and inadequate. (See Exceptions, Question 2., *ante.*) As the United States Supreme Court has recognized, "indications of conscientious police work will enhance probative force [of evidence] and slovenly work will diminish it." (*Kyles v. Whitley* (1995) 514 U.S. 419, 446, n. 15.) By showing the jury that the police work in petitioner's case was far from conscientious, Slick could have significantly undercut any value the police reports may have otherwise had as impeachment of Stewart.

sufficiently probative at petitioner's trial, the Referee also appears to have relied on Ron Slick's evidentiary hearing testimony. The Report notes that Slick testified that he felt Stewart's testimony was insufficiently probative and that this testimony was supported by Slick's 1987 declaration, exhibit 18. (Report p. 26.) Exhibit 18, however, was not admitted into evidence. (HT 2253.) Thus, it was improper for the Referee to rely upon it.

Moreover, a careful look at Slick's testimony on this point demonstrates that it was not credible. Slick asserted that Stewart's testimony would have been of "a tiny, tiny, tiny value" or "almost zero." (HT 806; see also, HT 946.) Although Slick admitted that he did not recall his thinking about Stewart at the time of trial (see, e.g., HT 751-752), he denied that Stewart had given a description of the shooter that was very different from the way petitioner looked at the time of the crimes (HT 752, 755). Although Slick had "thought about" Stewart's description of the beard with gray, he recalled that petitioner did have some kind of facial hair. (HT 755.) At the hearing Slick could not recall, however, whether petitioner had a beard at the time. (HT 755.) After looking at petitioner's booking photograph taken the day after the crimes, Slick acknowledged that petitioner had a mustache but no beard. (HT 757.) Slick also conceded that petitioner had no gray in his hair. (HT 757-758.) In sum, Slick's testimony that Stewart had not described someone who looked significantly different than petitioner is not credible, and the Referee's reliance on it is unfounded.

Equally incredible is a note in Slick's trial file in which Slick wrote that Stewart did not appear to be a good witness and might be able to identify petitioner. (Report p. 27; exh. 21.) Although Slick testified that this note led him to believe that he had talked to Michael Stewart on the telephone, he did not actually recall speaking to the witness (HT 780; see

also, HT 806) and there is nothing in Slick's billing records to indicate that he did (see exh. 13). Michael Stewart testified that he did not know Ron Slick's name and had not, to his knowledge, spoken to Slick until Slick approached him in the courthouse restroom during a break in the evidentiary hearing. (HT 658, 659-661.)¹⁹⁶

This evidence is insufficient to establish that Slick had contacted Stewart prior to trial. An equally plausible explanation is that Slick wrote the note after reviewing Kleinbauer's report of her interview with Stewart. If so, Slick's conclusions that Stewart would not be a good witness and might identify petitioner were unfounded. Kleinbauer told Slick that Stewart was an important witness because his description of a beard with gray excluded petitioner as the shooter. (HT 277, 378-380.)¹⁹⁷ The information Stewart gave to Kleinbauer was powerful and probative. It gave Slick no reason to believe Stewart would identify petitioner and every reason to believe that the witness would exclude petitioner if given the

¹⁹⁶ Michael Stewart explained that while he was in the courthouse men's restroom during a break in the hearing proceedings, Slick introduced himself and said that he believed he had spoken to Stewart previously. Stewart responded that he did not know and left. Stewart did not recognize Slick and this contact did not jog Stewart's memory as to whether they had previously met. (HT 659; see also, HT 659-661.)

Slick's conduct – speaking with someone he knew was a witness at the hearing, about matters at issue in the hearing, outside the presence of the court and counsel, and in a location where the witness was entitled to privacy – was highly questionable. It was inappropriate of Slick to suggest to Stewart that they had spoken before when Slick knew that whether they had was a contested question at the hearing.

¹⁹⁷ Slick admitted having a vague recollection that Kleinbauer had told him she believed Michael Stewart to be a key to the case. (HT 1023.)

opportunity to do so.

Even if it is assumed that Slick did contact Stewart by telephone, Slick's note contains no information that would support his otherwise inexplicable conclusions about Stewart's credibility and he was unable in his hearing testimony to provide any foundation for them. In fact, the note confirms that Stewart reported the shooter had a beard with gray in it (exh. 21), a description which excluded petitioner.

In sum, petitioner has shown that the Referee's finding about the probative nature of Michael Stewart's testimony is not supported by substantial evidence. Perhaps recognizing his reasoning lacked evidentiary support, the Referee goes beyond an analysis of Stewart's testimony, however, and assesses Slick's decision not to present the eyewitness in light of the prosecution's evidence against petitioner. The Report states:

Ultimately, in the context of the stated defense strategy of trying to contend with a confession and other compelling evidence against Petitioner, while seeking to maintain credibility with the jury for a likely penalty phase of the trial, this Court concludes by a preponderance of the evidence that Mr. Slick had reason to believe that Mr. Stewart was insufficiently probative to justify calling him during the guilt phase of trial.

(Report p. 27.) This analysis is completely inappropriate under *People v. Frierson, supra*, 39 Cal.3d 803. Moreover, because it involves a mixed question of law and fact, the Referee's finding on it is not entitled to deference. (*In re Lucas, supra*, 33 Cal.4th at p. 694.)

Frierson makes clear that whether an attorney has made a reasonable tactical decision is a question separate from whether a criminal defendant was denied his constitutional right to present a defense at the guilt phase of his capital trial. (*Id.* at p. 814-815.) Slick's claim that he decided to present

no guilt phase defense in order to save his credibility at penalty phase is thus irrelevant to the present inquiry. Also irrelevant is Slick's assessment of the strength of the prosecution's evidence against petitioner and his strategic calculations based on this assessment. Because the reasonableness of Slick's tactical decisions was outside the scope of the evidentiary hearing, petitioner did not have an opportunity to prove that both of these purported justifications for not defending were unreasonable.¹⁹⁸ By relying

¹⁹⁸ If the reasonableness of Slick's decision-making had been at issue, petitioner would have presented evidence establishing that Slick's strategy of maintaining his credibility for the penalty phase was highly unreasonable because, inter alia, he inadequately investigated and presented the available mitigating evidence. Slick presented only two penalty phase witnesses, petitioner's mother and a jail officer, whose combined testimony consumed approximately 16 pages. (See Statement of Facts, sec. A.4., *ante*.) Had the soundness of Slick's tactical decision-making been at issue in the reference proceedings, petitioner would have sought to prove that Slick could have presented the testimony of cousins, aunts, uncles, siblings, a grandmother, a former employer, a school friend and the friend's mother and father, who was a minister, to make a compelling case for a sentence less than death. (See, e.g., 1993 Habeas Corpus Petition, exhibits 29-32, 34-39, 45-48, 50-56.) Expert witnesses could have been presented to inform the jury that petitioner suffers from temporal and frontal lobe damage, as well as from symptoms of Fetal Alcohol Syndrome. His brain damage has resulted in an organic mood disorder. (*Id.* exh. 41.) Neuropsychological testing reveals clear and consistent evidence of cognitive and brain dysfunction. Petitioner's IQ is within the range of mental retardation. (*Id.* exh. 42.) His childhood and adolescence was filled with physical and emotional deprivations, neglect and abuse which would have overwhelmed the coping capacities of any child. Petitioner's family history was replete with multi-generational poverty, child neglect, child abandonment, physical, sexual and psychological abuse and violence, alcoholism and drug abuse, as well as undiagnosed and untreated mental illness. (*Id.* exh. 40.)

In addition, petitioner would have sought to show at the hearing that Slick

on Slick's tactical decision-making, the Referee has not only mis-applied *Frierson*, but also denied petitioner his constitutional rights to a full and fair hearing.¹⁹⁹ (See Exceptions, sec. C.7., *post*.)

The Referee's Report also concludes that Slick had reason to believe that the testimony of eyewitness Susana Camacho would not have been probative. (Report pp. 27-27.) This conclusion is not supported by substantial evidence. Although the probative value of the testimony Camacho could have given was not particularly great when considered in isolation, her testimony could have bolstered a mistaken identity defense that included testimony from Michael Stewart and was therefore worth presenting.

As to Susana Camacho, the Report states that she had "a very limited memory of the events of February 1983" and that her "other statements

inadequately investigated and therefore failed to rebut the prosecution's aggravating evidence. Had he conducted reasonable investigation, Slick could have shown the jury that at least one of petitioner's juvenile convictions, for lewd and lascivious behavior, was unfounded. (See 1993 Habeas Corpus Petition, pp. 282-284, 258-259; exhibits 45-47, 52.) Slick could also have presented evidence showing that the prosecution's characterization of the juvenile facilities in which petitioner was likely placed were non-punitive, nurturing places (see Statement of Facts, sec. A.3., *ante*). Slick could have shown that in fact petitioner's experience in these facilities was overwhelmingly harsh and that petitioner was damaged by the chronic maltreatment he endured in them. (1993 Habeas Corpus Petition at pp. 284-285; exhibits 43, 40, and 41.)

¹⁹⁹ To the extent that the Referee is weighing the probative value of Stewart's potential trial testimony against the weight of the prosecution's evidence (rather than merely relying on Slick's assessment), that assessment is also inappropriate. Although this will be discussed more fully in regards to Reference Question 9, *post*, *Frierson* does not call for such a balancing test. The question is whether some credible evidence supported the defense the defendant wished to present.

were also vague and uncertain.” (Report p. 27.) It is true that Camacho’s memory of the Pleasant Street shootings was substantially diminished in 2003. However, the best evidence of what Camacho would have said if called as a witness were two interview reports prepared prior to petitioner’s trial. (Exhs. 1, 43.) When the events were much fresher in her mind (see HT 1411-1412), Camacho described the man she saw running away from Anwar Khwaja’s car as white. On July 23, 1983, Camacho told an investigator for Otis Clements that the man she saw was white. (Exh. 43; see also, HT 1389.) On July 25, 1983, Camacho told petitioner’s trial investigator Kristina Kleinbauer that she had repeatedly told police that the man was white. (Exh. 1; see also, HT 1390.) Petitioner is an African-American with very dark skin. (Exh. 63.) Even if Camacho got only a cursory look at the perpetrator, her description of the man as white tended to eliminate petitioner. (See *People v. McDonald*, *supra*, 37 Cal.3d at pp. 358-360, 375-376.) Thus it had some probative value.

The Referee relies on the fact that Camacho’s memory has dimmed over the years, yet fails to acknowledge that in July 1983, Camacho consistently reported that the man was white.²⁰⁰ Therefore, his conclusion that her testimony would not have been probative should be rejected by this Court. A reasonable juror who heard Camacho’s 1983 account may well have concluded that she saw someone other than petitioner.

As to Zarina Khwaja, the Report concludes that “her ability to have identified or eliminated anyone during the 1983 trial was minimal because she did not get a good look at the man who shot her brother.” (Report p.

²⁰⁰ The Report makes no mention of exhibit 43 or Camacho’s testimony about it.

28.) This finding is supported by substantial evidence, including the witness' testimony at petitioner's preliminary hearing (CT 17, 22) and at the evidentiary hearing (HT 1598, 1604).

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QUESTION 8:

Did petitioner tell or make clear to Slick's investigator that he wanted to put on a guilt phase defense? If so, when did he do so and did the investigator relay that investigation to Slick?

In response to Reference Question 8, the Referee states: "Mr. Slick was not able to answer the first part of this question. (H.T. 810). This Court concludes by a preponderance of the evidence Petitioner did not tell or make clear to Ms. Kleinbauer that he wanted to put on a guilt phase defense." (Referee's Report at 28.) Petitioner objects to this finding because it is not supported by substantial evidence. In fact, it is not supported by *any* evidence.

Petitioner testified at the reference hearing that he told Kristina Kleinbauer he wanted defense witnesses called at the trial. (HT 1858-59, 1861, 1927-28, 1930, 1943.) Kleinbauer testified that petitioner always expressed a desire to defend and to call witnesses (HT 313, 438, 447-49; exh. H, ¶ 4), and that he never said anything to cause her to believe he would agree with a decision not to present a defense (HT 319-20, 436). As the Referee acknowledged, Slick admitted that he could not speak to what petitioner said to Kleinbauer. (Report at 23; HT 810.) In fact, there was no evidence adduced at the hearing that directly contradicted the mutually corroborating testimony by petitioner and Kleinbauer that he told or made clear to her that he wanted to put on a guilt phase defense.

The testimony by petitioner and Kleinbauer was corroborated by other evidence: Exhibit 1, Kleinbauer's contemporaneously prepared reports

of her interviews with petitioner and her investigation;²⁰¹ exhibit 15, petitioner's undated letter to Slick; petitioner's *Faretta* hearing statements about the incomplete investigation;²⁰² Ms. Kleinbauer's May, 2000 declaration;²⁰³ the testimony of Jeffrey Brodey, who represented petitioner on his motion for a new trial;²⁰⁴ and the testimony of L. Marshall Smith, who represented petitioner on direct appeal.²⁰⁵ In addition, petitioner's desire to defend the case is consistent with the uncontradicted evidence that he steadfastly maintained his innocence. (HT 228, 264-65 [Kleinbauer];²⁰⁶

²⁰¹ While Kleinbauer's reports do not contain a specific statement that petitioner desired to defend, the plain inference is that petitioner insisted on his innocence, told her what he was doing at the times of the offenses, supplied names of witnesses, etc., *because* he wanted a defense at trial. There was no other reason for petitioner to make the statements contained in Kleinbauer's report.

Furthermore, the investigation that was conducted corroborated petitioner's account, establishing that he had alibi witnesses and that the eyewitnesses to the homicide had exculpatory information. The results of investigation do not support an inference that petitioner discovered he had no basis for a defense.

²⁰² RT 1-7 (Aug. 10, 1983); RT 8-20 (Aug. 11, 1983); RT 391-92 (Aug. 16, 1983); RT 393 (Aug. 17, 1983).

²⁰³ Exhibit H, ¶ 4.

²⁰⁴ HT 54, 126, 135.

²⁰⁵ HT 1187-88 (Brodey).

²⁰⁶ Petitioner told Kleinbauer that he was not involved in the offenses charged against him and that there were witnesses who could help prove his innocence. (HT 227, 455-56.) Kleinbauer interviewed the witnesses named by petitioner, and others, and obtained exculpatory information. (Exh. 1; HT 236, 238, 247, 249, 250-55, 258-59, 262-63, 314-17.)

HT 561 [Slick]; HT 1858-59, 1861, 1927-28, 1930, 2043 [petitioner]; exh. 1, p. 2; RT 15 [Aug. 10, 1983].)

In finding that petitioner did not tell or make clear to Kleinbauer that he wanted to defend, the Referee has ignored all of this evidence. Although the Referee cites to his findings in Reference Question 1(b), those findings do not acknowledge petitioner's testimony that he told Kleinbauer that he wanted witnesses to be called at trial on his behalf. Nor do they recognize Kleinbauer's testimony to the same effect. Instead, the Referee offers therein various reasons for discounting Kleinbauer's testimony in general. As petitioner has demonstrated in his exceptions to the findings to Reference Question 1(b), however, the Referee's analysis of Kleinbauer is deeply flawed.

In sum, because there is no evidence to contradict the mutually consistent testimony by petitioner and Kleinbauer that he told or made clear to the investigator that he wanted to defend, the Referee's contrary finding is unsupported by the evidence and should be rejected by this Court.

Further, the evidence supports a finding that Kristina Kleinbauer relayed petitioner's desire for a defense to Slick. Slick "delegated to Ms. Kleinbauer the job of identifying and interviewing potential defense witnesses."²⁰⁷ (Report at 15). Kleinbauer and Slick testified that she told Slick petitioner said he was innocent and gave Slick the names of witnesses petitioner said could show he was innocent. Slick knew about Kleinbauer's

²⁰⁷ Ms. Kleinbauer had more frequent contact with petitioner than Slick. She interviewed him on June 15 and 17, 1983, and met with him on June 28 and July 29, 1983. (Exh. 9, entries for June 15, 17 and 28 and July 19, 1983; HT 452, 474-75.) She may also have spoken to petitioner at the jail in passing. (HT 444.)

interviews of these and other witnesses, which supported petitioner's alibi and a defense of mistaken identification. (HT 227, 231-35 [Kleinbauer]; HT 717-20 [Slick].) Kleinbauer had several contacts with Slick in 1983, during which she gave Slick additional information about the case and her investigation. (HT 234-35, 469-70, 266-67, 274, 277; exh. 9.)

Although Kleinbauer cannot relate the specific words she used during any discussion with Slick in 1983 (HT 476), she testified that she told Slick petitioner had not given any details about the crime because he was not involved in it. (HT 266-67.) Kleinbauer informed Slick that the four alibi witnesses she interviewed were credible and provided evidence helpful to the defense. (HT 289-90, 366-67.) She also told Slick that she believed Michael Stewart was a key witness in the case. (HT 378-80 [Kleinbauer]; HT 1023 [Slick].)

Although Slick claimed that he did not have a memory of Kleinbauer telling him that petitioner wanted to present a guilt phase defense (Report at 23), he admitted that Kleinbauer told him that defense witnesses should be called at the guilt phase (HT 811-12, 1025-26). He also acknowledged that Kleinbauer "could have" told him that she believed that the four alibi witnesses she interviewed would provide probative, credible evidence and would make good witnesses. (HT 1024-25.)

As petitioner has amply demonstrated, Slick's memory in general, and his memory regarding his contacts with Kleinbauer in particular, is very poor. (See, e.g., Statement of Facts, sections B.1.e.2. and B.1.e.11; Brief, sec. B.3.c., *ante*.) For example, he does not recall if Kleinbauer told him that petitioner said he was not at the scene of the crimes and he testified that looking at her report (exh. 1) would not help him remember (HT 722). Another example of Slick's admittedly poor memory came after his

testimony that he did not tell Kleinbauer petitioner's reaction when Slick told him that the prosecution's case was extremely strong. Slick then admitted: "But I have to say that's - - I don't put a lot of reliability on that. It was a long time ago." (HT 1024.)

In addition to Slick's demonstrably poor memory, his attitude towards Kleinbauer and her role in the case mitigates against a finding that his failure of recollection is evidence that Kleinbauer did not tell him petitioner wanted to defend. Slick viewed Kleinbauer's role as "gathering information." (HT 1027.) Kleinbauer wanted to discuss and be part of the decision about what to do in this case, but Slick considered her participation inappropriate; he was the attorney and he decided how to proceed independent of Kleinbauer's views. (HT 812.) In fact, Slick rejected Kleinbauer's recommendations about how to proceed in the case. (*Id.* at 1025.) He believed that the decision to call witnesses was his to make; he "was responsible for that, and it was [him] alone" who made the decision "without [Kleinbauer's] input." (*Id.*; see also, HT 1027-28 [Slick did not engage in any discussion with Kleinbauer of his analysis of the witnesses; he was responsible for deciding whether to call witnesses].)

