IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ANDRE BURTON,** On Habeas Corpus.	**CAPITAL CASE** S034725

Los Angeles County Superior Court No. A026664
The Honorable D. Sterry Fagan, Judge

BRIEF ON THE MERITS AND STATEMENT REGARDING EXCEPTIONS TO THE REPORT OF THE REFEREE

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PRELIMINARY STATEMENT

On February 25, 1983, petitioner murdered Gulshakar Khwaja after robbing and shooting her adult son twice in the face, and after having earlier robbed two women at gunpoint. On August 17, 1983, in Los Angeles Superior Court No. A026664, the jury found petitioner guilty of first degree murder, and found true the special circumstance allegation that the murder was committed while petitioner was engaged in the commission of a robbery. The jury also convicted petitioner of three counts of robbery. As to each count, the jury further found that petitioner used a firearm in the commission of each offense and, as to one robbery count, the jury also found that one of the victims sustained great bodily injury. On August 23, 1983, the jury fixed petitioner's penalty at death. After a partial retrial on the sole issue of intent to kill, the jury found on October 14, 1984, that petitioner acted with the intent to kill. On June 4, 1985, the trial court entered a judgment imposing the death penalty.

Petitioner pursued his automatic appeal to this Court, and this Court affirmed the judgment in its entirety on May 8, 1989. (*People v. Burton* (1989) 48 Cal.3d 843.) While his automatic appeal was pending, petitioner filed a petition for writ of habeas corpus in this Court (S002936). This petition was denied on June 30, 1988.

On or about August 30, 1993, petitioner filed a second petition for writ of habeas corpus (S034725) in this Court. On October 29, 1997, this Court

issued an order to show cause as to Claim XIV, wherein petitioner asserts he was denied the right to present a guilt phase defense and to use compulsory process in aid of his defense.

On October 25, 2000, this Court ordered a reference hearing on the following questions:

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 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 defense 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 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?

On January 6, 2005, the report of the referee was filed with the Court, and the Court invited the parties to file exceptions to the report of the referee and simultaneous briefs on the merits.

STATEMENT OF FACTS [1/]

A. Guilt Phase

1. Armed Robberies At K-Mart – Counts 1 And 2

On February 25, 1983, at about 1:00 p.m., petitioner, armed with a gun, approached a pickup truck that had just pulled into the parking lot of a K-Mart store in Long Beach. There were two women in the truck; Lisa Searcy was the driver and Margie Heimann was the passenger.

As Ms. Searcy was about to exit her car, petitioner approached her quickly and demanded money. Ms. Searcy saw that petitioner had a handgun and, fearing for her life, she gave him money from her purse. Ms. Heimann did the same. After taking their money, petitioner ordered the women to place their purses on the floor and threatened to kill them if they were hiding any money

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1. The Statement of Facts is primarily taken from this Court's opinion in *People v. Burton, supra,* 48 Cal.3d 843.

from him. He then ordered the women to drive off without looking back. The women left the parking lot and called the police. At trial, Ms. Searcy positively identified petitioner as the perpetrator.

2. Khwaja Murder And Robbery – Counts 3 And 4

Slightly after 1:00 p.m. on the same day, Anwar Khwaja, the owner of a 7-11 store in Long Beach, and his nine-year-old daughter picked up a cloth bag containing $190 in coins from a Bank of America branch in Long Beach. He then drove to his mother's residence and remained seated in the car while his daughter went to summon his mother, Gulshakar Khwaja, and sister, Zarina Khwaja. Mr. Khwaja was parked along the curb with his driver's door open when he saw his mother and sister approaching the car.

Petitioner suddenly approached from the rear of the car and pointed a gun at Mr. Khwaja's face. When petitioner demanded money, Mr. Khwaja told petitioner to take the money. Petitioner shot Mr. Khwaja in the forehead and again demanded money. Without awaiting a response, petitioner again shot Mr. Khwaja in the face and the bullet went through Mr. Khwaja's eye.

Mr. Khwaja was able to remain conscious and saw petitioner shoot Gulshakar Khwaja in the chest. She died of a gunshot wound to the lung and heart. Petitioner then took the money bag and was smiling or laughing as he strode off.

Neighbor Robert Cordova was with his brothers when he heard the shooting. He looked out the window and saw petitioner running down the street carrying a gun and a white canvas bag. Petitioner ran into an alley and entered into a red truck, which then drove off. Mr. Cordova positively identified petitioner at the preliminary hearing and at trial.