In summary, there is strong evidence that Kleinbauer communicated to Slick that petitioner desired to defend. The Referee, however, has failed to address this evidence because he unreasonably concluded that petitioner had not told or made clear to investigator Kleinbauer that he wanted to defend against the guilt charges.

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Reference Question 9

Would the potential witnesses, if any, identified by petitioner have been credible, would they have enabled Slick to put on a credible defense . . .

The Referee concludes that the potential witnesses identified by petitioner would not have been credible and would not have enabled Slick to put on a credible defense. (Referee’s Report p. 28, citing Findings to Reference Questions 1, 3, and 7.) These findings are not supported by substantial evidence.

As petitioner has already demonstrated, the potential witnesses known to Slick, including the alibi witnesses and the mistaken identification witnesses, would have been credible and their testimony would have been probative. (See Exceptions, Questions 3 and 7, *ante*.) A reasonable juror in possession of this evidence could have concluded that the witnesses were telling the truth and that the state had failed to sustain its burden of proof.

When this Court asks whether the witnesses would have enabled Slick to put on a credible defense, petitioner believes that it is referring to *People v. Frierson*’s holding that counsel may not refuse to present a defense at the guilt phase of a capital trial if the defense is supported by some credible evidence. (39 Cal.3d at pp. 812, 817-818; see also *People v. Burton, supra*, 48 Cal.3d 843, 856.)²⁰⁸ And, as petitioner has demonstrated

²⁰⁸ In *People v. Burton*, this Court noted that in *Frierson* it did “not reach the question whether a defendant has a right to insist on the presentation of a defense which has no credible evidentiary support or which no competent counsel would use, since counsel in *Frierson* actually presented the evidence defendant wanted used in his defense, but insisted on presenting it at the penalty phase rather than at the guilt phase.” (48 Cal.3d 843, 856.) In petitioner’s direct appeal, the Court rejected a *Frierson* claim because the appellate record did “not show that any defense

earlier in this brief, “some credible evidence” is not a demanding standard. The diminished capacity evidence which Frierson’s trial attorney refused to present in the guilt/special circumstances phase – but did present in the penalty phase – was not persuasive enough to convince even one juror to vote against a death sentence. In fact, this Court acknowledged in *Frierson* that a capital defendant has a right to present a defense even if the evidence he wants put before the jury is ultimately harmful to his case. (See Brief, sections A. and C., *ante*.)

During petitioner’s hearing, the Referee recognized that the “some credible evidence” standard sets a “pretty low threshold.” (HT 502.) Yet in making his findings the Referee inexplicably applied an inappropriately stringent standard when he assessed whether Slick could have put on a credible defense. The Referee does so by purporting to weigh the potential defense evidence against the evidence the prosecutor put on at trial. The Referee concluded in his Report that the witnesses petitioner’s attorney could have called on his behalf would not have enabled Slick to present a credible defense because of, *inter alia*, the confession evidence (see Report pp. 25, 27) and “other compelling evidence” against petitioner (*id.* p. 27).²⁰⁹

The Referee has erred in weighing the potential defense evidence against the prosecution’s evidence. This Court in *Frierson* did not engage

[petitioner] wished to present had credible evidentiary support.” (*Id.* at p. 857.) Because petitioner has demonstrated in these reference proceedings that there was credible evidentiary support for his desired defenses, this Court need not reach the question left open in *Frierson*.

²⁰⁹ Although the Report does not indicate what this purportedly compelling evidence is, presumably it is the prosecution’s eyewitness evidence since that was the only other evidence presented at petitioner’s trial.

in any such weighing. Petitioner's ability to exercise his fundamental constitutional right to present a defense in the guilt phase of his capital case cannot be contingent upon the strength of the state's. Because the Referee is addressing a mixed question of law and fact, his resolution of this issue is not entitled to deference by this Court. (See *In re Lucas, supra*, 33 Cal.4th at p. 694.) Moreover, because the Referee has applied an incorrect legal standard in determining whether Slick could have presented a credible defense, this Court should reject his findings.

Petitioner also emphasizes that he was not in this evidentiary hearing given the opportunity to establish the weaknesses in the state's evidence against him. The Referee repeatedly indicated that the scope of the hearing was quite narrow and made clear that the hearing did not encompass a general challenge to the confession and eyewitness identification evidence presented by the prosecution at petitioner's trial. (See, Exception, sec. C.1, *post*.) It is unfair to now use that evidence to find that the witnesses Slick could have called would not have enabled him to present a credible defense.

The Referee exacerbated this error by refusing to consider actions Slick could have taken at trial to bolster the testimony of the alibi and mistaken identification witnesses. In briefing presented to the Referee, petitioner demonstrated how Slick could have effectively cross-examined the prosecution's witnesses and taken other steps to strengthen the defense he could have presented in petitioner's guilt phase. (Memorandum of Points and Authorities in Support of Petitioner's Proposed Findings of Fact, pp. 130-166.) Although the testimony of the potential defense witnesses without more constitute some credible evidence for the purposes of *Frierson*, there is no reason why the Referee, and this Court, should not

look at actions Slick could have taken using the facts known to him prior to trial.

The Referee dismisses petitioner's efforts in this regard as irrelevant. The Report states: "Petitioner suggests in his Proposed Findings of Fact a variety of ways in which Mr. Slick could have attacked the People's case at trial or how better strategic decisions could have been made. But these observations would be more apt if the issue before this Court was ineffective assistance of counsel and not the *Freierson* [sic] related questions set forth by the Supreme Court." (Referee's Report p. 28.) The Referee has misunderstood the significance of the evidence upon which petitioner relies. Petitioner did not offer it to challenge Slick's strategic decision-making. The reasonableness of Slick's tactical decisions is not relevant to the issue before this Court and was not litigated by the parties below. Thus, whether Slick was reasonable or not in his decision to cross-examination the prosecution witnesses in any particular way, for example, is not before this Court. That is a different question, however, from asking whether there was evidence known to Slick which he could have used to cross-examine the state's witnesses in a manner that supported the defenses petitioner wanted him to present. Because the Referee dismissed this evidence out of hand, his conclusions about whether Slick could have presented a credible defense should be rejected. (See *Taylor v. Maddox*, *supra*, 366 F.3d at 1001.)

As petitioner will show below, Slick could have easily enhanced the probative value of the testimony of the potential defense witnesses by demonstrating to the jury serious weaknesses in the state's identification case and by challenging William Collette's testimony that petitioner had made an oral, unrecorded confession.

1. State's Identification Case

At petitioner's trial, the prosecution's identification case consisted of the testimony of three witnesses. Robert Cordova and Anwar Khwaja identified petitioner in court as the man responsible for the offenses on E. Pleasant Street. (RT 365, 352.) Lisa Searcy identified petitioner as the man who robbed her and Margie Heimann at a K-Mart store. (RT 344.) Slick conducted minimal cross-examination of these witnesses.²¹⁰ During closing argument, the prosecutor emphasized that there was no reason to question the identifications made by these witnesses. (RT 398-400.) In fact Slick had ample means to show petitioner's jury that the identifications by each of the witnesses was of questionable reliability.

The California and United States Supreme Courts have long recognized the inherent weakness of identifications based on human perception and recall. In *People v. McDonald*, *supra*, 37 Cal.3d 351, 363, this Court quoted the U.S. Supreme Court when it stated: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identity." (*United States v. Wade* (1967) 388 U.S. 218, 228.)" This Court in *McDonald* emphasized that: "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (37 Cal.3d at p. 363, quoting 388 U.S. at pp. 228-229.)

At the time of petitioner's trial, there was a wealth of scientific and

²¹⁰ Slick conducted only perfunctory cross-examination of Robert Cordova, which consumed less than three pages of reporter's transcript. (See RT 367-369.) Slick's cross-examination of Anwar Khwaja was a bit longer, but not particularly searching. (See RT 356-363.) Slick's cross-examination of Lisa Searcy consumed slightly more than one transcript page. (RT 346-347.)

legal literature exploring the dangers of eyewitness identification. (See *People v. McDonald, supra*, 37 Cal.3d at pp. 364-365 [collecting published studies, including Loftus, *Eyewitness Testimony* (1979)²¹¹]; *Cal. Criminal Defense Practice*, § 31.01[2] [citing articles].) There was also case law addressing the issue. In *Neil v. Biggers* (1972) 409 U.S. 188, 199-200, the U.S. Supreme Court listed factors to be considered in evaluating the reliability of an eyewitness' identification. These factors include: the accuracy of the witness' prior description of the perpetrator, the opportunity of the witness to view the perpetrator at the time of the crime, the witness' level of certainty demonstrated at the time of identification, the witness' degree of attention, and the length of time between the crime and the identification. In *McDonald*, this Court identified additional factors which could lead to a reasonable doubt as to the accuracy of an identification. These factors include, inter alia, whether the event was sudden and unexpected, whether the witness was afraid or under stress at the time of perception, and whether the witness has observed someone of a different race. (37 Cal.3d at p. 375.)

As petitioner will demonstrate, in his case each identification was made after only a single brief observation of the perpetrator, under stressful circumstances, while the observer was afraid. Each was a cross-racial identification, made either for the first time in the highly prejudicial setting of a courtroom or preceded by an equivocal identification from an unduly suggestive photographic lineup. Slick could have used these and other factors to show petitioner's guilt phase jury that *none* of the state's

²¹¹ The title page of this book was marked for identification only at the evidentiary hearing as exhibit 51. (HT 1439, 2129.)

eyewitness identifications was obtained under circumstances that inspired confidence in their accuracy.

Robert, Larry and Del Cordova are three brothers who were living on E. Pleasant Street in February 1983. The brothers were in their apartment at the time of the Khwaja shooting. After hearing gunshots, they looked out their window and observed the gunman flee the scene. The brothers were interviewed by Long Beach police at the scene and gave a description of the man they saw. (Exh. K. at p. 23.)

Only Robert was called as a witness by the prosecution at petitioner's trial. He identified petitioner as the man he had seen. (RT 365.) Many of the factors discussed above could have been brought to the jury's attention to raise reasonable doubt as to the accuracy of his identification. First, Slick could have used police reports to elicit evidence that petitioner's appearance differed greatly from the description provided by Cordova of the perpetrator to the police. (See *Neil v. Biggers, supra*, 409 U.S. at p. 199.) According to officer Valles, Robert and his brothers described the man they saw as a black male, 6'1" tall, weighing 200-220 pounds. The man was in his thirties, with pock marks and/or scars on his right cheek. (Exh. K. at p. 23.)²¹² Petitioner was younger, shorter and weighted 40-60 pounds less. (*Id.* at p. 51.) His face was unblemished. (HT 1325 [Black]; exh. 20.) The jury did not know about Cordova's description to police.

²¹² The Referee declined to hear from Robert Cordova at petitioner's evidentiary hearing. (HT 1623-1624.) If Cordova had been permitted to testify, he would have said that he believes this police report accurately reflects the description he and his brothers provided of the perpetrator. (See exh. 47 [marked for identification only].)

In addition, Slick could have established and exploited the facts that Robert Cordova's opportunity to observe the gunman was extremely limited and that he observed the gunman under stressful conditions. (See *Neil v. Biggers, supra*, 409 U.S. at p. 199.) Cordova admitted in his trial testimony that he saw the shooter for only five seconds or so. (RT 367.) Using Cordova's preliminary hearing testimony, Slick could have further established that the witness primarily saw the man from a side view and only saw his full face for one second. (See CT 35-36.) Slick also could have elicited that Cordova was a substantial distance from the perpetrator when he made this very brief observation. The jury did not know that Cordova was 60-75 feet away from the man he saw running. (See Exceptions, Question 7, *ante*.) Slick could have further brought out the fact that Cordova was afraid for his own safety at the time of the observation. (See CT 32, 34.)²¹³

Finally, Slick could have made the jury aware of the very suggestive circumstances under which Robert Cordova identified petitioner. The jury did not know that Cordova's first opportunity to view a possible suspect and identify the man Cordova saw running down E. Pleasant Street came during an earlier court proceeding (CT 36-37),²¹⁴ an inherently suggestive

²¹³ If Robert Cordova had testified at the evidentiary hearing, he would have confirmed that he was very scared and nervous at the time of the shooting, and that he might have mis-identified petitioner since he saw the gunman only a second, from a "far-away" distance. (Exh. 47 [marked for identification only].)

²¹⁴ Robert Cordova testified at the preliminary hearing that his first identification of petitioner came on the preceding Friday, when he had come to court to testify and saw petitioner and two others sitting in the courtroom, although Cordova did not inform anyone at that time that he recognized petitioner. (CT 37.) Cordova has since declared that prior to

situation. (See *People v. Palmer* (1984) 154 Cal.App.3d 79, 87-88 [asking a witness to make an identification in court is even more suggestive than exhibiting a single suspect to the witness outside of court].)

In sum, Slick could have given the jury ample reason to question the reliability of Robert Cordova's identification of petitioner by showing how limited the witness' opportunity to view the perpetrator was and that the identification was made under highly suggestive circumstances.

Slick could have also demonstrated to the jury that Anwar Khwaja's identification of petitioner was not reliable. As it was with Robert Cordova, the jury was unaware that the *only* identification Mr. Khwaja made of petitioner came in the prejudicial setting of the courtroom. (See *People v. Palmer, supra*, 154 Cal.App.3d 79, 87-88.) Slick could have made it known to the jury that Khwaja had never been asked to look at a live or photographic lineup prior to trial. (See, generally, RT 348-363 [Khwaja's trial testimony].) In fact, Khwaja's first opportunity to identify the man who shot him came almost six months after the crime occurred, when petitioner was already on trial for killing Khwaja's mother.

Slick also could have presented testimony that Anwar Khwaja did not provide a description of the perpetrator to police. (See *Neil v. Biggers, supra*, 409 U.S. at p. 199.) Remarkably, Khwaja remained conscious at the

the Friday proceeding, police had shown him a single photograph of petitioner and told him that they believed it was of the man who had shot the Khwajas. (Exh. 47 [for identification only].) As petitioner has noted, the Referee refused to hear from Robert Cordova. (HT 1624.) Because petitioner was prevented from calling Cordova and thereby demonstrating the weakness of his trial identification of petitioner, it is unfair for the Referee to rely on the prosecution's eyewitness identification evidence to find that Slick could not have presented a credible defense.

scene of the shootings and was able to provide police with substantial information about what had occurred. (See exh. K., at pp. 3, 11; see also, RT 355, 362.)²¹⁵ Although Khwaja was able to say that his assailant was a black male, and wielded a blue steel revolver in his right hand, Khwaja failed to give any further description of the gunman.²¹⁶

In addition, Slick could have made the jury understand the importance of the facts that Anwar Khwaja observed the gunman only briefly and under great stress. Khwaja testified that the gunman came upon him suddenly; Khwaja did not see him approach. (RT 352.) The man immediately put a gun to Khwaja's face, demanded money, and shot at him twice. The man then grabbed the bank bag and ran off. Khwaja lost his right eye as a result of the shooting. (RT 354-355.) Mr. Khwaja

²¹⁵ Anwar Khwaja told police the following: that he was the owner of the 7-11 Store at 4200 Long Beach Boulevard; that he had stopped across the street from his sister's apartment and was going to pick up her and their mother and take them to the bank to make a deposit; that he sent his nine-year-old daughter Zohara to get them; that as his sister started to get into the passenger side of his car, a male Negro approached his window and demanded money; that the suspect suddenly opened the driver's door, lifted up a blue steel revolver in his right hand and shot the witness one time in the head, then reached into the back seat where he removed a white canvas money bag from the Bank of America full of cash receipts from the floor; that the suspect fired one more shot across the front seat of the car and then started running eastbound on Pleasant; and that he saw his mother approaching his car from the apartment building on the north side of the street, heard another gunshot, but was unaware of anything else that happened. (Exh. K., at pp. 3, 11.)

²¹⁶ Otis Clements told police that petitioner used a black gun with brown wooden grips. (Exh. K., at p. 37.) Obviously this did not match Khwaja's description. The gun was never recovered. No ballistics evidence was every produced by the prosecution, although at one bullet apparently lodged in the dashboard of Khwaja's car (*id.* at p. 3).

acknowledged that he saw his assailant for a “very short period” and that a lot was happening during this brief time. (RT 358.) In light of this evidence, Slick could have persuasively argued that Khwaja’s in-court identification of petitioner was unreliable.

Finally, Slick could have impeached Anwar Khwaja by pointing out various inconsistencies between Khwaja’s trial testimony and the information he provided to police. (See *People v. McDonald, supra*, 37 Cal.3d at pp. 355-356. [discrepancies between account witness gave at trial and that he gave earlier to police is a factor that contributes to reasonable doubt as to accuracy of the witness’ identification].) Most notable was the discrepancy about whether Khwaja had been to the Bank of America before or after the robbery and whether he was robbed of cash receipts or coins. In his testimony, Khwaja stated that he had been coming from the bank and was going to his sister’s home, to take her and their mother to see a new apartment. (RT 349, 351.) He testified that he had already been to the bank, and was robbed of \$190 in coins he had obtained to use as change in his store after depositing the store’s cash receipts. (RT 349-350, 355.) Khwaja told the police, however, that he was on the way to the bank, and was robbed of the money he was going to deposit. (Exh. K, at p. 11.)²¹⁷

²¹⁷ Anwar Khwaja’s sister Zarina also told police that her brother was picking her and her mother up to take them to the bank. She said nothing about looking for an apartment. (Exh. K., at p. 4.) In her evidentiary hearing testimony, Zarina Khwaja testified that her brother was picking her and their mother up to go to the mosque for Friday prayers. (HT 1610.)

Whether Anwar Khwaj was coming from or going to the bank, and whether coins or cash receipts were taken from him, were facts of critical importance. If Slick had demonstrated that Khwaja had not yet been to the

There were other inconsistencies. Khwaja told police that although he saw his mother approaching his car and heard a gunshot, he did not see anything further. (Exh. K., at p. 3.) At trial, however, he claimed that he saw the gunman shoot at his mother and watched her fall to the ground. (RT 355.)²¹⁸ Khwaja also told police that the gunman had opened the door to his car (exh. K., at p. 3), but at trial Khwaja testified that he himself opened the door in preparation for his mother or sister to enter (RT 353.)²¹⁹ Slick could have also impeached Khwaja's testimony that the gunman laughed after shooting him (RT 355) with Khwaja's failure to report this seemingly memorable fact to police at the scene.

These inconsistencies, along with Khwaja's limited opportunity to

bank, petitioner's alleged confession, as well as Clements' second and third confessions, would have been proven false. If Khwaja had already made the deposit, Slick would have had additional evidence of the inaccuracy and unreliability of the police reports in petitioner's case. Remarkably, neither Slick nor the police took the simple step of checking with Bank of America to see if Khwaja had made a deposit on February 25, 1983. (See generally, exhs. I, 36 and 63 [Slick's files]; exh. K [police reports].)

²¹⁸ It would be surprising if Anwar Khwaja had been able to see the gunman shoot his mother. Police reports suggest that Gulshakar Khwaja was approximately 70 feet away from her son's car when she was shot. (See exh. K., at pp. 5, 6 [officers unable to find any blood on the ground to indicate that victim had moved any distance after being shot].) Khwaja sustained a serious injury to his right eye (RT 354-355), and his eyeglasses were broken by the impact of the shooting (RT 653 [retrial].)

²¹⁹ Zarina Khwaja confirmed, in her preliminary hearing testimony, that the gunman opened Anwar's car. (CT 16.) Zarina did not testify at trial, however. If Slick had presented evidence at the guilt phase that the man who shot the Khwajas had opened the car door, he could have argued that the prosecution's failure to produce any fingerprint evidence inculcating petitioner tended to show that petitioner was not involved.

view the man who shot him, the passage of six months between the crime and the purported identification, and other pertinent factors which Slick could have established, would have given the jury a firm basis upon which to find the Anwar Khwaja's identification of petitioner was made in error.

There was also substantial evidence, even in the police reports, that could have been used to undermine the identification of petitioner made by K-Mart robbery victim Lisa Searcy. Most importantly, Slick could have made it known to the jury that Searcy had made a pre-trial identification of petitioner which was equivocal and was made after viewing a highly suggestive photographic lineup. Searcy was shown by detective Collette a lineup that included two outdated photographs of petitioner. (Exh. K. at p. 78.) Despite the extreme suggestiveness of this lineup,²²⁰ Searcy was unable to make a certain identification of petitioner. She stated only, "[t]his looks the same" when she selected the second of petitioner's two pictures. (Exh. K., at p. 78; see *Neil v. Biggers, supra*, 409 U.S. at p. 199; *People v. Palmer, supra*, 154 Cal.App.3d at p. 87 [some of "positive" in-court identifications were preceded by equivocal photographic lineup identifications].) Petitioner's guilt phase jury knew nothing of this prior equivocal identification. (See, generally, RT 343-348.) All it heard from

²²⁰ Petitioner sought to definitively establish the extremely suggestive nature of a lineup which includes two photographs of one person, by proffering the testimony of Dr. Steven Clark. (See exh. 50, p. 10 [marked for identification only].) The Referee declined to hear from Dr. Clark. (HT 1444.) For the Referee to prevent petitioner from proving the unreliability of Searcy's identification but then rely on it when finding that the defense evidence would not have been credible denies petitioner of a full and fair adjudication of his claim. (See Exceptions, sec. C.3.a., *post*.)

Searcy was her certain identification of petitioner in the courtroom. (See RT 346.)

Slick also could have established and argued that Searcy saw the robber for a relatively short period, did not have an unobstructed view of him and was under great stress during the incident. (See *Neil v. Biggers*, *supra*, 409 U.S. at p. 199; *People v. McDonald*, *supra*, 37 Cal.3d at p. 361, 363-364.) Slick could have elicited at trial the facts that the K-Mart robber appeared suddenly (see CT 9) and that Searcy was afraid for her life during her encounter with the man (exh. K., at p. 75). Slick could have argued that Searcy's view of gunman was partially obstructed, since Searcy was sitting in the passenger seat with Heimann between her and the robber. (See RT 344.) Slick also could have argued that Searcy had overstated the duration of the encounter. (See *People v. McDonald*, *supra*, 37 Cal.3d at pp. 367, n. 13, 375-376.) Although Searcy estimated that the gunman was at the truck for five minutes (RT 347), the events she described could not have lasted that long.²²¹ However long the encounter lasted, it is apparent from her testimony that Searcy spent only some portion of it looking at the perpetrator's face.

Finally, Slick could have shown the jury that the gun described by the K-Mart victims did not match the gun described by the Khwaja

²²¹ Searcy testified that the gunman approached the driver's side of Heimann's truck and demanded money. She and Heimann both took money from their purses and gave it to the man. He then told them to put their purses on the floor and threatened to shoot them if they were withholding money. He told Heimann to start the truck and drive away, and warned them not to look back at him. Searcy and Heimann said nothing to their assailant during the encounter, and obeyed his commands. (RT 344-346.)

eyewitnesses, tending to establish that the crimes were not committed by the same person. Significantly, the K-Mart victims seemed quite certain that the gun they saw was a .22 caliber weapon, as they gave a fairly specific description of it. They reported to police that the gun was a small black or blue steel .22 caliber revolver, similar to a starter pistol or the RG model .22 Saturday Night Special. It had a short barrel. (Exh. K., at pp. 74-76.) In contrast, the robbery-homicide eyewitnesses reported seeing a longer barreled .38 caliber weapon. (Exh. K., at p. 12.)²²² The K-Mart victims also described their assailant's clothing in a manner that raised a question as to whether one perpetrator had committed both crimes. They reported to police that the K-Mart robber was wearing a blue nylon ski jacket, black painters pants, and a dirty white baseball cap. (Exh. K., at p. 74.) None of the E. Pleasant witnesses described seeing similar clothing on the man who shot the Khwajas. (See exh. K., at p. 22.) In fact, Michael Stewart's description of the jackets worn by the two men involved in the Khwaja offenses did not match the jacket seen by Searcy and Heimann.

Slick could have brought out these facts at petitioner's trial to create doubt in the minds of the jurors as to whether Lisa Searcy had correctly identified petitioner and whether the person who committed the K-Mart robbery was the same man who committed the Khwaja offenses. The prosecution contended that petitioner had confessed to both the K-Mart

²²² Otis Clements claimed to police that petitioner had used a .38 caliber weapon (exh. K., at p. 37), which he described as “[b]ig, heavy. Not a small but a heavy, heavy gun, big gun.” (Exh. 25, at p. 10 [marked for identification only]). Although a copy of the tape recording of Clements' third confession (exh. 24) and a transcript of it (exh. 25) were not admitted into evidence at petitioner's hearing, Slick testified that he listened to the tape prior to petitioner's trial (HT 669).

robbery and the Khwaja robbery-homicide. Therefore, evidence tending to show that petitioner had not robbed Searcy and her friend would have provided Slick with powerful evidence with which to argue that the alleged confession was fabricated and that petitioner was not involved in the killing. (See, e.g., *Baylor v. Estelle* (9th Cir. 1996) 94 F.3d 1321, 1325 [evidence creating reasonable doubt that defendant committed first rape would necessarily have raised reasonable doubt about the validity of his confession to second rape, since both convictions were based on same confession].) Petitioner's jury never knew, however, that Searcy's identification of petitioner was of questionable reliability.

With the information known to him at the time of petitioner's trial, Slick could have used cross-examination and argument to the jury to effectively undermine the reliability of the identifications made by the state's witnesses of petitioner. (See *Cal. Crim. Defense Practice*, § 31.01[3][a], citing *People v. Breckenridge* (1975) 52 Cal.App.3d 913, 935-936 [standard trial techniques such as cross-examination and jury argument can be used to demonstrate weakness of the People's identification evidence].)

In addition to conducting cross-examination of the state's witnesses, Slick could have presented the testimony of an expert on eyewitness identification to inform the jury of various psychological factors that may affect the reliability of eyewitness identification and help counter some common misperceptions many lay persons have about the nature of such identifications. (See *People v. McDonald, supra*, 37 Cal.3d at p. 361.)²²³

²²³ This Court's opinion in *McDonald* was issued in 1984, about a year after petitioner's guilt phase trial in August, 1983. However, the Court noted that the admissibility of such testimony was an issue

Expert testimony would have been particularly useful in disabusing jurors of the commonly held belief that cross-racial factors are insignificant. (See 37 Cal.3d at p. 362.) The Court in *McDonald* recognized: “it appears that few jurors realize the pervasive and even paradoxical nature of this ‘own-race effect,’ information that has emerged from numerous empirical studies of the question.” (*Id.* at p. 368.) All three of the prosecution eyewitnesses in this case were of a different race than petitioner,²²⁴ yet the jury was unaware of the inherent difficulties of making an accurate cross-racial identification.

Slick also could have requested the trial court to give a special instruction, similar to what is now CALJIC No. 2.92, that would have focused the jury’s attention on evidence from which it might have drawn a reasonable doubt as to the accuracy of the identifications. (*People v. Hall* (1980) 28 Cal.3d 143; *People v. West* (1983) 139 Cal.App.3d 606; see also,

“increasingly heard in the courts of California and our sister jurisdictions....” (37 Cal.3d at p. 355.) The Court found the trial court’s ruling to exclude the testimony of Dr. Shomer, the proffered expert, was unsupported by the law. (*Id.* at p. 376.) The fact that *McDonald* involved a capital crime which occurred in 1979, in Long Beach, demonstrates that there were qualified experts available to Slick and that other defense attorneys were pursuing this avenue at the time of petitioner’s trial.

Petitioner tried to introduce the testimony of Dr. Steven Clark to establish what an expert could have testified to in 1983, but the Referee refused to hear from Dr. Clark. It is inappropriate for the Referee to rely on the supposed strength of the prosecution’s identification case in making his findings of fact when petitioner was prevented from exposing the flaws in that evidence. (See Exceptions, sec. C.3., *post.*)

²²⁴ Petitioner is black. (Exh. K., at p. 51.) Anwar Khwaja is east asian. (*Id.*, at p. 1.) Robert Cordova is hispanic. (*Id.* at p. 10.) Lisa Searcy is white. (*Id.*, at p. 74.)

People v. Palmer, supra, 154 Cal.App.3d 79 [conviction reversed due to trial court's refusal to give proposed special instruction].)²²⁵

In sum, using information that was readily available to him, Slick could have shown the jury that the three eyewitness identifications were flawed, which in turn would have tended to corroborate testimony by witnesses he could have presented to say that petitioner was elsewhere when the crimes occurred and was not the man seen running down East Pleasant Street.

2. Confession

The authenticity of the confession was not litigated at petitioner's evidentiary hearing. (See Exceptions, sec. C.3.d., *post*.) Nonetheless, the record shows that there was information known to Slick prior to trial which would have allowed him to challenge testimony from detective William Collette that petitioner admitted committing the crimes during an unrecorded interrogation. (See generally, RT 371-382 [Collette's testimony].) Through cross-examination and argument to the jury, Slick could have created some doubt in the minds of the jurors as to whether Collette's claim that petitioner had confessed was true, which in turn would have supported the testimony of witnesses Slick could have presented that petitioner was not at the scenes of the crimes.²²⁶ Petitioner emphasizes that he is *not* attacking Slick's strategic decision-making by arguing that Slick

²²⁵ CALJIC No. 2.92 was adopted in 1984. It was based on *People v. West*, supra, with the addition of several other factors. (*People v. Wright* (1988) 45 Cal.3d 1126, 1141.)

²²⁶ Slick declined to cross-examine Collette. (RT 382.) Slick did not argue that the detective's testimony was unreliable. (See, generally RT 407-411 [Slick's guilt phase closing argument].)

should have challenged the confession evidence or that he unreasonably decided not to do so. Rather, petitioner seeks to show that Slick could have presented a credible defense had he followed his client's wishes to defend at the guilt phase.

As discussed more fully in petitioner's exceptions to the Referee's findings relating to Reference Question 2, *ante*, the investigation by Long Beach police in this case was seriously shoddy and incomplete. In *Kyles v. Whitley*, *supra*, the United States Supreme Court recognized: "When . . . the probative force of evidence depends upon the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." (514 U.S. at p. 446, n. 15; see also, *Bowen v. Maryland* (10th Cir. 1986) 799 F.2d 593, 613 [a common defense trial tactic is to discredit the caliber of the investigation]; *Lindsey v. King* (5th Cir. 1985) 769 F.2d 1034, 1042 [withheld *Brady* evidence carried potential for discrediting the police methods employed in assembling case].) Details of the investigatory process potentially affect the weight to be given to the evidence produced as well as the credibility of the officer conducting the investigation. (*United States v. Sager*, *supra*, 227 F.3d 1138, 1145.)

The poor quality of the police work in petitioner's case raised questions about the credibility of Collette, as one of the detectives in charge of the investigation, and the reliability of the evidence the investigation produced. Slick could have made the jury aware of the many shortcomings and questionable aspects of the investigation, thereby raising doubt about the truthfulness of the detective's testimony against petitioner and the probative value of his testimony that petitioner had confessed. Based on information Slick had available to him at the time of trial, he could have

elicited the following facts from Collette: that the police reports prepared by the responding officers conflicted on critical facts such as whether Michael Stewart and the Cordova brothers positively identified Otis Clements as the getaway driver, and the description of the perpetrator's gun; that despite these discrepancies, Collette caused no follow-up reports to be prepared resolving these important questions; that Collette obtained no signed statements from any of the witnesses or even had them review the police reports for accuracy; that misleading affidavits of probable cause for search and arrest warrants were filed; that Collette failed to show live or photographic lineups to the many available eyewitnesses to the Khwaja crimes; that he prepared an unduly suggestive photographic lineup for the K-Mart victims to look at, despite the availability of petitioner's booking photograph; that Collette failed to see that ballistics evidence was recovered and analyzed; that he failed to turn over exculpatory fingerprint evidence; that he made no efforts to determine and document how much was stolen from Anwar Khwaja, although police reports indicated that substantial cash receipts were taken but petitioner reportedly claimed to have stolen only \$100; that although petitioner claimed to have spent the stolen money on marijuana, no marijuana was found at 1991 Myrtle and petitioner was not under the influence at the time of his arrest; that Collette never investigated the possibility that Clements, who more closely resembled the description provided by the eyewitnesses, was the shooter; that Collette failed to search Clements' car or motel room for evidence, although Clements had enough time before his arrest to have driven to back to the motel; that although Collette claimed that petitioner refused to allow the detectives to record his interrogation, such a recording could have been made without petitioner's permission; and that Collette and his partner purposely misinformed the

media as to the location of petitioner's arrest, misinformed Elizabeth Black that petitioner had implicated her in the crimes, and threatened Black with arrest in order to gain the cooperation of her and her family. (See Exceptions, Question 2, *ante.*)²²⁷

Slick also had the option of eliciting testimony from Collette about statements made by Otis Clements, in which Clements implicated petitioner, to create a foundation from which to argue that the detectives had both the means and a motive to falsely claim petitioner confessed. Slick might have elicited from Collette that the detective had interviewed Clements three times (on February 25th and 28th) and petitioner twice (on February 25th), however the reports of all these interrogations were prepared on the same day, February 28, 1983. (Exh. K., at pp. 33-43, 54-58.) Thus, by the time Collette documented petitioner's purported confession, he had all the information he needed, from Clements and other witnesses, to create a plausible inculpatory statement he could attribute to petitioner. He also had the opportunity to ensure that the statement was reasonably consistent with the story given by Clements.

The fact that Clements repeatedly implicated petitioner also provided

²²⁷ Collette might have claimed, if examined about all of these shortcomings, that he saw no reason to continue his investigation after petitioner confessed. Slick could have quickly discredited any such testimony. By Collette's own assertion, on February 28th petitioner disavowed the purported confession and claimed that any inculpatory statements he made were out of fear of being framed. (See exh. K., at p. 58; see also, RT 380-381.) Thus Collette knew early on that a challenge of the unrecorded confession was a possible defense. Because Clements' confession would not have been admissible for its truth against petitioner, and there was little if any other evidence establishing petitioner's guilt, one would expect Collette to have thoroughly investigated the case, despite the alleged confession.

a motive for the officers to claim falsely that petitioner confessed. By the time the interrogation reports were prepared on the 28th, detectives had no eyewitness to the Pleasant Street shooting who had identified petitioner and no physical evidence linking petitioner to the crime, such as a gun, bank bag, inculpatory fingerprint evidence or robbery proceeds. And, at least according to police reports, they had no alternative suspects.²²⁸ (See Exceptions, Question 2, *ante*.) Fabricating a confession from petitioner was the easiest way to close the investigation and to protect their case against Clements as well.

While intentionally eliciting evidence of Clements' statements to police appears bold at first blush, in *Kyles v. Whitley*, *supra*, 514 U.S. 419, the U.S. Supreme Court suggested that defense counsel therein might have followed a very similar strategy in order to discredit the probative value of the prosecution's evidence as well as the police investigation itself.

In *Kyles*, the high court reversed that defendant's conviction because the prosecution failed to disclose to the defense several pieces of material evidence. (*Id.*, at p. 421-422.) This evidence included several statements by "Beanie," the man who first implicated Kyles in the homicide at issue and led police to physical evidence tying Kyles to the crime. (*Id.*, at pp. 424-430.) The court concluded that Beanie's statements, which changed repeatedly, were material because they would have allowed the defense "an opportunity to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." (514 U.S. at p. 445.)

²²⁸ Michael Stewart testified that the police indicated they had a second suspect, which they showed to him and the Cordovas in a second, undocumented showup. (Stewart, HT 597; see also, exh. 1.)

The court suggested that Kyle's lawyer might have called Beanie, who was not called by the prosecution, as a witness so that the inconsistencies in his statements could be elicited.

. . . Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for [the victim's] murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police."

(514 U.S. at p. 445.) The Supreme Court added that even if Kyles' attorney chose not to call Beanie to testify, the defense could have cross-examined the police witnesses about Beanie's statements:

Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.

(514 U.S. at p. 446.)

As in *Kyles*, the police in petitioner's case demonstrated a remarkably uncritical attitude, failing to consider that Clements was the shooter despite evidence that pointed to him. (See Exceptions, Question 2, *ante*.) By questioning Collette about Clements' statements, Slick could have given the jury reason to doubt the reliability of the state's evidence and the good faith of the detectives who conducted it. Moreover, the risk of presenting evidence of Clements' confession was mitigated by the fact that petitioner's jury already knew, from Collette's direct examination, that Clements had given a recorded statement to the police. (RT 382.) They likely surmised that Clements had inculpated petitioner, since the defense did not show otherwise.

In fact, Slick could have shown the jury that Clements was a liar who had every reason to blame someone else for the shooting after being caught “red-handed” driving the getaway truck 20 minutes after the homicide, wearing the jacket the shooter wore (see exh. K., at pp. 26, 24). Slick could have informed the jury, through Collette, that Clements tried in his first confession to completely exonerate himself and place all the blame on petitioner, even claiming that petitioner had threatened him at gunpoint (a claim he later dropped). Slick could have shown that Clements lied to police repeatedly, which cast doubt on the entirety of his story. For example, Clements’ told the police varying stories about whether he knew petitioner had a gun, whether the K-Mart robbery had occurred, whether he and petitioner checked out any banks, whether they followed Khwaja from the bank, whether Clements had agreed to be the getaway driver, and where he and petitioner separated after the Khwaja incident. (See exh. K., at pp. 33-34.) Clements also apparently lied about whether Rev. Vining had given him permission to use Vining’s truck. (See exh. K., at pp. 34, 79.) By eliciting the many lies told by Clements to Long Beach police, Slick could have made a strong argument that whether Clements was in fact the shooter or the driver, he had no reason to turn in his true co-perpetrator and every reason to falsely accuse someone like petitioner – someone he knew was in the area but whose fate was of no concern to him.