Long Beach Police Detective William Collette obtained a search warrant and arrested petitioner at a location in Long Beach. At the location of the arrest, Detective Collette also found coin wrappers. At the police station,

petitioner was advised of his constitutional rights and agreed to waive them.

Petitioner initially denied any involvement in the offenses, but he eventually admitted his culpability. He told the detectives that, on February 25, 1983, he and his confederate, Otis Clements, met together with the purpose of "going to go make some money today." Petitioner provided a dark blue shirt with a Ford emblem on the shoulder for Clements and himself. They drove off in Clements' red pickup truck and went to several banks to find someone to rob. When they were unsuccessful, they went to the K-Mart and robbed the two women of about $15.

Petitioner further stated that, after the robberies of the two women, he and Clements went to a Bank of America branch in Long Beach. Petitioner saw a young girl and a man holding a money bag enter a small blue car. Petitioner told Clements to follow that car because the man had a sack full of money, and they followed the man until he parked. Clements parked the truck in an alley and petitioner approached the man by foot. Petitioner demanded money from the man, and the man attempted to snatch the gun from petitioner. Petitioner shot the man in the face and grabbed the money. As petitioner was running away, he also shot a woman who was attempting to grab him from behind. Petitioner ran to the truck and laid down on the floor as Clements drove off. They went to the home of petitioner's girlfriend and counted the money, which amounted to about $100 in change. Petitioner spent the money on marijuana and Clements was arrested before petitioner could give Clements his share. Petitioner burned the money bag and sold the murder weapon to a person he would not identify.

On February 28, 1983, the police attempted to interrogate petitioner again. Petitioner, however, denied any knowledge or involvement in the offenses. He stated that he was lying when he made his prior statements to the police and that he only made those statements to avoid being framed.

The defense did not present any evidence at the guilt phase.

B. Penalty Phase

The prosecution presented evidence that petitioner had been adjudged a ward of the court on four different occasions because petitioner had committed the following offenses: lewd act upon a child in 1976; residential burglary in 1977; attempted robbery in 1978; and attempted grand theft person in 1979. The trial court took judicial notice that petitioner had pled guilty to two counts of residential burglary in 1982, which resulted in a 16-month prison sentence.

In the defense case, petitioner's mother, Gloria Burton, testified that she had eight children, that she lived on Social Security and welfare, and that petitioner's father had been murdered when petitioner was five years old. Four of her five boys and one of her three girls had been in trouble with the law. Until the age of 13, petitioner did fairly well in school. He was always a good boy at home, sometimes attended church, and had been taught right from wrong. Petitioner began having trouble because of fighting at school and he was then removed from her home intermittently for juvenile placement. Petitioner was a loner, but got along well with his siblings.

A Los Angeles County deputy sheriff testified that petitioner had been in his area of the county jail for two months. Petitioner had been given privileges, was a backup trustee, was obedient, and had never caused any trouble.

C. Reference Hearing

At the reference hearing, petitioner presented 13 witnesses: Lomax Marshall Smith, Kristina Kleinbauer, Ronald Slick, Michael Stewart, Jeffrey Brodey, Ora Trimble, Elizabeth "Penny" Black, Susana Camacho, Denise Burton, Hope Black, Zarina Asrani, William Collette, and petitioner. Respondent presented three witnesses: Lynda Larsen, Ilene Chase, and William Collette.

1. Lomax Marshall Smith

Lomax Marshall Smith worked on petitioner's direct appeal and currently represented petitioner in petitioner's federal habeas corpus case. (RHT 27-29, 71-72.) In December 1985, Mr. Smith and a second attorney, Sam Jackson, met with Mr. Slick to discuss petitioner's case. During this meeting, Mr. Slick stated that the case against petitioner had been a "slam dunk" as to guilt, and that he met with petitioner and told him about the strength of the prosecution case. Mr. Slick also stated that he had spoken with the police officers, who were reliable witnesses, and that petitioner had confessed. Mr. Slick further said that petitioner had told him that he did not confess, that he was not a participant, that he was not present, and that he had witnesses that could be used for this purpose. (RHT 33-35, 48-49, 54.) Mr. Smith did not take any notes of this meeting with Mr. Slick. (RHT 73-75.)