Slick also had the option of putting petitioner on the witness stand for the limited purpose of testifying that he did not make an inculpatory statement to Long Beach detectives. Such testimony would not have opened up petitioner to cross-examination on the charged crimes. (See *People v. Tealer* (1975) 48 Cal.App.3d 598.)

In sum, Slick could have presented a credible defense had he

honored petitioner's request to defend against the guilt charges.

3. . . . and did Slick have reason to believe that any would commit perjury if they testified as suggested by petitioner?

The Referee cites Slick's testimony that he did not believe that eyewitnesses Michael Stewart or Susana Camacho would lie. (Referee's Report p. 29, citing HT 813; see also HT 806, 808-808.) The Referee finds no evidence to conclude otherwise. (Report p. 29.) This finding is supported by substantial evidence, in that there was no evidence produced at the hearing to suggest either would lie.

The Referee then cites Slick's testimony that alibi witnesses Ora Trimble, Penny Black, Gloria Burton and Denise Burton "had every reason in the world to lie." (Report p. 29, citing HT 813.) The Referee concludes that he had no reason to doubt "the subjective conclusions of Mr. Slick." (Report p. 29.) This finding is not supported by substantial evidence, as it completely ignores the remainder of Slick's testimony on this issue as well as other relevant evidence. (See *Taylor v. Maddox, supra*, 366 F.3d at pp. 1007-1008.) Furthermore, Slick's subjective conclusions are irrelevant to the objective questions posted by this Court.

Slick admitted that none of the alibi witnesses had informed him that they would lie if called to testify. (HT 815.) He did not have "that kind of hard evidence" that they would commit perjury. (*Ibid.*) Therefore, he did not feel that he was in an ethical position that prevented him from calling the witnesses, had he judged their testimony helpful to petitioner's case. (HT 815-816.)²²⁹

²²⁹ See also, HT 921 (Slick did not believe the jury would conclude that the alibi witnesses, had they testified, were deliberately lying

Slick was correct in thinking that he was not ethically prevented from presenting the witnesses unless he had “hard” evidence that they would commit perjury. Although attorneys may not present evidence they know to be false, they may ethically present evidence that they suspect, but do not personally know, is false. (*People v. Riel* (2000) 22 Cal.4th 1153, 1217.) As demonstrated above, Slick had no personal knowledge that the witnesses would lie. In fact, a lawyer should not conclude that testimony will be false unless he or she had a firm factual basis for doing so. It is not enough that the attorney merely suspects the testimony will be false. (*Ibid.*)

Here, the Referee has relied merely upon Slick’s suspicion that the alibi witnesses might lie, although Slick readily admitted that he had no proof that they would. Moreover, Slick testified that his “subjective” belief that the four alibi witnesses might lie was based on their familial or romantic relationships with petitioner. (HT 813-815.) As petitioner has previously shown, such an assumption is unwarranted. (*Luna v. Cambra, supra*, 306 F.3d 954.)

Slick’s testimony that he had no hard evidence of possible perjury is corroborated by a lack of any proof that the alibi witnesses had colluded with each other and/or with petitioner to fabricate their accounts of the events of February 25, 1983. Ora Trimble testified at the evidentiary hearing that petitioner had never asked her to lie for him. She affirmed that she was telling the truth to the best of her ability. (HT 1260.) Elizabeth Black did not tell William Collette that she did not know where petitioner was on February 25th. (HT 1323-1324; see also, HT 1694-1696, 1711.) She testified that she would not lie about the events of February 25th because of

in an effort to save petitioner).

any feelings for petitioner, and that she was telling the truth. (HT 1365.) Denise Burton testified that she had no contact with petitioner after his arrest (HT 1515) so he could not have asked her to lie for him. Each witness also testified that she had told investigator Kleinbauer what had occurred on February 25th to the best of her recollection at the time of interview. (HT 1262 [Trimble]; HT 1326, 1352-1353 [Black]; HT 1511 [D. Burton].)

Kristina Kleinbauer's testimony that each of the four alibi witnesses she personally interviewed would have, in her opinion, made credible witnesses (HT 366-367) is further evidence that Slick had no basis for believing that any of them would commit perjury.

In sum, the Referee's finding that he had no reason to doubt Slick's admittedly subjective belief that the alibi witnesses would lie was not supported by substantial evidence and should be rejected by this Court.

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Reference Question 10

In particular: (a) Did detective William Collette tell Slick that Elizabeth Black told him that she did not know petitioner's whereabouts at the time and on the day of the charged homicide?

The Referee concluded “by a preponderance of the evidence that Mr. Slick received some information about Ms. Black prior to trial and, as a result, believed that Ms. Black could not testify as to Petitioner’s whereabouts on the day in question.” (Report p. 30.) This finding is not supported by substantial evidence.

Initially, petitioner emphasizes that respondent conceded in post-hearing briefing that the “totality of the evidence” is that the answer to Reference Question 10 (a) – as well as to Questions 10 (b)-(d) – is *no*. (Respondent’s Reference Hearing Brief, p. 140.) The Referee has failed even to acknowledge respondent’s concession. However, as petitioner demonstrates below, respondent was correct in recognizing that the weight of the evidence is that Collette did not tell Slick that Black told him that she did not know where petitioner was when the homicide occurred.

William Collette’s best recollection was that Elizabeth Black never told him that she did not know where petitioner was on February 25, 1983 and Collette did not tell Slick that she had. (HT 1694-1696, 1711; exh. 54.) Collette testified that he would have documented this statement in a police report, pursuant to his custom and practice, if it had been made. (Exh. 54; HT 1689-1691, 1695-1696, 1711-1712.) No such statement by Black exists in the homicide book. (Exh. K; HT 1690-1691, 1711-1712.)

Collette’s testimony was corroborated by Elizabeth Black’s recollection that she never told Collette that she did not know petitioner’s whereabouts on February 25, 1983. (HT 1323-1324.) To the contrary,

Black testified about her activities and the times she was with petitioner on the day of the crimes, which was consistent with the information she gave investigator Kleinbauer prior to trial. (See Exceptions, Question 3, *ante*.)

Ron Slick had no recollection of Collette telling him that Black had denied knowing where petitioner was on the day of the crimes. (HT 797-799.) Slick did testify that he had recently “stumbled over” a note in his file, which indicated that he received information about Elizabeth Black from William Collette. (Slick, HT 797.) He could provide no details of how he came to make the note and it did not refresh his recollection of having had a conversation with Collette about Black. Slick first recalled seeing the note in his file when his second declaration for the state was filed in 1998. Slick was not sure whether the Attorney General’s Office had brought it to his attention or whether he had found the note himself. (HT 819-820.) Slick testified that he had no recollection of receiving the information from Collette prior to looking at the note. (HT 797-798.) Slick did not recall what specific information he had received from Collette or when he had received it. (HT 798-799.) The note did not refresh Slick’s recollection and he continued to have no recollection of receiving such information from Collette. (HT 798-799.)

Slick testified that he was “troubled” because he had no current memory of the information in the note and had subsequently been informed that Collette believed he did not provide Slick with the information contained in the note,²³⁰ and that he had never verified the information. (HT 817.) Slick said, “That’s the troubling part. [¶] For the first time –

²³⁰ Slick testified that he first learned that Collette believed he did not give Slick the information at issue from deputy district attorney Kelberg, on January 9, 2003. (HT 1142.)

when I – when I made that note, I never asked him about it, never asked anybody to confirm it, I don't believe it.” (HT 817-818.) Slick added, “I'm looking at the thing 17 years later, and for the first time ever – and I've never one time talked to him about that, never one time – and for the first time ever, I see where he said he didn't make that note. [sic] It's troubling. It's troubling to me . . . and it bothers me.” (HT 818.)

When asked whether Collette's denial of giving Slick such information affected his state of mind or recollection of the note, Slick indicated that he did not think the detective would lie about whether he had given Slick the information in question. Slick stated:

I'm aware of that. [¶] And not only that, there's more – I really respect the man, and – and I – and I respect him enough that I – I – I just don't believe he's going to come and lie about that. [¶] And I respect him enough that I'm not gonna put something down knowingly that I think that – and then not do anything, to be challenged about that later and look stupid like I'm looking now, and I feel that way. No. I do. I feel that way. It's very, very troubling to me, and when I read that, it's bothered me since I read it.

(HT 818-819.) Slick also testified that, in his experience as a lawyer, he would have expected there to exist a police report documenting information such as that Black allegedly provided to Collette. (HT 846.) Slick was “reasonably sure” that the police reports did not contain such information. (HT 846; see also, exh. K [homicide book contains no such report].)

Despite this evidence and respondent's concession, the Referee concluded Slick had “received some information about Ms. Black prior to trial and, as a result, believed that Ms. Black could not testify as to Petitioner's whereabouts on the day in question.” (Report p. 30.) This conclusion must be rejected by this Court because the Referee's analysis of

the evidence relevant to Question 10 (a) is seriously flawed.

In his analysis of Collette's testimony, the Referee has failed to even acknowledge that the detective testified that to the best of his recollection he did not tell Slick that Elizabeth Black told him that she did not know where petitioner was on February 25, 1983. (See Report pp. 29-30; see also, Exh. 54; HT 1695, 1712.) While ignoring this part of Collette's testimony, the Referee relies on an exhibit not admitted into evidence and finds contradiction and uncertainty where it does not exist. The Referee's Report states:

In August 1998, Detective Collette stated in his declaration that, "at this time I have no memory of the contents of any discussions I had with Ron Slick." (Exhibit DD, paragraph 15). Five years later, at the Reference Hearing, Detective Collette testified that, to the best of his recollection, Ms. Black never told him that "she did not know Petitioner's whereabouts [on] the day and [at] the time of the charged homicide." (H.T. 1694-1695; Exhibit 54.) On the other hand, Detective Collette recalled that the issue came up "I believe after the verdict ... out in the hallway I heard about it ... I just recall that Ora Trimble and Mrs. Burton were in the hallway, and that's when I heard about it, and I really can't remember anything else about it." (H.T. 1691-92.) In sum, Detective Collette is very uncertain about his conversations with Ms. Black and Mr. Slick. Thus, this Court substantially discounts his Reference Hearing testimony as to such conversations unless there was some substantial corroboration.

(Report pp. 29-30.)

First, petitioner emphasizes that it is inappropriate for the Referee to rely on exhibit DD since that exhibit was not admitted into evidence. (HT 2136.) Next, petitioner points out that the testimony relied upon by the Referee is not "contradictory" (Report p. 30) and does not show that Collette was "very uncertain" about his conversations with Black and Slick

(*id.* p. 29). The only point Collette was uncertain about related to his hearing a comment in the hallway after petitioner's guilt phase jury reached a verdict. That fact that Collette's recollection about this incident was vague (HT 11715), however, does not undermine the detective's recollection that Black did not tell him that she did not know where petitioner was on the day of the crimes and that he did not tell Slick that she had, and his testimony that he would have memorialized such a conversation in a report.

The Referee also points to testimony from Collette that he might have asked Elizabeth Black or her family about the proceeds of the robbery. (Report p. 30.) This testimony was elicited after Elizabeth Black testified at petitioner's evidentiary hearing that one of the police officers who searched her home on February 26, 1983, accused her of having knowledge of some money and threatened her with arrest for harboring petitioner. (HT 1320-1321.) They did not tell her, however, what petitioner was being arrested for. (HT 1320.) The fact that the detectives accused Black of having knowledge of some money in no way supports a conclusion that Collette told Slick that Black admitted she did not know where petitioner was when the crimes occurred. The Referee's reliance on this evidence is misplaced.

Although the Referee suggests that there was no substantial corroboration of Collette's testimony regarding Question 10 (a), the Report neglects to acknowledge that Collette testified that he would have documented receiving such information from Black, according to his custom and practice. (See Report pp. 29-30.) The fact that there was no such report in the homicide book corroborated Collette's testimony that Black did not make the statement to him and that he did not tell Slick that she had.

The Referee also ignores the fact that Elizabeth Black's testimony that she did not make the disputed statement to Collette (HT 1323-1324) tends to corroborate Collette's testimony. About Black's evidentiary hearing testimony the Referee's Report states:

Ms. Black admitted at the Reference Hearing that her memory of the events in 1983 was not strong (H.T. 1347-53), but she remembered that the police found some rolls of coins which she "was saving for [her] daughter." (H.T. 1355-56.) She also remembered that she spoke to the detectives and they suggested that she was involved in the crimes charged against Petitioner. (H.T. 1319-20.)

(Report p. 30.) The Referee then concludes that when the coins were found, Black "attempted to distance herself from the crimes." (*Ibid.*) The Report is drawing unwarranted conclusions from the evidence in order to reject the mutually-corroborating testimony of Black and Collette that she did not make the disputed statement. The Referee misunderstands the significance of the coins. As petitioner shows below, there was nothing particularly incriminating about them when recovered at Black's residence. Therefore, the Referee's assumption that Black attempted to distance herself from the crimes when they were found is unsound.

Immediately after the shootings on February 25, 1983, Anwar Khwaja told police that his store's cash receipts which he was planning to deposit at the Bank of America had been stolen from him. (Exh. K., at p. 3, 11.) On that same day, officer Workman prepared a Report of Property which indicated that an "undetermined amount of U.S. currency and possibly checks" had been taken. (*Id.* at p. 15.) Also on February 25th, Otis Clements told detectives Collette and Miller that petitioner told him the bank bag had \$1,000 in it; Clements said nothing about coins at that time. (*Id.* at p. 36.) In light of this information, the search warrant applications

prepared by detective Miller indicated that police were looking for “ a bank type money bag, . . . money and any receipts and checks taken during the commission of the crime.” (*Id.* at pp. 65-67.) During the search of 1991 Myrtle (Black’s home) police found no bank bag, currency or checks, but claim to have found one roll of pennies in a Bank of America wrapper in the front room and two empty nickel coin wrappers in the kitchen trash can. (*Id.* at pp. 72-73.) Given the fact that police were looking for currency and checks rather than coin rolls when they searched 1991 Myrtle on the morning of February 26th, it simply is not believable that police would have confronted Black with a roll of pennies and two discarded nickel wrappers as proof of her involvement in the Khwaja homicide, and that Black would then have stated that she did not know where petitioner was when the crimes (about which she had no information) occurred, in an effort to “distance” herself. Yet the Referee draws this inference and uses it to discount other persuasive evidence that Black did not make such a statement to Collette.

Curiously, the Referee also finds it significant that “there was no testimony elicited from Ms. Black at the Reference Hearing that she had told the detectives that she could provide an alibi for Petitioner.” (Referee’s Report p. 30.) There was no evidence presented, however, that Black realized she could provide an alibi for petitioner until she was interviewed by Slick’s investigator Kristina Kleinbauer. In fact, Elizabeth Black testified that the detectives did not tell her what petitioner was being arrested for. (HT 1320.) Thus, the Referee’s conclusion that Black’s failure to tell police she was with petitioner during critical portions of February 25th is meaningful is unsound.

The Referee’s assessment of the value of exhibit 33, Slick’s

handwritten notes, is also problematic. The Report characterizes the exhibit as “the only contemporaneous document apparently in existence which summarizes Ms. Black’s lack of value as a defense witness.” (Report p. 30.) However, exhibit 33 was admitted for non-hearsay purposes only.²³¹ It is therefore inappropriate for the Referee to use it as evidence of the truth of the matter asserted therein.²³²

Slick’s testimony about the note is equally problematic. As noted above, he had absolutely no recollection of having the conversation in question with Collette and exhibit 33 did not refresh his recollection. (HT 797-790.) In fact, he could not even recall how he came to find the note. (HT 819-820.) Although Slick claimed that he did not fabricate the note (HT 1144), he acknowledged he was unable to recall any of the circumstances of its creation. He was very troubled and bothered by the note, because he did not believe Collette would lie and say that he did not make the statement in question to Slick (HT 817-819).

Deering’s California Codes Annotated suggests the following cautionary instruction be given when evidence of a past recollection recorded has been admitted: “A witness may testify by referring to a writing even though he has no recollection of the facts or events described

²³¹ The parties agreed that all exhibits were admitted for non-hearsay purposes only, unless otherwise specified. (HT 2124.) Neither party offered exhibit 33 for the truth of the matter when that exhibit was admitted. (HT 2136.)

²³² The Referee’s reliance on the note for the truth of the matter asserted denies petitioner of his rights to a full and fair hearing. It also denies petitioner of his constitutional rights to confrontation under the 6th Amendment of the United States Constitution and Article I, section 15 of the California Constitution. (See *People v. Simmons* (1981) 123 Cal.App.3d 677, 683.)

in the writing, *but this type of testimony must be viewed with caution.*” (Italics added.) In petitioner’s case, the Referee did not view exhibit 33 with caution, even though Slick himself was “troubled” and “bothered” by the note and he admitted that he “never asked anybody to confirm it” (HT 818.) To the contrary, the Referee has credited the note above other persuasive and corroborated evidence that Collette did not tell Slick that Black had told him she did not see petitioner on the day of the crimes. The Referee further disregarded evidence that Slick, in his experience as a lawyer, would have expected there to exist a police report if Black had made such a statement to Collette (HT 846), yet there was none. Slick’s testimony that he did not have any “hard evidence” that Black and the other alibi witnesses would lie on the witness stand, did not believe that the jury would find they were deliberately lying for petitioner’s benefit and did not feel ethically constrained from calling Black at petitioner’s trial (HT 815-816, 921) further tended to undercut the significance of the note. Finally, it is obvious that exhibit 33 was not prepared to document the contemporaneous receipt of information but rather to insulate Slick’s strategic decision not to present a defense from later challenge by his client. Because it was not prepared for petitioner’s benefit but for Slick’s own protection, the information in it is further suspect.²³³

²³³ See also, *People v. Simmons*, *supra*, 123 Cal.App.3d 677.) In *Simmons*, the appellate court held that evidence of a prior recollection recorded pursuant to Evidence Code section 1237 was inadmissible because the witness, who recognized his signature on the document, did not recall any event recorded therein. In fact, due to amnesia the witness did not even remember making the statement or any circumstance surrounding its preparation. Although the witness indicated that the statement was true to the best of his knowledge and that he had no reason to lie when the statement was prepared, the reviewing court stated: “The fact is, [the

The Referee adds that there “was no credible evidence adduced during the Reference Hearing which would suggest that Exhibit 33 was fabricated or altered.” (Report p. 30.) This point is insignificant, however, since the exhibit has not been admitted for the truth of its contents. In any event, there was no evidence presented tending to prove that the note was authentic, much less accurate. And, the Referee ignored evidence which at least raised the possibility that it was not. Significantly, fifteen years passed before Slick brought the note to anyone’s attention, although he had reviewed his file at least twice in the intervening span in order to discuss the case with others. As noted above, Slick testified that he first saw the note in his trial file while preparing a declaration for the Attorney General in 1998. (HT 819-820.) However, Slick prepared an earlier declaration for the Attorney General, in 1987 (HT693-695), in response to a claim pursuant to *People v. Frierson* that petitioner was denied his right to present a guilt phase defense (see Respondent’s Informal Response to 1st Habeas Corpus Petition).²³⁴ Although Slick’s billings show that he spent many hours reviewing his file and preparing for a conference with deputy attorney general Katz prior to filing the 1987 declaration,²³⁵ there is no evidence on

witness] simply has no knowledge at all. One who has no knowledge as to the truth or falsity of a representation may honestly say it is either true or false to the best of his knowledge with neither rejoinder having any evidentiary value” (123 Cal.App.3d at pp. 682-683). Similarly, Slick’s testimony about exhibit 33 had no evidentiary value because he simply had no knowledge as to its truth or falsity.

²³⁴ This declaration was exhibit 18, which was marked for identification only. (HT 2253.)

²³⁵ Slick billed 4.0 hours on December 4, 1987, as follows: “Studied Writ of Habeas Corpus and my complete file.” He billed 5.0 hours

the record that Slick brought the note to anyone's attention at that time. Slick had also reviewed his file before meeting with petitioner's original post-conviction lawyers, Samuel Jackson and Marshall Smith, on December 4, 1985.²³⁶ Slick did not provide exhibit 33 to petitioner's counsel, however, when he gave them what he purported to be the trial file in petitioner's case. (See HT 34-36 [no handwritten notes by Slick were in file provided].) The fact that Slick first "stumbled over" exhibit 33 in 1998 (HT 797), despite his previous file reviews, provides some evidence from which one might conclude that the note was not authentic. The Report fails to address these facts. (See *Taylor v. Maddox*, *supra*, 366 F.3d at pp. 1007-1008.)

The Report also fails to acknowledge that Slick did not maintain his trial file in way which allowed him to definitively state which documents were created prior to the close of petitioner's trial proceedings and which were not. Slick testified at petitioner's hearing that he did not have his original trial file and had no idea where it was. (Slick, HT 994, 1059.) At some time, he gave the file to someone in the Attorney General's office, although he could not say to whom or when, other than that it was before 1998. (HT 1059.) Slick had no inventory of what was in his original file. (HT 1060.) After the close of the evidentiary hearing, Slick informed respondent that he had found what he believed to be his original file in his

on December 10, 1987, for "Preparation and conference with Robert Katz, Deputy Attorney General in Los Angeles." (Exh. 14.)

²³⁶ Slick spent 4.0 hours on "preparation and conference" with Jackson and Smith. (HT 577, exh. 14.) Although Slick was unable to recall what he had done to prepare for the meeting (HT 577), it is reasonable to assume he spent some time reviewing his file.

chambers. (HT 2299-2300 [stipulation of May 16, 2003]; exh. 63.) However, both this file and that which he previously brought to court contain a mix of originals and copies of documents created in 1983, in addition to originals and copies of documents created well after the end of Slick's representation of petitioner at trial. (HT 2308-2309.) Slick's failure to maintain the integrity of the trial file and his practice of mixing it with documents created years after petitioner's trial ended, leaves open the possibility that exhibit 33 was created subsequent to August 17, 1983.

Although the facts set forth above do not conclusively prove that exhibit 33 was inauthentic, they do provide evidence from which such an inference may be drawn. In contrast, it is inappropriate for the Referee to draw a contrary inference from the appearance of exhibit 33 (see Report p. 30), as there was no evidence presented at the hearing that one could determine the authenticity of such a document using the naked eye.

Finally, after finding that Slick received some information about Black from Collette, the Referee apparently raises the possibility that Collette may have *erroneously* informed Slick that Black said she did not know where petitioner was when the homicide occurred but then dismisses the importance of the information. The Report states: "But this conclusion, whether based on erroneous information or not, was of small moment. Mr. Slick testified persuasively that the testimony of Petitioner's lover (or other 'family members') would not have been persuasive and, had such testimony been elicited, it could have adversely affected the credibility of the defense in the penalty phase of the case." (Report p. 30.) While petitioner agrees that exhibit 33 was of "small moment," Slick's assessment of whether testimony by the alibi witnesses would have been persuasive to the jury is not relevant to the *Frierson* inquiry. (See Exceptions, Question 3, *ante*.)

For all these reasons, the Referee's findings regarding Reference Question 10(a) are not supported by substantial evidence.

(b) Did Black tell Collette that she did not know petitioner's whereabouts at the time and on the day of the charged homicide?

The Referee states:

This Court concludes by a preponderance of the evidence that Ms. Black did say something to Detective Collette, later conveyed to Mr. Slick, to the effect that she would not be an effective alibi witness for Petitioner. There is insufficient evidence to conclude one way or the other that the precise statement referenced in this question was in fact made.

(Report p. 31.)

This finding is not supported by substantial evidence. As petitioner has shown above, both Elizabeth Black and William Collette testified that she did not make the statement at issue to the detective. Their testimony is corroborated by the absence of a police report documenting such information.

Black's testimony that she did not make the alleged statement to Collette is also supported by the fact that her account of seeing petitioner on February 25, 1983, was corroborated by Ora Trimble, Gloria Burton and Denise Burton prior to trial. (Exh. 1.) It was corroborated by Trimble, Denise Burton and Hope Black at the evidentiary hearing. (See Exceptions, Questions 3 and 7, *ante*.) While the accounts of these witnesses do not directly speak to the content of any conversations between Black and Collette, they corroborate Black's testimony that she was with petitioner on the day of the crimes, which tends to diminish the likelihood that she told Collette she was not.

As petitioner has demonstrated above, the Referee's reliance on

exhibit 33 is unfounded. Slick cannot vouch for the accuracy of the note, which was not admitted for its truth. In short, there is no reliable evidence on the record that Black made such a statement to Collette. Accordingly, the Referee's findings should be rejected by this Court as not supported by substantial evidence.

(c) Did Collette tell Slick that Ora Trimble told him that petitioner had asked her to provide him with a false alibi for the charged murder?

The Referee concludes that exhibit 33, the note written by Slick, is the "best evidence" of what occurred prior to petitioner's trial and finds that it shows "that there was a conversation between Mr. Slick and Detective Collette about Ms. Trimble's state of mind." (Report p. 31.) This finding is not supported by substantial evidence.

As petitioner has already explained, the note (which was admitted only for a non-hearsay purpose) must be viewed with caution because Slick has no recollection of speaking with Collette about Trimble or even making the note. Moreover, Slick was troubled and bothered by its existence. In sum, this note is not the "best evidence" of anything because the memory of its author was not refreshed in any way by its existence.

In contrast to Slick's inability to recall what the note purports to memorialize is the mutually corroborating testimony by William Collette and Ora Trimble on this issue. Collette testified that to the best of his recollection that Ora Trimble did not tell him that petitioner had asked her to provide him with a false alibi. Collette further testified that he did not tell Slick that Trimble had made such a statement. (HT 1695-1696, 1711-1712; exh 54.) Ora Trimble testified that she did not tell Collette that petitioner had asked her to provide him with a false alibi. (HT 1260.) Trimble stated that petitioner had not asked her to lie for him. (HT 1259.)

Petitioner had no opportunity to do so, since Trimble had no contact with him after his arrest (HT 1258-1259).

The testimony of Collette and Trimble is further corroborated by the absence of a police report indicating that petitioner attempted to induce a witness to fabricate evidence. Collette testified that he would have documented the statement allegedly made by Trimble in a police report, pursuant to his custom and practice, had it been made. (Exh. 54; HT 1689-1691, 1695, 1711-1712.) Slick testified that, in his experience as a lawyer, he would have expected there to exist a police report documenting information such as that allegedly provided by Trimble to Black. (HT 846.) He explained that the prosecution could have offered evidence that petitioner had attempted to induce a witness to create a false alibi as evidence of his consciousness of guilt at the guilt phase of trial. (HT 846.)

The Referee acknowledges, but then discounts, the absence of a police report documenting any statement by Trimble. (Referee's Report p. 31.) The Referee also acknowledges Collette's testimony about the issue "coming up." (*Ibid.*) The record indicates that Collette had a vague recollection about hearing information relating to Trimble in the courthouse hallway *after* petitioner's guilt phase verdict was returned. Collette did not recall the information as something that was communicated to him directly and could not recall anything else about the matter, including from whom he might have heard the information. (HT 1691-1692, 1715.)

The Referee concludes that because Trimble was not in the courthouse when the guilt verdict was returned (HT 1258), Collette must have heard the information earlier. There is no evidence to support this conclusion, however, and Collette made clear that whatever he might have heard did not come from Trimble herself. In fact, it is more likely that if

Collette overheard anything about her, it was on August 17, 1983, the day petitioner was convicted of the charged crimes (see CT 179-180).

As with the information allegedly conveyed by Black to Collette to Slick, exhibit 33 provides no reliable basis for concluding that any rumors about Ora Trimble were accurate. The note was not admitted for the truth of the matters asserted therein, the evidence did not establish that it was contemporaneously prepared, both Trimble and Collette denied the information the exhibit purported to document, and Slick can shed no light on its creation or veracity.

In short, the Referee had ignored the weight of the evidence, as well as respondent's concession, in answering this question. The Referee's finding should therefore be rejected by this Court.

(d) Did Ora Trimble tell Collette that petitioner had asked her to provide him with a false alibi for the charged homicide?

The Referee finds that "No credible evidence was adduced at the Reference Hearing which would allow this Court to conclude that Ms. Trimble made or did not make this precise statement to Detective Collette." (Referee's Report p. 32.)

Petitioner agrees with the first part of this finding, in that there is no credible evidence that Ora Trimble made such a statement to William Collette. However, there is substantial evidence that the witness did *not* make the statement. As noted above, Trimble testified that petitioner did not ask her to lie and that she did not tell Collette that he had. Collette testified that Trimble did not make this statement to him and that if she had, he would have documented it in a police report. (See Question 10 (c), *ante*.)

Although the Referee characterizes Trimble's recall of events at the

hearing as “very weak” (Report p. 31), petitioner has already demonstrated that the Referee is not correct on this point (see Exceptions, Question 3, *ante*). Trimble’s testimony is corroborated by Collette’s and by the absence of a police report. It is further corroborated by the consistency among the accounts of the alibi witnesses, the lack of evidence suggesting that the alibi witnesses colluded with Trimble and petitioner to create an alibi for him, and by Kristina Kleinbauer’s impression that Trimble and the others were credible. (See Exceptions, Questions 9 and 10 (b), *ante*.)

Petitioner therefore urges this Court to find that Trimble did not tell Collette that petitioner had asked her to provide a false alibi for him.

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Reference Question 11

In sum, did Slick override a clearly expressed desire of petitioner to put on a guilt phase defense, and, if so, would that defense have been credible? (*People v. Frierson* (1985) 39 Cal.3d 803, 814-815.)

The Referee concludes the following:

Based on all the evidence adduced at the Reference Hearing and this Court's *Findings of Fact* as to Questions one through ten, this Court concludes that Petitioner has failed to prove by a preponderance of the evidence that Mr. Slick overrode a clearly expressed desire of Petitioner to put on a defense. Further, based upon the above *Findings of Fact*, this Court concludes that even had such a request been made, the evidence would not have been sufficiently credible or probative to call into question the tactical decision of Mr. Slick to focus instead on the penalty phase trial of trial.

(Referee's Report at p. 32.) As petitioner has demonstrated, Question 11 is a mixed question of law and fact. It poses the ultimate issue in this case and requires the application of facts to the correct legal rule. (See Exceptions, sec. A., *post*.) Accordingly, the Referee's finding regarding Question 11 is not entitled to deference by this Court. (See *In re Lucas*, *supra*, 33 Cal.4th at p. 694.)

In fact, the Referee's findings as to Question 11 are not supported by substantial evidence or the law. What's more, they deprive petitioner of his constitutional and statutory rights a full and fair hearing.

Prior to the start of petitioner's evidentiary hearing, the Referee declared that the parties should adduce evidence responsive to the first ten reference questions, but not Reference Question 11. (Transcript of April 19, 2002, at pp. 2-3, 29-30; see also, HT 415-416.) The Referee specifically directed the parties to make their witness lists and evidentiary proffers responsive only to Questions 1-10. (See HT 1284.)

During the hearing, both sides were limited to eliciting evidence relating to information actually known to or possessed by trial counsel Ron Slick. (See, e.g., HT 641-642, 868, 1424, 2058.) The Referee expressed the position that to elicit evidence which petitioner believed Slick reasonably should have known about, had he properly investigated petitioner's case and developed available investigative leads, would lead too far down the continuum toward ineffective assistance of counsel. (See, e.g., HT 678, 1426.)

In making the findings set forth above in response to Reference Question 11, the Referee has ignored the fact that he limited the hearing to Questions 1-10. Because petitioner was not given an opportunity to present evidence responsive to Question 11, he has been denied a full and fair hearing. (See Exceptions, sec. C., *post.*) For this reason alone, the Referee's findings regarding Question 11 should be rejected by this Court.

Moreover, the Referee's factual findings are not supported by substantial evidence and his application of the law is erroneous. Under *People v. Frierson, supra*, a criminal defendant has been denied of his constitutional right to present a defense at the guilt phase of his capital trial, and is entitled to relief, if he can demonstrate that: 1) he openly expressed his desire to present a defense; and 2) some credible evidence existed to support the defense. (39 Cal.3d at pp. 812, 814-815.)

A preponderance of the evidence adduced at petitioner's hearing establishes that petitioner openly expressed his desire to defend against the charges at the guilt phase of his trial. In sum, petitioner's communications, both directly to Slick and through Kleinbauer, clearly expressed his desire to defend at the guilt phase because he was innocent. The information provided by petitioner supported a defense based on the complementary

theories of alibi and mistaken identity. Petitioner also informed Slick that his purported confession had been fabricated by police. (See Brief, sec. B. and Exceptions, Questions 1, 4, 6, and 8, *ante.*)

Petitioner has also demonstrated by a preponderance of the evidence that there was some credible evidence to support his desired defense. (See Brief, sec. C. and Exceptions, Questions 2, 3, 7, and 9, *ante.*) As explained more fully in petitioner's response to Reference Question 9, *ante*, *Frierson* does not require petitioner to show that he was prejudiced by Slick's failure to defend. Petitioner need not, for example, demonstrate that it is probable that the outcome of the guilt phase would have been different if Slick had presented a defense. The defense evidence available need not be weighed against the strength of the prosecution evidence. (See also, Brief, sec. C., *ante.*)

A question which *People v. Frierson* does not specifically address is whether a reviewing court, in assessing whether there exists some credible evidence to support the defendant's desired defense, must look only to that evidence known to trial counsel prior to trial, or also to that evidence counsel should have known if he had properly investigated the case.²³⁷

Petitioner believes he has made a forceful case with the evidence already adduced that Slick actually knew or had available to him some credible evidence to support petitioner's defense, sufficient for this Court to grant relief without further proceedings. However, it would be grossly unfair to deny relief without giving petitioner the opportunity to develop

²³⁷ In *Frierson*, the California Supreme Court did not need to go beyond consideration of the evidence known to trial counsel, which was in fact presented in the penalty phase, since it concluded that the evidence did constitute sufficient evidence to support *Frierson*'s desired defense.

and elicit evidence supporting petitioner's innocence that Slick should have known, had he reasonably investigated petitioner's case at the time of trial.²³⁸ Under the rubric of *Frierson*, there is no principled reason why a defendant (like Mr. Frierson) whose attorney fully developed the evidence supporting his desired defense should be granted relief, while a defendant (like petitioner) whose attorney failed to follow through on the most basic and obvious investigative opportunities should be denied relief. Therefore, at a minimum, petitioner is entitled to an additional hearing at which he may present the evidence reasonably available at the time of trial tending to support his desired defenses, whether or not that evidence was actually known by Slick before trial.

Finally, petitioner again emphasizes that it was inappropriate for the Referee to consider whether the evidence which could have been presented in support of petitioner's desired defenses was "sufficiently credible or probative to call into question the tactical decision of Mr. Slick to focus instead on the penalty phase of the trial." (Referee's Report at p. 32.) The reasonableness of Slick's tactical decisions are not at issue herein. Petitioner had a constitutional right to present a guilt phase defense at his

²³⁸ Some of this evidence has been the subject of witness proffers petitioner submitted prior to and during the course of the evidentiary hearing. Other evidence was not included in the proffers, as it was clearly outside of what the Referee would permit in addressing Reference Questions 1-10. Petitioner also notes that he has not finished his investigation into the evidence that Slick could have developed if he had competently investigated the case prior to trial. However, in light of the Referee's bifurcation of the hearing, petitioner suspended his investigation, pending the outcome of this portion of the proceedings. Petitioner was concerned that it could be a waste of precious resources to pay for additional investigation which the Referee was not yet willing to accept.

capital trial, regardless of whether presenting no defense might have been a more reasonable or successful course of action. The decision whether to defend was petitioner's, not Slick's. (See, Brief, sec. A., *ante*.) Thus the Referee has erred in evaluating the credibility and probative value of the potential defense evidence by measuring it against Slick's claimed strategy of saving his credibility for the sentencing phase. Because the Referee has applied an incorrect legal standard in responding to Reference Question 11, his findings should be rejected by this Court.

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**C. PROCEDURAL INADEQUACIES DEPRIVED
PETITIONER OF A FULL AND FAIR OPPORTUNITY
TO PROVE HIS CASE.**

Petitioner is entitled to a full and fair hearing in these habeas corpus proceedings as guaranteed by the due process, equal protection and cruel and unusual punishment clauses of the state and federal Constitutions. (U.S. Const., Amends. V, VI, VII and XIV; Cal. Const., art. I, sections 1, 7, 15, 16, 17; Pen. Code § 1484; see *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1; *Young v. Weston* (9th Cir. 1999) 192 F.3d 870, 876; *In re Avena* (1996) 12 Cal.4th 694, 730; *In re Clark* (1993) 5 Cal.4th 750, 780.) Fair notice is the bedrock of any constitutionally fair procedure. (*Lankford v. Ohio* (1991) 500 U.S. 110, 121.) This is particularly true in a capital case. (*Id.* at p. 125.)

In this case, petitioner was deprived of his rights to a full and fair hearing during the proceedings below. As demonstrated herein, the Referee made various rulings prior to and during the evidentiary hearing which significantly narrowed the scope of the hearing. The Referee then precluded petitioner from presenting certain evidence and from fully litigating issues he (the Referee) deemed to be outside of the limited scope of the proceedings. The Referee's Report, however, includes broad evidentiary findings which implicate issues petitioner was not permitted to litigate fully and evidence petitioner was not permitted to present. In a number of instances, the Referee relied on evidence and theories he had ruled irrelevant before and during the hearing. Because the Referee's actions deprived petitioner of due process and the notice he required to fully litigate the issues address in the Report, as well as of other rights, petitioner did not receive the full and fair hearing to which he was constitutionally entitled.

1. The Referee Significantly Narrowed the Scope of the Hearing.

In order to understand how petitioner was denied his rights to a full and fair evidentiary hearing, it is first necessary to understand how the Referee's rulings significantly narrowed its scope. Thus, petitioner sets out the relevant rulings in some detail herein.