Mr. Smith began a draft declaration for Mr. Slick in October 1997 and completed the draft declaration on October 21, 1997; the declaration was prepared entirely on the basis of Mr. Smith's recollections of his December 1985 meeting with Mr. Slick. Mr. Slick did not sign the declaration. (RHT 73-75.) After Mr. Smith's memory was refreshed by this draft declaration, Mr. Smith recalled that Mr. Slick had stated in the 1985 meeting that petitioner had said he wanted to call witnesses. (RHT 60.)

Mr. Smith had spoken to petitioner prior to preparing the draft declaration for Mr. Slick. Petitioner advised Mr. Smith that he had wanted to call alibi witnesses at trial, but Mr. Smith did not include that language in the draft Slick declaration. (RHT 116-119.) Mr. Smith's 1994 and 2000 declarations did not include any statement to the effect that Mr. Slick had described the prosecution case as a "slam dunk." (RHT 201.)

2. Kristina Kleinbauer

Kristina Kleinbauer, a licensed private investigator, began working on petitioner's case in April 1983. Mr. Slick gave her general instructions on the investigation she was to conduct in the case. In June 1983, Ms. Kleinbauer interviewed petitioner and he described his activities on the date of the offenses and mentioned certain individuals by name or description: Penny Black; Willie Davis; petitioner's mother (Gloria Burton); Penny Black's mother (Ora Trimble); and Penny Black's cousin. (RHT 222-227, 230-246.)

Ms. Kleinbauer then interviewed Penny Black, Ora Trimble, Gloria Burton, Denise Burton, Michael Stewart, and Susan Camacho. (RHT 246-267, 313-315.) She prepared a report for Mr. Slick (Pet. Exh. No. 1) and met with him on August 10, 1983. (RHT 236, 277.)

At some point in time, petitioner expressed his dissatisfaction with Mr. Slick to Ms. Kleinbauer. As a result, Ms. Kleinbauer contacted another attorney, Jeff Brodey, on petitioner's behalf. On or about July 29, 1983, she met with petitioner and provided the advice she had received from Mr. Brodey. (RHT 280-282, 285-286, 454.) Ms. Kleinbauer's last professional contact with petitioner in the jail was on July 29, 1983. (RHT 354-355, 374-376, 452-454.)

On October 11, 1990, Ms. Kleinbauer obtained a written statement from Michael Stewart. (RHT 290-292.) During the course of petitioner's post-conviction litigation, Ms. Kleinbauer had signed three declarations, but none of those declarations contained any statement that petitioner had told her that he wanted to have a guilt phase defense presented or to have alibi witnesses called. (RHT 437-438, 448-449.)

3. Ronald Slick

Mr. Slick was appointed to represent petitioner on or about March 1, 1983. He met with petitioner on March 1, 11, 14, and 28. Mr. Slick also had

several court appearances and meetings with petitioner in April, May, and July 1983. (RHT 506, 510-516, 524-529.) On August 10, 1983, Mr. Slick met separately with petitioner and Ms. Kleinbauer; his meeting with petitioner probably occurred at the courthouse and his meeting with Ms. Kleinbauer most likely occurred at his office. (RHT 544-546.) In 1983, petitioner told Mr. Slick that he was not involved in the crimes, that he was not present when the crimes were committed, and that he was being framed by the police. (RHT 560-561, 723-727.)

Mr. Slick discussed the case with petitioner and informed petitioner that he did not intend to call witnesses or put on a guilt phase defense because that would make the penalty phase defense more credible. Mr. Slick, however, did not remember the particular circumstances of these statements to petitioner. Mr. Slick advised petitioner "early on" about his assessment of the case, and petitioner did not like the assessment. Petitioner became evasive and uncooperative, and his attitude prevented Mr. Slick from having meaningful communications with him. Mr. Slick discussed with petitioner how to exclude petitioner's statement to the police and explained that petitioner would need to testify to exclude the statement. (RHT 763-766, 769-770.)

Petitioner did not tell Mr. Slick that he wanted a guilt phase defense presented and did not object after Mr. Slick discussed the planned guilt phase strategy of not presenting a defense. (RHT 770, 882, 919-921, 933.) Mr. Slick did not believe that Ms. Kleinbauer ever told him that petitioner was directing her to tell Mr. Slick to do a certain thing or present a guilt phase defense. (RHT 810-812.)