During the course of the proceedings below, the parties grappled with the scope of the hearing. (See, e.g., HT 891.) Petitioner's first indication that he might have been viewing the scope of this Court's eleven reference questions very differently from the Referee came during a March 29, 2002, hearing on his *Pitchess* motion. In the motion, petitioner requested any *Pitchess* materials on five Long Beach police officers, including William Collette, John Miller, Stephen Borst, Leon Norman, and George Fox. (Petitioner's Motion for Discovery (*Pitchess* and *Brady*), dated February 22, 2002.) Petitioner asserted that he had shown good cause for the discovery of complaints against these officers relating to a range of misconduct by setting out a specific factual scenario which established a plausible factual foundation for the various types of materials sought. Petitioner also asserted that the materials sought were relevant to the issues being litigated in his hearing because he was required to demonstrate, under *People v. Frierson, supra*, 39 Cal.3d 803, that some credible evidence supported the defense he wished to present. He further argued that the materials were relevant to the credibility and bias of the officers who claimed petitioner confessed to them, which was at issue, as well as to the reliability of the police investigation as a whole, citing *Kyles v. Whitley, supra*, 514 U.S. 419. (Petitioner's Motion for Discovery, *supra*, pp. 22-24; see also, e.g., transcript for March 29, 2002, pp. 21-23, 26-27.)

The Referee, however, had a much different view of the relevancy question. Without reaching the question of whether petitioner had set forth a plausible factual foundation for the request, the Referee concluded that any *Pitchess* material relating to all of the officers except Collette, who had testified at petitioner's trial, was not relevant to the issues raised in this Court's reference order as he interpreted them. (Transcript for March 29, 2002, p. 39) The Referee concluded that the reference questions did not require a "re-analysis of the prosecution's case." About the reference order, he stated, "I think it has specific reference to the defense side of the case only. And that's the only way you can read questions one through ten. And to take Question 11 and that one phrase and expand the entirety of the reference, I just don't read it that way. I think that's overly broad." (*Id.* at pp. 28-29.)²³⁹

In light of the Referee's *Pitchess* ruling, petitioner filed a motion to clarify the parameters of the reference order. (See Motion to Clarify the Scope of the Evidentiary Hearing, dated April 12, 2002.) Therein, petitioner explained that the reference questions issued by the California Supreme Court could be read broadly or narrowly, and asserted that without knowing how the Referee viewed the hearing's scope, petitioner could not adequately prepare and present his case. In particular, petitioner explained

²³⁹ At the hearing, William Reidder of the Long Beach City Attorney's Office provided a declaration stating that it had no *Pitchess* material relating to William Collette or John Miller. (See transcript for March 29, 2002, pp. 43, 51; see also, Declaration of No Records by Janie Bordelon, dated March 7, 2002.) Reidder indicated that there was *Pitchess* material for one of the other officers. (Transcript for March 29, 2002, p. 43.) Both respondent and petitioner asked the Referee to file the material Reidder possessed under seal to make a record for appellate review. (*Id.* at p. 42.) The Referee did not, however. (See, *id.* at p. 43.)

that he had been interpreting the Supreme Court's reference questions broadly, to include the presentation of any evidence he had developed to support his guilt phase defense, regardless of whether such evidence had been known to Slick or his investigator prior to trial. (Motion to Clarify, at p. 10.) Petitioner indicated that he expected he could present the following kinds of evidence: testimony of any witness that tended to support his alibi; any evidence tending to show that he did not confess, whether direct or circumstantial; evidence that he was falsely accused by alleged co-perpetrator Otis Clements; third-party culpability evidence; misidentification evidence; and the lack of physical evidence tying petitioner to the charged crimes. (*Id.* at pp. 10-11.)

Instead of addressing specifically the issues raised in petitioner's motion to clarify the scope of the hearing (see, generally, transcript for April 17, 2002), the Referee stated that he was inclined to take evidence on the first ten reference questions and would postpone any decision of whether to take evidence on Question 11 (*id.* at p. 2). In addition, the Referee indicated that the hearing would be "very narrow and specific" and involve few witnesses. (*Id.* at p. 5) When respondent stated that it agreed that petitioner had the right to present, for example, evidence challenging the reliability of the eyewitness identifications (*id.* at pp. 14-15), the Referee disagreed and stated:

Well, we may get there as a second phase, Mr. Kelberg, but the primary thing that we need to do is start to hear about what the petitioner allegedly told Slick and/or the investigator, and that's the thrust of the first series of questions here. . . .

Maybe we're going to get to credibility and weighing statements of potential witnesses against other evidence in this case. [¶] But if, if petitioner never gave witness names, if

he never told the investigator the – let me say it a different way: if the answer to Question Eight is not yes, then we may not get to any credibility issues.

(Transcript for April 17, 2002, at p. 15.) The Referee reiterated that he would start the hearing by addressing the first ten reference questions, and added that he did not intend to embark on what in effect would be a retrial of petitioner’s case at that point. (*Id.* at pp. 29-30; see also, HT 415-416.)

As the proceedings continued, the Referee continued to make it clear that he viewed the scope of the inquiry to be very narrow, primarily involving a determination of whether petitioner’s trial counsel, Ronald Slick, was clearly advised that petitioner wanted to present a guilt phase defense at trial. While petitioner’s second witness, investigator Kristina Kleinbauer, was on the witness stand, the Referee stated that until and unless he had determined that Slick overrode petitioner’s clearly expressed desire to put on a guilt phase defense, he would not “spend a lot of time on assessing ultimately whether the defense was credible.” (HT 415.) The Referee added, “we may, unfortunately, have to bring a few witnesses back to deal with credibility, but that’s not why we’re now here.” (HT 417.)

On the next day of the hearing, the Referee elaborated his position, stating:

I’m not going to move us in the direction of assessing the credibility of the defense at this point because I just think that first we have to resolve what I envision to be the first question or first focus of the Supreme Court which is whether or not Slick was given a specific indication from the petitioner to put on a guilt-phase defense and, if he wasn’t, whether directly by witnesses or indirectly through Miss Kleinbauer or directly by the petitioner, then I just don’t think we get to the sub part of number 11.

(HT 427-428.) The Referee indicated that he considered the inquiry limited

to information known to Slick, stating: “If it’s not communicated in some fashion to Mr. Slick . . . I guess I’m hard pressed to see how the Supreme Court would want this court now to independently assess the credibility.” (HT 428.) After respondent reasserted its position that the inquiry required an assessment by the Referee as to whether any potential witnesses identified by petitioner would have been credible, petitioner’s counsel emphasized that the inquiry required by *Frierson* was limited to whether there existed some credible evidence which could have led a reasonable juror to conclude that petitioner was not guilty. Petitioner’s attorney said:

. . . *Frierson* talks about some credible evidence, and clearly it is – it is not the lawyer’s assessment of credibility. The lawyer can’t be the judge and the jury. [¶] If the client wants a defense and there is some credible evidence to support the defense, then the lawyer is obligated to put on that defense.

(HT 429.) The Referee concurred, stating, “That’s how I’ve always read *Frierson*.” (*Ibid.*) The court explained: “And I don’t think we go from that to, in a sense, a full-blown trial where every witness is called in a habeas petition and this court has to determine independently if I would view the defense as credible because it’s now 20 years later . . .” (HT 430.) Petitioner’s counsel agreed that it was not the Referee’s role under *Frierson* to assess the credibility of the defense petitioner’s trial lawyer could have presented, stating: “. . . I don’t believe it is the Court’s role in this to act as a jury and decide whether the Court believes it’s credible. In fact, I think that is a misapplication of the rule. [¶] I think the issue is was there some credible evidence from which a reasonable juror could have concluded that Mr. Burton didn’t commit these crimes.” (*Ibid.*)²⁴⁰

²⁴⁰ See also, HT 494 (Referee admonished parties they had “gone way beyond what I think was, frankly, necessary” with testimony of

At the beginning of the next day of the hearing, the Referee returned to the topic of the scope of the hearing, making clear his belief that it was narrow. He stated: “Let me just advise counsel that I again reread *Frierson* last night and further this morning, and it reaffirmed my belief this hearing is to be fairly narrow.” (HT 499.) The Referee indicated that the focus of the hearing would be whether Slick was clearly advised that petitioner wanted to present a defense at the guilt phase. (*Ibid.*) In response to respondent’s concerns that credibility was very important, the Referee indicated that he would not be assessing each witness’ credibility 20 years after trial. He also acknowledged that the quantum of evidence required by *Frierson* to support a defendant’s desired defense is quite low. The Referee stated:

[I] have never viewed this hearing as one in which this court was to make some independent sort of initial or case of first-impression analysis of the credibility of each successive witness, and *Frierson* doesn’t suggest that either. What it says in dicta, really – it’s a footnote – is that there is some point at which the testimony of proffered witnesses by a defendant is so incredible that competent counsel, despite a clear request by that defendant to have a certain defense, could reject it because there’s no evidentiary support for it. And so I think that’s a pretty low threshold or, stated a different way, it would have to be a pretty serious showing.

(HT 502.)

As the hearing continued, the Referee made a variety of rulings consistent with these statements which indicated that he would not be conducting a broad inquiry. For example, the Referee reaffirmed that he would not be making an independent analysis of the credibility of potential

Kleinbauer).

witnesses. (See, e.g., HT 502.) The Referee indicated that the present recollections of the fact witnesses were not relevant to the inquiry before the court, nor were their recollections as recorded in post-trial reports or declarations. (See, e.g., HT 641-644.) The Referee indicated that he was disinclined to give much weight to a witness' testimony 20 years after the events at issue, noting that memories dim and witnesses may have sustained felony convictions in the intervening period. (HT 1673-1674.) The Referee reaffirmed his position that only information known to Slick prior to trial was relevant. (See, e.g., HT 413-414, 641-642.) The scope of Slick's testimony was circumscribed, and the testimony of several of petitioner's proffered witnesses was rejected as irrelevant to the issues before the court. (See discussion below.)

The Referee's Report, however, ignores these rulings. As petitioner demonstrates below, the Report includes broad findings on questions that the Referee repeatedly indicated would not be examined, at least during the first phase of the hearing addressing Reference Questions 1-10, and which implicate evidence that petitioner was not permitted to present.

2. The Referee Made Findings Based on Witness Recollection and Credibility Although He Stated During the Evidentiary Hearing that These Factors Were Not Relevant and Limited Litigation of Them.

As set forth above, the Referee repeatedly indicated that his function was not to make independent analyses of the credibility of witnesses, 20 years after trial, who would have testified in petitioner's defense. Nonetheless, the Report engages in such assessments, based on factors the Referee said he would not weigh.

Most significant in this respect is the Referee's conclusion that eyewitness Michael Stewart was insufficiently probative to justify calling

him at petitioner’s guilt phase. (Report, at p. 27.) In so finding, the Referee places great reliance on perceived inconsistencies between the information Stewart gave to investigator Kleinbauer prior to petitioner’s trial and Stewart’s post-trial declarations and evidentiary hearing testimony. (Report, pp. 26-27.) The Report states, “This Court concludes that, taken by itself, the testimony of Mr. Stewart might have been somewhat probative as to a defense of misidentification. But his memory of the events of the day in question seems to have varied over the years, and it is unclear which of his several versions would have been testified to in August 1983. Indeed, Mr. Stewart might have come into court, seen Petitioner at counsel table and concluded that he ‘looked like the shooter,’ as Mr. Stewart stated in his 1998 statement. . . .” (Report, at p. 27.)²⁴¹

The Report’s reliance on these alleged inconsistencies is directly at odds with the Referee’s repeated statements that the post-trial and present recollections of facts witnesses were not relevant, and that the Referee would not give 20-year old recollections by witnesses such as Stewart much weight. In fact, the Referee interrupted Stewart’s cross-examination to repeat his view that any inconsistencies between the information the witness had provided to Kleinbauer prior to trial and his recollection of events after trial were irrelevant. (HT 641-642.) The Referee said:

. . . I don’t think it’s one bit relevant – what this witness’ memory today is of the events in 1983 or whether or not he had a 1990 declaration or a 1980 [sic] declaration or he said anything to counsel in the last few weeks or months. That

²⁴¹ As petitioner has demonstrated, the conclusion that Michael Stewart might have identified petitioner at the trial is unsupported by any evidence and completely at odds with Stewart’s testimony that petitioner was not the shooter. (See Exceptions, Question 9, *ante*.)

isn't the issue, and we are not going to put on a mini trial here and have the People point out inconsistency after inconsistency, especially with later-prepared declarations, and then take the time to have Ms. Morrissey try to rehabilitate the witness' present memory because that isn't what we're about.

(HT 642.) The lower court added, "We are so far down the road on getting into the credibility of, today, of witnesses that we have gone far beyond the call of the Supreme Court." (HT 644.) The Referee precluded any additional cross-examination of Stewart on "alleged inconsistent statements." (HT 645.)

Petitioner asserts that the Referee was correct when he recognized during the evidentiary hearing that any inconsistencies created by Michael Stewart's inability to recall details precisely over a span of 20 years were not known to Slick in 1983 and could not have affected Stewart's ability to give probative evidence at petitioner's trial.²⁴² Moreover, had petitioner known that the Report would rely on these alleged inconsistencies despite the Referee's assertions that they were not relevant, he would have conducted both his direct and redirect examination of Stewart differently, so as to establish the insignificance of any inconsistency created by a fading memory of events. Michael Stewart was a key witness, who could have provided powerful, probative testimony on petitioner's behalf. (See Exceptions, Question 7, *ante*.) The Report's minimization of the probative value of the testimony Stewart could have given at trial, based on factors deemed irrelevant during the evidentiary hearing, has denied petitioner the full and fair hearing to which he is entitled.

²⁴² Petitioner also asserts that the inconsistencies relied upon by the Referee's Report concerning Stewart were minor and to be expected in light of the passage of years. (See Exceptions, Question 7, *ante*.)

The Report minimized the probative value of testimony from potential defense witnesses in addition to Stewart. Despite repeated indications by the Referee during the hearing that he would not be placing heavy emphasis on the recollection of fact witnesses 20 years after trial, the Report concludes that Ora Trimble’s memory of events at the hearing was “very weak.” (*Report*, at p. 31-32; see also, pp. 21-22; see also, *Report* at p. 22 [relying on Penny Black’s post-trial recollection that petitioner and alleged co-perpetrator Otis Clements had a “grudge”]; *Report*, p. 22 [emphasizing that Hope Black was not questioned about events until 2001].)²⁴³ Had petitioner known that the Referee would be placing great weight on such factors, petitioner would have conducted his examination of these witnesses differently as well.

As set forth above, the Referee also indicated during the hearing that he would not be making independent analyses of the credibility of potential defense witnesses. (See, e.g., HT 502.) Despite this statement, the Report placed much emphasis on the perceived lack of credibility of petitioner’s potential alibi witnesses, based in part on information not available at trial. The Report emphasizes felony convictions sustained by Elizabeth Black, Denise Burton and Hope Black (*Report*, at p. 22), although none of the witnesses had these convictions at the time of trial and therefore could not have been impeached with them. Because the Report has engaged in credibility assessments that the Referee repeatedly indicated would not occur, petitioner has been denied a full and fair hearing.

²⁴³ As petitioner has demonstrated earlier in this brief, the Referee’s finding that Trimble’s recollection of events was very weak is not supported by the evidence. (See Exceptions, Question 3, *ante*.)

3. The Referee Made Broad Findings Implicating Evidence Which He Had Excluded as Beyond the Hearing's Scope.

Petitioner has argued that the Referee misunderstood the nature of the credibility determinations called for by *Frierson* and this Court's reference questions relating to the potential defense witnesses. (See Exceptions, Question 3., *ante*, and section C.7., *post*.) Even if this Court concludes that it was appropriate for the Referee to make such findings, the manner in which the Referee did so was unfair to petitioner and violated his constitutional rights to a full and fair hearing. The Referee drew broad conclusions about the strength of the defense petitioner's trial attorney could have presented, as well as about the strength of the prosecution's case against petitioner. This was unfair because the Referee excluded much additional evidence reasonably available to Slick prior to trial which supported petitioner's desired defenses and excluded evidence casting doubt on the prosecution's case.

The Referee's Report makes several findings that incorporate an assessment of the strength of both: 1) the prosecution's case against petitioner, and 2) the defense that could have been presented. In response to Reference Question 3 (Did Slick have reason to believe that potential defense witnesses would not be credible), the Report relies heavily on Slick's assessment of the potential alibi witnesses which was based on weighing their possible testimony against the state's evidence, including petitioner's alleged confession, his "ludicrous" claim that the police made it up, and "a number of witnesses" who identified petitioner. (Report, at p. 22.) Similarly, in response to Question 7, the Report relies on Slick's testimony that the potential alibi witnesses would not have been probative in the face of petitioner's "unchallenged confession" and the additional

eyewitnesses the state might have presented. (*Id.* at pp. 25-26.)²⁴⁴ The Report also concludes that eyewitness Michael Stewart’s testimony would not have been sufficiently probative “in the context of the stated defense strategy of trying to contend with a confession and other compelling evidence against Petitioner” (*Id.* at p. 27.) Finally, in response to Question 11, the Report states that even if petitioner had requested a defense, “the evidence would not have been sufficiently credible or probative to call into question the tactical decision of Mr. Slick to focus instead on the penalty phase of the trial.” (*Id.* at p. 32.)

All of these findings are inappropriate because, *inter alia*, as petitioner demonstrates below, he was prevented from presenting evidence that would have added to the credibility of the potential defense witnesses presented at the hearing and the probative value of their testimony, and that would have substantially undercut the strength of the prosecution’s case against petitioner.

a. Eyewitness Identification Evidence.

Petitioner was denied a full and fair hearing because he was prevented from presenting evidence that could have demonstrated that the prosecution’s eyewitness identification evidence was particularly weak. Petitioner sought to present the testimony of three key eyewitnesses, brothers Robert, Larry and Del Cordova, as well as an eyewitness identification expert, Dr. Steven Clark, Ph.D. (Proffer of Testimony of Witnesses Not Yet Called by Petitioner, pp. 10-12; exhs. 47-50, 53 [marked for identification only].)

Robert Cordova would have testified that he might have

²⁴⁴ Slick has not said who these witnesses were.

misidentified petitioner at trial since he had only a brief look at the shooter from a substantial distance. Robert would have also testified that he described the man he saw on East Pleasant Street as 6'1", 200-220, in his thirties and with pock marks on his face, a description that tended to exclude petitioner and was not brought out at trial by Slick. Robert Cordova also would have testified at the hearing that he may have mistakenly identified petitioner because the police had shown him a single photograph of petitioner prior to trial and told him they believed the man to be the shooter. (Proffer, p. 10; exh. 47 [marked for identification only].)

Larry Cordova would have testified that he saw the gunman on E. Pleasant Street, who he described to police. Larry attended court with his brother Robert, but did not recognize petitioner as the gunman he saw. (Proffer, p. 11; exhs. 48-49 [marked for identification only].)