Mr. Slick did not have any reason to believe that the police officers who took petitioner's confession were not credible because Mr. Slick had a longtime knowledge of the officers, their experience, and their credibility. (RHT 728-729.) Mr. Slick also had no reason to believe that the police officers were not credible because petitioner also made admissions to his jailers, and

petitioner had a history of confessing to other crimes. (RHT 737-741, 872-877.)

Mr. Slick was aware of potential witnesses Elizabeth Black, Ora Trimble, Gloria Burton, Michael Stewart, Susan Camacho, and Zarina Khwaja. He believed that the testimony of each of these witnesses would have been incredible or insufficiently probative to justify their presentation at trial. (RHT 791-810, 813-817.)

On August 10, 1983, petitioner expressed dissatisfaction with Mr. Slick and asked to represent himself. Jury selection began the next day, and the trial testimony in the guilt phase concluded on August 17, 1983. (RHT 564-565, 572-576.)

In December 1987, Mr. Slick met with Mr. Smith and Mr. Jackson to discuss petitioner's case. Mr. Slick did not sign a declaration prepared by Mr. Smith because it was not accurate. (RHT 824-836, 828, 830-831.)

4. Michael Stewart

Mr. Stewart was a peace officer in Oregon between 1971 and 1976. In February 1983, he lived on Pleasant Street in Long Beach. On February 25, 1983, Mr. Stewart was in front of his apartment when he observed two Black males back a car or truck into the alleyway behind his truck. One of the males got out and walked down the street. Several minutes later, Mr. Stewart heard popping sounds and saw a black male hurriedly come up the street. He then saw a lady come out of an apartment across the street, heard a possible gunshot, and saw the lady fall. The Black male passed Mr. Stewart and entered the passenger side of the vehicle in the alleyway. The man seemed to be carrying a money bag and a small gun. He appeared to be six foot, between 180 and 190 pounds,

25 to 30 years old, and appeared to have graying in the side of his beard and in his hair. Mr. Stewart obtained the license plate number of the vehicle and provided it to the police. (RHT 587-596, 601-603.)

About an hour later, the police took Mr. Stewart and two other individuals to see a vehicle and Mr. Stewart was able to identify the driver. The police then took Mr. Stewart and the other individuals to another location and showed them a second person. He could not identify that person because the man he saw at the scene of the incident was older than the person at the showup. One of the individuals with Mr. Stewart stated that the person at the showup looked like the shooter. (RHT 596-598, 603-605.)

In August 1983, Ms. Kleinbauer called Mr. Stewart about the events on February 25, 1983. Ms. Kleinbauer's written report of her conversation with Mr. Stewart appeared to be accurate. (RHT 598-599.) In 1990, Ms. Kleinbauer visited Mr. Stewart, and he signed a declaration at that time. (RHT 605-606.) Based upon Mr. Stewart's current recollection, petitioner (as reflected by his appearance at the reference hearing) did not look like the person he saw on February 25, 1983. (RHT 250.)

Mr. Stewart agreed that the statements he provided to the police officers on February 25, 1983, as reflected in the police reports, were made when the events were "freshest" in his mind. (RHT 609-612.) He further agreed that the police reports accurately reflected his statements to the police, and that these statements did not include any mention of the gunman having a beard or the presence of gray in the gunman's hair or facial hair. (RHT 612-615.)

5. Jeffrey Brodey

Mr. Brodey substituted for Mr. Slick as petitioner's attorney in November 1984, and filed a motion for new trial on petitioner's behalf on May 2, 1985. (RHT 1167, 1171.) Petitioner complained to Mr. Brodey about Mr.

Slick's representation. Petitioner stated that "Mr. Slick had refused to call witnesses in his behalf at the defense phase, had called no witnesses in the penalty phase, had not seen him, had not visited him, had done no preparation, and had expressed his opinion that [petitioner] was guilty." (RHT 1170.)

Mr. Brodey and his law clerk met with Mr. Slick at Mr. Slick's office. In response to Mr. Brodey's question about presenting witnesses, Mr. Slick stated that he knew petitioner wanted to put on a defense and that Mr. Slick felt that the defense would not work. Mr. Slick also stated that he was aware of an out-of-state witness and the statements the witness made to an investigator. (RHT 1172-1174.) Mr. Brodey did not take notes during his conversation with Mr. Slick. Mr. Brodey believed that his law clerk took notes during the interview, but he did not recall seeing the notes in his file. (RHT 1176-1178.)

Ms. Kleinbauer had worked for Mr. Brodey and would sometimes call him for advice. Ms. Kleinbauer called Mr. Brodey about petitioner, but he did not remember the specifics of the conversation. (RHT 1174.)

Mr. Brodey had been practicing criminal law since 1968, and had tried 12 to 15 capital cases. (RHT 1182-1184.) Mr. Brodey acknowledged that, if petitioner had told Mr. Slick that he wanted a defense presented, if petitioner had identified to Mr. Slick specific witnesses to be called, and if petitioner had wanted to testify on his behalf but was rebuffed by Mr. Slick, such information would have been a significant aspect of a motion for new trial. (RHT 1188-1193.) In April 1985, Mr. Brodey prepared a declaration signed by petitioner that was submitted in support of the motion for new trial. (RHT 1198.) Mr. Brodey acknowledged that the declaration did not include any statement that petitioner had told Mr. Slick that he wanted to put on a defense. (RHT 1193-1194.) Mr. Brodey further acknowledged that the declaration did not include a statement that petitioner had told Mr. Slick he would testify pursuant to a motion to suppress the confession (RHT 1202), even though the motion for new trial alleged that Mr. Slick had rendered ineffective assistance of counsel in

failing to call petitioner to testify pursuant to such a motion (RHT 1192). As to the state of the law in 1985, Mr. Brodey also acknowledged that, if evidence existed that the client told the lawyer that he wanted certain witnesses called and there was a basis to show that the failure to call these witnesses amounted to ineffective assistance of counsel, it would be helpful to a motion for new trial to include a statement that the client asked the lawyer to present those witnesses. (RHT 1233.)

6. Ora Trimble

In 1983, Ms. Trimble lived at 1991 Myrtle Street in Long Beach, and petitioner had a romantic relationship with Ms. Trimble's daughter, Elizabeth "Penny" Black. (RHT 1240.) After Ms. Trimble's memory was refreshed with Ms. Kleinbauer's report, Ms. Trimble testified that petitioner left Ms. Trimble's home shortly after 10:45 a.m. on February 25, 1983, and he returned at about 2:00 p.m. (RHT 1251, 1256.) On cross-examination, Ms. Trimble testified that petitioner returned to her home at about 2:30 p.m (RHT 1293); on redirect examination, Ms. Trimble's memory was refreshed with Ms. Kleinbauer's interview report and she again testified that petitioner returned at about 2:00 p.m. (RHT 1298.)

On June 20, 1983, a defense investigator interviewed Ms. Trimble about the events of February 25, 1983. (RHT 1248.) Petitioner never asked Ms. Trimble to lie for him, and she did not tell Detective Collette that petitioner had asked her to lie for him. (RHT 1259-1260.) Ms. Trimble did not have an account with Bank of America in February 1983. (RHT 1279-1280.) On the morning of February 26, 1983, the police came to her apartment and arrested petitioner. (RHT 1242-1243.)

7. Elizabeth Black

In 1983, Elizabeth "Penny" Black (Elizabeth) lived with her mother on Myrtle Street and had a romantic relationship with petitioner. (RHT 1301-1302.) On February 26, 1983, petitioner was arrested at her home. (RHT 1302.)

On the morning of February 25, 1983, petitioner was present with Elizabeth when she awakened. Elizabeth left for school at about 7:00 a.m. for a 12:15 p.m. class, and she asked petitioner to watch her three-year-old daughter. (RHT 1307-1309.) At about 12:30 p.m., petitioner showed up at her school, and she and petitioner began walking back to her home. (RHT 1310-1312.) Along the way, petitioner and Elizabeth parted company, and she arrived at her home at about 1:00 p.m. (RHT 1313-1314.) Petitioner then arrived at her home about 15 minutes later. (RHT 1315.)

Later in the day, petitioner and Elizabeth went to the arcade and the home of petitioner's mother. They then returned to Elizabeth's home and petitioner stayed the night with her. (RHT 1318-1319.) Early the next morning, the police arrived and arrested petitioner. (RHT 1319.) A police officer accused Elizabeth of being involved with something petitioner had done and stated that they could arrest her and her family members for having petitioner in the house. (RHT 1320.) Detective Miller accused Elizabeth of doing something with the money, and he further told her that he could help her. (RHT 1321.) She did not tell Detective Collette that she did not know petitioner's whereabouts on February 25, 1983. (RHT 1324.)