Del Cordova would have testified that he contributed to the description the brothers gave to police of the gunman. (Exh. 54 [marked for identification only].) As noted above, this description tended to exclude petitioner. At the evidentiary hearing, Del would have testified that although did not testify at petitioner's trial, he went to court with his brother Larry. Del knew that the police and prosecutor expected him to identify the defendant on trial (petitioner) as the man he saw running down E. Pleasant. Del felt pressured and coerced by the police. He could not have truthfully testified at trial that petitioner was the man he saw. At the evidentiary hearing, Del would have also testified that petitioner, who Del had recently seen in the county jail, was not the person he saw running on E. Pleasant. (*Ibid.*)

Dr. Clark would have testified that in 1983 a psychologist with expertise in eyewitness identification issues could have provided evidence

to explain that various psychological factors may affect the reliability of eyewitness identification, and to help counter common misperceptions many lay persons have about the nature of such identifications. (Proffer, p. 12; HT 1438-1443; exh. 50 [marked for identification only].) Dr. Clark would have testified that there were several of these factors present in petitioner's case, and that the circumstances under which each of the state's eyewitness identifications of petitioner was made fails to rise to what Dr. Clark considers the conditions for solid, reliable eyewitness identification. (Exh. 50.)

Prior to and during the evidentiary hearing, petitioner asserted that the testimony of these witnesses was relevant to Reference Question 9, as well as to the credibility of Slick, who testified that he determined that potential defense witnesses were not probative or credible in light of the prosecution's strong eyewitness identification evidence. (Proffer, at pp. 10-12; HT1617-1622, 1626-1627, 1630-1631.)²⁴⁵ The Referee refused to allow petitioner to present these witnesses. As to Dr. Clark, the Referee concluded that whether Slick should have called an eyewitness identification expert was beyond the Supreme Court's reference order. (HT 1444.) The Referee also found that the Cordova brothers' testimony fell outside the scope of the order. (HT 1623-1624, 1630, 1631.) The Referee added that the statements of Del Cordova 20 years after events would probably be given very little weight by the Court in any event. (HT 1631.)²⁴⁶

²⁴⁵ See also, HT 1421-1433, 1452-1453.

²⁴⁶ The Referee made other rulings which precluded petitioner from fully establishing the weakness of the state's eyewitness evidence. (See HT 706 [Referee says that asking Slick whether the state had used

These rulings deprived petitioner of a full and fair hearing. The testimony of these witnesses provided powerful corroboration of Michael Stewart's testimony that petitioner was not the man who shot the Khwajas – testimony which the Report finds insufficiently probative. The misidentification evidence also bolstered the alibi evidence (which the Report also found insufficiently probative and credible) that could have been presented. Moreover, although the Referee ruled that this testimony was outside the scope of the hearing, the Referee's Report credits Slick's hearing testimony that he determined that the alibi witnesses and others were not credible and/or probative in light of the prosecution's strong identification case. Whether Slick's testimony on this significant point deserves credit cannot fairly be measured because petitioner was denied the opportunity to show that the state's eyewitness case was in fact very weak.

b. Evidence Relating to Gloria Burton.

Petitioner was also prevented from presenting the testimony of investigator Lynda Larsen, who had interviewed petitioner's mother, Gloria Burton, prior to Mrs. Burton's death before the hearing. Larsen would have testified that she interviewed Mrs. Burton in 1999, and obtained a declaration from her in 2000. Mrs. Burton told Larsen that she saw her son at Ora Trimble's home at about 1:15 or 1:30 p.m. on the day before his arrest in February 1983. Mrs. Burton had previously conveyed this information to trial investigator Kristina Kleinbauer in 1983, when the events at issue were fresh in her mind. (Proffer of Witnesses Not Yet

suggestive eyewitness identification practices seems "pretty tangential.>"; HT 1699 [Referee suggests that whether detective Collette used suggestive photographic lineup was not relevant to the California Supreme Court's reference order].)

Called by Petitioner, dated Jan. 20, 2003, p. 5.)

In the proffer, petitioner asserted that Larsen's testimony about her interview with Gloria Burton was relevant to Reference Questions 3, 7, and 9. Petitioner also claimed that Larsen's testimony was relevant to important credibility issues. Her testimony tended to impeach Ron Slick's credibility, because Slick asserted at the hearing that the testimony Mrs. Burton could have given at petitioner's trial lacked sufficient probative value to present. (Proffer of Witnesses, p. 5.) Mrs. Burton's statements to Larsen also corroborated the hearing testimony of Kleinbauer about her contact with Gloria Burton prior to petitioner's trial. (*Id.*, at pp. 5-6; see also, HT 1374-1375.)

The Referee declined to let Lynda Larsen testify about her contact with Gloria Burton, finding Larsen's proposed testimony to be hearsay. (HT 1372, 1378.) The Referee also stated, ". . . I don't think [Larsen] would assist the Court in determining the credibility of Gloria Burton some 20 years ago." (HT 1372.)

The Referee's refusal to hear from Larsen, when coupled with the finding in the Referee's Report that petitioner's potential alibi witnesses were not credible or probative, denied petitioner of a full and fair hearing. The Referee erred in failing to recognize that Larsen's testimony was offered for non-hearsay purposes. The issue was not (as the Referee had recognized) whether petitioner was at 1991 Myrtle Street at the time of the Khwaja shootings but whether there existed some credible evidence to support a defense. Testimony by Mrs. Burton that she saw her son arrive at the Trimble residence between 1:15 and 1:30 p.m. would have constituted some credible evidence of petitioner's innocence, whether or not the testimony would have been accurate. Larsen's testimony was not offered,

then, to prove that Gloria Burton did see petitioner arrive at the Trimble residence at 1:15 or 1:30 p.m., but that Mrs. Burton would have testified at trial that she had. Moreover, the Referee ignored the fact that Larsen's testimony about her interview with Gloria Burton was offered for the non-hearsay purpose of corroborating Kleinbauer's testimony about her pre-trial interview of Gloria Burton, and impeaching Slick's testimony that petitioner's mother's testimony was of no value.

Petitioner's inability to present the testimony of his mother at the reference hearing was obviously due to matters beyond his control. Prior to trial, petitioner informed his lawyer and investigator that his mother Gloria Burton was a witness. Investigator Kleinbauer documented what Mrs. Burton knew about her son's whereabouts on February 25, 1983. (See Exceptions, Questions 1 and 3, *ante.*) Petitioner has diligently pressed his *Frierson* claim for many years and the delay in proving this claim was not of his making. There is every reason to believe that Mrs. Burton would have testified at trial consistently with the information she gave Kleinbauer (which was corroborated by other witnesses). It is clear Gloria Burton was available to testify in petitioner's guilt phase, as she testified at the penalty phase of trial. Despite petitioner's diligence, he did not have the opportunity to present his mother's testimony regarding his alibi in any court until after she had passed away.

The Referee's refusal to permit Larsen to testify denied petitioner of a fair hearing because the Referee's Report made findings regarding the probative value of testimony from other potential alibi witnesses and assessed the credibility of those witnesses without taking into account the corroborating trial testimony Gloria Burton would have given, as demonstrated by Mrs. Burton's statements to Lynda Larsen in 1999. (See

Exceptions, Question 3, *ante.*)

c. Evidence Relating to Otis Clements.

The Referee also deprived petitioner of a full and fair hearing by excluding evidence about the credibility of co-defendant Otis Clements, who was caught in the getaway truck shortly after the homicide and tried to exculpate himself by placing the blame on petitioner. Petitioner offered the testimony of Elizabeth Vining, daughter of the deceased Rev. Vining, who would have testified that she did not see Otis Clements at her house prior to his arrest on February 25, 1983. This testimony contradicted Clements' claim to police that Elizabeth had given him the keys to Vining's truck (the "getaway" vehicle) the morning of the shootings. Elizabeth also would have testified to Clements' reputation as a liar who manipulated others to his own benefit. (Proffer, pp. 12-13.) Petitioner also sought to present Brenda and Kenny Fleets, who could have testified at trial to Clements' reputation as a liar. (Proffer, p. 13.) Finally, petitioner wanted to call Gregg Stutchman, an expert in forensic audio analysis, to present evidence that the police turned off the tape recorder during their third and only recorded interrogation of Clements. (Proffer, p. 14; HT 963-985.)²⁴⁷

The Referee concluded that witnesses relating to the credibility of Clements were not relevant since Clements did not testify. (HT 1446.)²⁴⁸

²⁴⁷ The Court also declined to allow petitioner to fully examine Slick about the contents of Clements' various and conflicting statements in order to impeach Slick's testimony that he found Clements' confession to be credible. (HT 664-680.)

²⁴⁸ Earlier in the proceedings, the Referee had granted petitioner an opportunity to call Gregg Stutchman as a witness in an Evidence Code section 402-type hearing, to supplement the proffer previously made by petitioner regarding Stutchman's proposed testimony. The Referee declined

The Referee erred. Clements' credibility was relevant, for several reasons. Petitioner was arrested solely on the basis of Clements' claim that he was involved; no other evidence corroborated this account. The police then claimed they obtained a confession from petitioner, which largely tracked the final version of Clements' statements. But the authenticity of petitioner's alleged confession was not corroborated any other evidence, including contemporaneous notes of the officers or a tape recording of the interrogations.

In addition, petitioner complained to the trial court that he was being "framed" by Clements and that Slick had failed to investigate the matter. (RT 11; see also, exh. 15.) Thus, the evidence petitioner sought to introduce was relevant to proving the truth of petitioner's claim that he was being framed by Clements as well as bolstering his credibility in general. (See Proffer, at pp. 12-15; HT 964, 968, 971-975; HT 1444-446.) Stutchman's testimony also would have provided some corroboration of petitioner's belief that the Long Beach detectives investigating the Khwaja shootings were working to implicate him (see exh. 15) and that Slick had reason to believe they were not credible (see Reference Question 2).

The evidence was also relevant to the credibility of Slick, who made representations both at trial and at the evidentiary hearing about Clements. Prior to trial, Slick directed investigator Kleinbauer to conduct a "background history of Otis Clements." (Exh. 8.) When petitioner

to rule at that time whether it would allow Stutchman to testify regarding the integrity of the recording of Clements' confession, however. (HT 975-976, 984-985.) In light of the Referee's later ruling that witnesses relevant to Clements were not relevant to matters at issue in the evidentiary hearing, petitioner offered his additional proffer via counsel, rather than calling Stutchman into court. (HT 1753-1759.)

complained at trial that Slick had not investigated the matter, Slick assured the trial court that he had. (RT 11.)²⁴⁹ During petitioner's evidentiary hearing, Slick testified that he had previously stated in a declaration for respondent that he had listened to Clements' taped confession and found it to be credible. (HT 669.) The evidence petitioner sought to adduce would have tended to show that Slick was not credible because these representations were not true – Clements was a liar whose confession was not credible and Slick had failed to contact any of the witnesses whose testimony petitioner tried to present.²⁵⁰

Also at issue was whether police chose to turn a blind eye to the obvious lies told by Clements and fabricate evidence against petitioner as the most expeditious way of resolving the Khwaja homicide.²⁵¹ Thus, even

²⁴⁹ At the evidentiary hearing, Slick testified that he did not recall making such a representation to the trial judge. (HT 666.) When confronted with a transcript of exhibit 5, Slick acknowledged that he had. (HT 666-667.)

²⁵⁰ Slick in effect admitted that his statement to the trial judge that he had investigated petitioner's claim that Clements had falsely implicated him was not true. During the evidentiary hearing he acknowledged that the investigation concerning Clements he had asked investigator Kleinbauer to do prior to trial was not done. (HT 664-665.)

²⁵¹ As petitioner has demonstrated, Slick had ample reason to question whether the officers who alleged to have taken a confession from petitioner were credible. (See Exceptions, Question 2, *ante*.) This information, known to Slick prior to trial, should have caused him to investigate whether Clements was lying when he told police that petitioner participated in the Khwaja incident. As petitioner also demonstrated, Slick had the means to challenge detective Collette's trial testimony that petitioner had confessed to him in an unrecorded encounter. (See Exceptions, Question 9, *ante*.) Evidence that Clements had lied to police about the events of February 25, 1983, would have allowed Slick to make

though Clements did not testify against petitioner at trial, evidence tending to show that he lied to police was relevant for a variety of reasons and should have been admitted.

d. Evidence Relating to Petitioner's Purported Confession.

As the foregoing discussion makes clear, the Referee relies heavily on Slick's testimony that he found the potential alibi and misidentification witnesses not credible or probative because of, inter alia, petitioner's "unchallenged" confession. What the Referee ignores, however, is that the purported confession was unchallenged at the evidentiary hearing only because the Referee concluded that questions about its validity were not relevant to the reference questions. It was unchallenged at trial because Slick decided not to defend.

Prior to the start of the evidentiary hearing, petitioner indicated that under a broad reading of the reference order, any direct or circumstantial evidence tending to show that he had not confessed to Long Beach police would be relevant. (Motion to Clarify the Scope of the Evidentiary Hearing, pp. 10-11.) As described above, the Referee rejected a broad interpretation of the order, and indicated that the scope of the hearing would be circumscribed. The Referee affirmed this position later in the proceedings below, vis-a-vis the purported confession. In declining respondent's request to present the testimony of the police officers who claimed that they took an inculpatory statement from petitioner, the Referee stated, ". . . I don't think that the Supreme Court has asked this Court to go into the admissibility or the reliability of the confession given 20 years ago

an even stronger argument to the jury that petitioner had not in fact confessed. (*Ibid.*)

about which there was litigation pretrial adverse to Mr. Burton.” (HT 1677.)²⁵²

In light of the fact that the Referee made clear that evidence relating to the alleged confession was beyond the scope of the hearing, the Report’s reliance on it as unchallenged denies petitioner of a fair hearing.

The Referee also relied on Slick’s testimony that he concluded the alibi witnesses were not credible because of, inter alia, inculpatory statements petitioner allegedly made to two jailers. (See Referee’s Report p. 21; see also, Exceptions, Question 3, *ante*.) However, as set forth above, the Referee had earlier ruled during a hearing on petitioner’s *Pitchess* motion that information relating to the credibility of these two officers was not relevant to the this Court’s reference questions. Since the Referee denied petitioner an opportunity to develop evidence that might be offered to challenge the validity of the jailers’ claims, it is unfair for the Referee to use Slick’s reliance on them as reason to believe that Elizabeth Black, Ora Trimble, Gloria Burton and Denise Burton would not have been credible witnesses. Alternatively, if it was appropriate to consider the reports by jailers Norman and Borst, then the Referee erred in refusing petitioner’s *Pitchess* request to discover evidence of prior complaints against these officers.

²⁵² See also HT 1753-1754 (Petitioner’s counsel understood the Referee to be ruling that the broader issue of the validity of petitioner’s alleged confession was not within the scope of the reference questions, as the Referee was interested only in information known to Slick at the time of the trial, but requested that petitioner not be precluded from offering additional information regarding the validity of the confession if the hearing progressed to Reference Question 11); transcript of March 29, 2002, pp. 28-29 (Referee stated that reference questions did not involve a re-analysis of the prosecution’s case).

4. Petitioner Was Denied an Opportunity to Present Evidence Relevant to Reference Question 11.

As noted above, the Referee ruled that it would bifurcate the evidentiary hearing, taking evidence on Reference Questions 1-10 first, and then evidence on Question 11 if necessary. In fact, the Referee specifically directed the parties to make their witness lists and proffers responsive only to Questions 1-10. (See HT 1284.)²⁵³ The Referee's Report, however, ignores this ruling and in response to Question 11 concludes that "the evidence would not have been sufficiently credible or probative to call into question the tactical decision of Mr. Slick to focus instead on the penalty phase of the trial." (Referee's Report, p. 32.) As demonstrated above, petitioner was denied an opportunity to fully litigate and present evidence showing that there was credible evidence to support a guilt phase defense. He has been, therefore, denied a full and fair hearing by the Referee's finding on Reference Question 11.²⁵⁴

²⁵³ The parties have never been asked to submit a witness list and proffer of testimony as to Question 11. In fact, after the Referee bifurcated the hearing, petitioner suspended his investigation into broader issues raised by Question 11, so as not to waste scarce investigative resources provided by this Court. (See Memorandum of Points and Authorities in Support of Petitioner's Proposed Findings of Fact, p. 185, n. 165.) Petitioner did initially proffer some witnesses related to the K-Mart incident and to fingerprint evidence not disclosed to Slick by police or the prosecution prior to trial (see Supplement to Evidentiary Hearing Witness List and Proffer, dated Jan. 3, 2003, p. 2 [Margetta Heimann and Officer P.J. Kerbil].) Petitioner did not renew his request to present these witnesses during the hearing, because their testimony was clearly outside of the scope of the hearing as it was defined by the Referee.

²⁵⁴ During post-hearing proceedings on January 23, 2004, respondent asserted that petitioner had waived an opportunity for further hearing on Question 11, because petitioner contended in briefing that

5. The Referee Made Findings Approving of Slick's Tactical Decision-Making Although the Soundness of Counsel's Trial Strategy Was Outside the Scope of the Hearing.

In *People v. Frierson*, *supra*, 39 Cal.3d 803, this Court made it exceedingly clear that whether a trial attorney has made a reasonable tactical decision not to present a defense to the charged crimes is not relevant to the question of whether a criminal defendant has been denied his constitutional rights to present a defense at the guilt phase of his capital trial. (See Brief, sections A. and C., *ante*.) Petitioner has been denied a full and fair hearing because the Referee unilaterally expanded the scope of this Court's reference questions to reach beyond *Frierson* when he decided to assess whether various aspects of trial counsel's strategic decision making were supportable. This redirection of the proceedings deprived petitioner of his rights, including his right to fair notice, and prevented him fully litigating major issues addressed in the Referee's Report. Why the Referee did so in light of *Frierson*, the reference questions and his own prior rulings is not explained.

further hearing was unnecessary. Petitioner strenuously disagrees with respondent. In the Memorandum of Points and Authorities in Support of Petitioner's Proposed Findings of Fact, petitioner asserted that further hearing was not necessary because he had already met his rather minimal burden under *People v. Frierson* of establishing that some credible evidence existed to support a guilt phase defense. (Memorandum at p. 181.) Petitioner made clear, however, that if the Referee disagreed that petitioner had met this burden, he wanted an opportunity to present all evidence relevant to the question. (*Id.* at pp. 185-186.) It would have been an extreme waste of resources for the parties to further litigate the question if the Referee had already concluded that petitioner had met his burden of proof. Petitioner's argument that he had in no way constituted a waiver of his opportunity to fully present his case.

During the instant proceedings, petitioner repeatedly asserted that the effectiveness of Slick's representation, and the reasonableness of his strategic decision-making was not at issue. Petitioner set the stage early when, in a request for an order protecting privileged material in the trial file, he stated: "As the California Supreme Court has made clear in *Frierson*, a trial counsel's competency is irrelevant to the issue of whether a defendant was deprived of his constitutional right to present a defense. . . . Mr. Slick's strategic reasons for his actions at petitioner's trial, including his decision not to present a guilt phase defense, are not now at issue." (Petitioner's Motion for Protective Order as to Privileged Attorney-Client Information, served October 3, 2001, p. 9; see also, Motion to Clarify the Scope of the Evidentiary Hearing, pp. 4-5.)

During the evidentiary hearing, petitioner's counsel continued to assert that Slick's tactical decision-making was not at issue, and emphasized that the reference questions posed objective, rather than subjective, inquiries. The questions, she contended, "don't focus on Mr. Slick's trial strategy or his subjective thinking about the evidence. They are focused on objective factors concerning the credibility of the information available to Mr. Slick." (HT 889.)²⁵⁵ In support of her position, petitioner's counsel quoted from the *Frierson* opinion and then stated: "So Mr. Slick's justifications for why he believed a defense wouldn't be credible are, at this point in time, are irrelevant. The issue is whether there was some credible

²⁵⁵ Counsel's position is supported by the phrasing of the reference questions, several of which ask whether Slick had "reason to believe" whether particular witnesses were credible, etc.. (See Reference Questions 2, 3, 7 and 9.) The questions do not ask the Referee to determine what Slick actually believed or whether his beliefs were well-founded.

evidence from which a trier of fact could have concluded that Mr. Burton had a credible defense.” (HT 889-890; see also, HT 992 [counsel argued that *Frierson* did not require Referee to determine whether Slick made a reasonable tactical decision not to present a defense and that Slick’s strategic considerations were irrelevant to issues in reference order].)

Respondent agreed that Slick’s reasons for his actions or inaction were not relevant under this Court’s reference order. (HT 47.) Indeed, even the Referee appeared to agree, stating: “As I think both of you have indicated – and *Frierson* points out – it’s not an I.A.C. [ineffective assistance of counsel] case” (HT 678.)

In the midst of the evidentiary hearing, however, the Referee made some contradictory and ambiguous remarks concerning the relevance of Slick’s strategic decision-making. (HT 867-868.) When respondent sought to cross-examine Slick about a probation report for petitioner in the trial file, petitioner’s counsel objected that respondent’s exam went to the reasonableness of Slick’s strategic decision-making, an issue irrelevant to *Frierson*. (HT 992.) The Referee ruled that some “limited inquiry” was appropriate, stating:

Well, the reference order, I think, goes a little bit beyond *Frierson* – although that is the only case that is cited – because it does ask us to attempt to reconstruct through witnesses, including Commissioner Slick, what his thinking was with respect to putting on a so-called credible defense, to quote from question nine, for example. And I think that takes us a little bit into the realm of his tactical decision making at that time.

It is not clear from the Supreme Court’s reference order to what extent that takes us all the way into the realm of an ineffective assistance of counsel argument. I don’t think it goes that far. But there is something on the continuum or

there's some place on the continuum that we must go in that direction.

(HT 992-993.) The Referee was mistaken. *Frierson* clearly holds that a defendant may be denied his constitutional right to defend even where his trial counsel's strategic decisions were reasonable. (See, e.g., 39 Cal.3d at p. 815.) Thus, there is no need to delve into how counsel arrived at the tactical decisions he made. Moreover, there is nothing in Reference Question 9 – or any other reference question – that directs an inquiry into Slick's tactical decision-making.

Unfortunately for petitioner, the Referee's inappropriate focus on Slick's decision-making did not end with the above-described ruling. In fact, the Referee's Report includes several findings which address, directly or indirectly, the reasonableness of Slick's tactical decision-making. In response to Reference Question 2, the Report concludes that Slick had a "supportable opinion" as to the credibility of the officers who allegedly took a confession from petitioner and as to the officers' persuasiveness before Long Beach juries. (Referee's Report, at p. 20.) This Court did not ask, however, whether Slick's assessment of the officers' credibility was supportable, but whether trial counsel had any reason to believe that the officers were not credible. (See Reference Question 2.) The reference question poses an *objective* inquiry, answered by looking at the information available to Slick, not by assessing whether his tactical decision not to challenge detective Collette's credibility at trial was reasonable. Because this Court did not ask whether Slick's tactical decision not to challenge the confession was a reasonable one, petitioner did not seek to litigate the issue.

The Referee's findings relating to Reference Question 3 also incorporate an assessment of Slick's strategic decision-making. (Report,

pp. 21-22.) Therein, this Court asked whether Slick had reason to believe that potential defense witnesses identified by petitioner would not be credible. The Referee, however, answered Question 3 by assessing whether Slick's belief that the witnesses were not credible was reasonable. The Referee stated, "By a preponderance of the evidence, this Court concludes that Mr. Slick had reasonable and valid reasons to believe that these witnesses would not have been credible." (Report, at p. 22.) Although the difference between the two inquiries is subtle, it is significant. Petitioner asserts that Reference Question 3 poses an objective question which does not require a fact-finder to examine Slick's actual thinking about the credibility of the potential witnesses or to determine whether that thinking was reasonable. In assessing the reasonableness of Slick's determination that the witnesses were not credible, the Referee considered "the reasoned decision of an experienced trial attorney who is familiar with jurors' reluctance to credit such 'family testimony.'" (Report, at p. 21.) The Referee also looked, inter alia, to Slick's belief that "'alibi defenses don't work . . . in the fact of an unchallenged confession.'" (*Ibid.*) The Referee's calculus is not only beyond the reference order but unfair to petitioner because he had no opportunity to litigate whether Slick's assessments of jurors' views of "family testimony" and the strength of an "unchallenged confession" in comparison to an alibi defense were valid.

In response to Reference Question 7, the Referee made additional findings that were based on an assessment of the reasonableness of Slick's trial strategy. In Question 7, this Court asked whether Slick had reason to believe that the testimony of a number of potential defense witnesses would be incredible or insufficiently probative to justify presenting them at the guilt phase. Regarding the alibi witnesses, the Referee again relied on

factors that went more to Slick’s strategic assessment of the case than to an objective assessment of the witnesses’ credibility, including Slick’s belief that alibi defenses “don’t work . . . in the face of . . . an unchallenged confession.” (Report, at p. 25.) The Referee also credited Slick’s belief that the prosecution had “two other good eyewitnesses.” (*Ibid.*) The reasonableness of Slick’s assessment of these factors was not before the lower court, however, nor did petitioner have a chance to show that trial counsel’s strategic assessments were unreasonable.

As to eyewitness Michael Stewart, the Referee concluded in response to Reference Question 7:

Ultimately, in the context of the stated defense strategy of trying to contend with a confession and other compelling evidence against Petitioner, while seeking to maintain credibility with the jury for a likely penalty phase of the trial, this Court concludes by a preponderance of the evidence that Mr. Slick had reason to believe that Mr. Stewart was insufficiently probative to justify calling him during the guilt phase of the trial.

(Report, at p. 27.) Again, the Referee has answered the question posed by assessing the reasonableness of Slick’s strategic decision-making – in this instance Slick’s decision not to call Stewart to testify at petitioner’s guilt phase – thereby going beyond this Court’s reference order and *Frierson*. Again, the Referee has credited Slick’s tactical thinking although petitioner had had no opportunity to demonstrate how manifestly unreasonable it was.

Finally, the Referee concludes that even if petitioner had requested Slick to put on a guilt phase defense, “the evidence would not have been sufficiently credible or probative to call into question the tactical decision of Mr. Slick to focus instead on the penalty phase of the trial.” (Report, at p.32 [Question 11].) The question the Referee purports to answer is not the

one asked by this Court (nor was it litigated by petitioner; see below). The latter part of Reference Question 11 asks whether the defense petitioner desired would have been credible.²⁵⁶ This inquiry does not implicate trial counsel's strategic decision-making. Moreover, nothing in any other reference question directed the Referee to measure the credibility of the potential defense witnesses or the probative value of the testimony they could have given at petitioner's trial by determining whether either or both called into question Slick's tactical decision not to defend. In fact, the Referee's findings on Question 11 vividly demonstrates his misunderstanding of the *Frierson* opinion, which expressly states that a capital defendant's attorney may not tactically decide not to defend against the guilt charges in hopes of obtaining a life verdict at the penalty phase if the defendant openly expresses his desire to present a guilt phase defense and there is some credible evidence to support it. (See Brief, sections A. and C., *ante*.)

Petitioner bears the burden of proof in these proceedings. It is exceedingly important that one bearing that burden have notice of the issues of importance when he still has the opportunity to present evidence upon them. (See *Lankford v. Ohio*, *supra*, 500 U.S. 110.) Petitioner conducted his presentation at the hearing with the understanding that the inquiry was limited to the reference questions posed by this Court, which do not call for an inquiry into the soundness of Slick's tactical decisions. Had petitioner known that Slick's strategic decision-making would be at issue, he would have presented a wealth of evidence showing that his trial attorney

²⁵⁶ As repeatedly explained, *Frierson* requires a showing of "some credible evidence." (39 Cal.3d at pp. 812, 817-818; see also, Brief, sections A. and C., *ante*.)

unreasonably failed to investigate and present potential guilt phase defenses as well as mitigating evidence and evidence rebutting the prosecution's aggravating evidence. (See Exceptions, Question 7, *ante*.)

In sum, the Referee erred by evaluating the potential defense evidence in light of Slick's irrelevant tactical decisions, the soundness of which was not litigated in these proceedings, thereby depriving petitioner of a full and fair hearing.

6. The Referee Incorrectly Assessed The Credibility of Witnesses Under *People v. Frierson*.

In his findings the Referee has misconstrued the type of credibility assessment called for by *People v. Frierson* and this Court's reference order. The Referee correctly recognized his role during the reference hearing when he stated: "[I] have never viewed this hearing as one in which this court was to make some independent sort of initial or case of first-impression analysis of the credibility of each successive witness, and *Frierson* doesn't suggest that either. . . ." (HT 502.) The Referee correctly went on to say that although *Frierson* did not require the presentation of evidence that was so incredible no competent attorney would introduce it, "that's a pretty low threshold" (*Ibid.*)

In issuing his findings the Referee ignored his previous recognition the "some credible evidence" standard of *Frierson* was not demanding and that it was not his job to independently assess the credibility of the witnesses petitioner could have presented at trial. In fact, in finding the witnesses incredible, the Referee substituted his own judgment, or "first-impression analysis," instead of evaluating whether a reasonable juror could have given weight to the potential defense evidence.

The Referee also evaluated the credibility and probative value of the

defense evidence that could have been presented in petitioner's guilt phase in an inappropriately broad manner, by weighing it against the state's evidence and the reasonableness of Slick's tactical decision-making. Both of these factors are irrelevant under *Frierson*. A defendant is not required to show that he was prejudiced in order to prevail. He is entitled to defend at the first phase of his capital trial whether or not his counsel reasonably believes a better outcome would ensue by not presenting a defense to the guilt charges. (See Brief, sections A. and C., *ante*.) In addition, petitioner was denied due process in the reference proceedings because he had no opportunity to contest either the strength of the state's case or the soundness of his attorney's tactical decisions (see sections C.3. and C.5., *ante*).

The Referee's witness credibility determinations not only were erroneously made but also deprived petitioner of the due process and fair notice to which he was entitled. (See *Lankford v. Ohio*, *supra*, 500 U.S. at 121 [fair notice is the bedrock of any constitutionally fair procedure].)

7. The Referee Applied Uneven Standards in Assessing the Credibility of the Witnesses.

The uneven or arbitrary application of evidentiary standards may violate a defendant's right to present a defense and witnesses. (See, e.g., *Washington v. Texas*, *supra*, 388 U.S. at p. 23; *Rock v. Arkansas* (1987) 483 U.S. 44, 55-56.) The United States Supreme Court has also reversed criminal convictions in cases where the trial court has applied unjustified and uneven evidentiary standards in a way that favors the prosecution over a defendant. (See, e.g., *Green v. Georgia* (1979) 442 U.S. 95, 97 (per curiam); *Webb v. Texas* (1972) 409 U.S. 95, 97-98; *Chambers v. Mississippi*, *supra*, 410 U.S. at 295-298; *Cool v. United States* (1972) 409 U.S. 100, 103, n. 4; *Wardius v. Ohio* (1973) 412 U.S. 470, 472.)

Although these cases involve trials rather than habeas corpus, petitioner has established that he is entitled to due process in these proceedings. As petitioner shows herein, the Referee's application of uneven and arbitrary standards in assessing witness credibility which favored respondent has denied him of due process and his rights to a full and fair hearing.

The Referee repeatedly discounted witnesses who gave testimony helpful to petitioner, finding them to be biased in petitioner's favor. The Referee found that Kristina Kleinbauer was "substantially biased" in petitioner's favor. (Referee's Report at 17; see also, at 25.) The Referee found Marshall Smith biased in petitioner's favor because he was still representing petitioner in his federal habeas corpus case (Report at 18), although those proceedings have been dormant since 1993 (HT 71-72, 164, 179). The Referee rejected petitioner's claim that the alibi witnesses were unbiased. (Report at 21-22.) And, the Referee rejected petitioner's testimony as self-serving. (*Id.* at 25.)

Although the Referee was quick to find these witnesses biased for petitioner,²⁵⁷ he ignored substantial evidence that Slick was biased *against* petitioner. As petitioner has demonstrated, Slick repeatedly cooperated with respondent throughout this case while he refused to cooperate with petitioner's counsel. Slick believed that he was the "defendant" in the proceedings and obviously was trying to justify his conduct at trial. (See Statement of Facts, sec. B.1.e.9. and Brief, sec. B.3.f.; see also, Exceptions, Question 1, *ante.*)

²⁵⁷ Petitioner has also shown throughout this brief that each of these findings of bias are not supported by the evidence.

In fact, Slick was so obviously hostile to petitioner that petitioner sought during the hearing to have him declared an adverse witness pursuant to California Evidence Code section 767. (HT 895, 897-898.) As former trial counsel, he was certainly not “distinterested.” (*Bolius v. Wainwright, supra*, 597 F.2d at 989.) By admitting that he knew petitioner wanted to defend, Slick would have put himself in an awkward ethical position. Thus, “the weight [of trial counsel’s] testimony must be discounted by the possibility of a conflict of interest” (*Id.* at p. 990.)

Nowhere in his findings did the Referee ever address the overwhelming evidence that Slick was biased against his former client. This uneven and arbitrary application of evidentiary standards denied petitioner of due process.

The Referee also employed unequal standards when assessing the strength of the witnesses’ memories. The Referee concluded that several witnesses who testified favorably for petitioner had poor recollections and thus discounted their testimony. The Referee gave Kleinbauer’s testimony little weight because he found that her recollection of her conversations with petitioner was “virtually non-existent” and because she responded to some leading questions by petitioner’s counsel. (Report at p. 17.) He also found her to be “often confused and distracted” in her testimony (*ibid*), although he knew she suffered from a medical condition. The Referee also discounted favorable testimony from Michael Stewart, William Collette, and Ora Trimble because he found their memories to be poor or their recollections to have varied over time. (*Id.* at pp. 27, 29-30, and 22.)

In contrast, the Referee repeatedly accepted Slick’s testimony on key points although, as the Referee acknowledged during the hearing, Slick recalled little (see HT 892). In fact, Slick’s memory was extremely poor,

his recollection was rarely refreshed by documentary evidence, and he was impeached on significant issues. (See Statement of Facts, sec. B.1.e., Brief, sec. B.3.c., and Exceptions, Question 1, *ante*.) The Referee failed even to address this evidence. In addition, although the Referee gave little weight to Kleinbauer's testimony because she was asked leading questions, the Referee ignored the fact that Slick was repeatedly asked leading questions by respondent. (See, e.g., HT 856, 865-866, 870-871, 875, 879-881, 884, 919, 924, 932-933, 936-943, 949-950, 957-958, 994-995, 999-1000, 1001, 1002-1003, 1003-1004, 1006, 1136-1137, 1140, 1148.)²⁵⁸ In fact, the Referee applied one standard to witnesses whose testimony aided petitioner and another, far more lenient standard to Slick, thereby denying petitioner of due process.

The Referee similarly applied disparate standards when he discounted the testimony of Marshall Slick and Jeffrey Brodey because they had not made notes of their conversations with Slick (Report at p. 18), while ignoring the substantial evidence showing that Slick failed to make

²⁵⁸ In *People v. Spain* (1984) 154 Cal.App.3d 845, 851-854, the appellate court recognized that it is at times appropriate for the trial court to declare a witness to be a hostile one and thus to prohibit the use of leading questions in cross-examination, pursuant to Evidence Code section 767. Citing Wigmore, the court in *Spain* stated, “The purpose of the cross-examination is to sift [a witness'] testimony and weaken its force, in short, to discredit the direct testimony. . . .” Obviously, respondent did not seek to discredit Slick's direct testimony in its cross-examination of him. Moreover, Slick had an obvious bias against petitioner. (See 154 Cal.App.3d at p. 854 [defendant's mother, who was called by the prosecution, had demonstrated her obvious and natural bias in favor of defendant].) Given these facts, the Referee erred in refusing to declare Slick a hostile witness and to permit respondent to use leading questions to cross-examine him. This error added to the denial of a full and fair hearing.

notes of these same conversations or even of his contacts with petitioner (see Exceptions, Question 1, *ante*).

In sum, petitioner was denied due process by these rulings.

8. The Referee Relied on Exhibits Not Admitted Into Evidence.

Petitioner has also been denied a full and fair hearing because the Referee has relied on exhibits that were not admitted into evidence at the hearing. The Referee's Report cites declarations by Slick, exhibits 18 and 23. (Report, at pp. 24, 26.) These exhibits were not admitted into evidence. (HT 2253). The Referee also relies on a declaration by Detective William Collette, exhibit DD (Report, at p. 29), that was not admitted into evidence (HT 2136). The Referee relied upon exhibit 17, a report by respondent's investigator Ilene Chase of her 1998 interview with Michael Stewart. Although only one paragraph of this report was admitted into evidence, the Report uses the entirety of the exhibit. (Report, at p. 27; HT 2254-2264; see also, Exceptions, Question 7, *ante*.) He also cited exhibit T, a declaration by Denise Burton (Report at p. 22), which was not admitted (HT 2133). Because these declarations were not admitted into evidence, any reliance upon them is inappropriate.²⁵⁹

In sum, this Court should reject the Referee's findings because petitioner was not given a full and fair opportunity to litigate all of the issues contained therein.

²⁵⁹ Petitioner also notes that the Report cites exhibit A, a declaration by Marshall Smith, on page 2, in addition to a citation to the reporter's transcript regarding Smith's testimony of the contents of exhibit A. Exhibit A was not admitted into evidence, however. (HT 2130.)

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reject the Referee's Report and issue a writ of habeas corpus. Alternatively, petitioner requests that this Court re-open the proceedings so that he may present all evidence relevant to the reference order.

Dated: July 15, 2005 Respectfully submitted,

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