Elizabeth testified that, to her knowledge, Otis Clements did not know petitioner. She further testified that she never saw petitioner and Clements together at her house or outside of her house. (RHT 1317.)

At the courthouse, Mr. Slick told Elizabeth that, if she testified, she "could be found guilty and he didn't need me, something like that." (RHT 1323.) On February 25, 1983, petitioner did not have a beard or any gray in his

hair. Petitioner wore his hair in a "jerry curl." (RHT 1324.) Petitioner did not have scars or pockmarks on his face, but Otis Clements did have such facial marks. (RHT 1325-1326.)

On cross-examination, Elizabeth acknowledged that her testimony that petitioner and Clements did not know each other was inconsistent with her statement in a 1998 declaration (Pet. Exh. No. 40) that Clements and petitioner had a grudge against each other before the murder. (RHT 1343.) She also acknowledged that, in a 1991 declaration (Pet. Exh. No. 39), she did not state that she and petitioner had separated as they walked from the school to her home on February 25, 1983. (RHT 1338-1339.) Elizabeth further acknowledged that she did not state in a 1990 declaration (Pet. Exh. No. 38) that she had asked petitioner to watch her child. (RHT 1347-1348.)

Elizabeth had corresponded with petitioner several times in the past five years. She was in love with petitioner in 1983, and had never fallen out of love with him. (RHT 1357-1358.) Elizabeth had felony convictions for drug offenses in 1989 and 1996. (RHT 1305, 1338.)

8. Susana Camacho

In 1983, Ms. Camacho lived at 510 Pleasant Street in Long Beach. On February 25, 1983, she was inside her home when she heard several sounds that she believed were gunshots. Ms. Camacho ran outside and saw a woman lying in the street and someone running away from the woman. (RHT 1384-1385.) She had no current recollection of the fleeing man's description, and she had no current recollection of the description that she provided to the police. (RHT 1387.) Ms. Camacho did not get a good look at the man, her opportunity to see anything was extremely limited, and at no time did she feel that she could provide a detailed description of the fleeing man. (RHT 1399.)

In a July 1983 interview with a male defense investigator, Ms. Camacho stated that she thought the fleeing man was White, but that she could

not really remember whether the man was White or Black. (RHT 1139.) Two days later, in an interview with Ms. Kleinbauer, Ms. Camacho stated that she told the police that the fleeing man was White. (RHT 1391.) In subsequent interviews in 1998 and 2000, Ms. Camacho stated that she could not tell whether the fleeing man was White or Black. (RHT 1396-1398.) The fleeing man had dark skin, but she could state with any certainty whether the man was White with dark skin or Black with dark skin. (RHT 1397, 1399.) The closest that she got to the fleeing man was about 80 feet, and she was viewing the back of the man. (RHT 1407.) After being shown a 2000 declaration from petitioner's investigator, she then stated that she might have been driving home when she saw the man fleeing, but she did not remember making that statement to the investigator. (RHT 1409-1410.)

9. Denise Burton

Ms. Burton was petitioner's sister. (RHT 1506.) In 1983, petitioner lived with his mother and also spent time at the home of Ora Trimble and Elizabeth Black. (RHT 1508.) On February 25, 1983, at about 12:30 p.m., Ms. Burton saw her brother at her school after the class that she and Elizabeth Black attended was released early. (RHT 1509-1510, 1529, 1533-1534.) After Ms. Burton left the school to pick up her daughter, she arrived at the Trimble home at about 2:00 p.m. or "somewhere after 2:00" p.m. and saw petitioner at the house. (RHT 1512-1513.) Because it took about two hours for Ms. Burton to complete her errands after she left the school at 12:30 p.m., she might have arrived at the Trimble home at about 2:30 p.m. (RHT 1535.)

In June 1983, Ms. Burton told Ms. Kleinbauer that she was not close to petitioner. (RHT 1519-1520.) In a 1993 declaration, Ms. Burton stated that she was "always close" with petitioner. (RHT 1522.) To her knowledge, petitioner knew Otis Clements in February 1983. (RHT 1524.)

In 1998, Ms. Burton told an investigator (Ilene Chase) that she saw petitioner during her lunch break on February 25, 1983, and that her lunch break would have been between 11:00 a.m. and 1:00 p.m. She also told Ms. Chase that she did not remember seeing Elizabeth Black that day. (RHT 1524-1532, 1540.)

Ms. Burton suffered a felony conviction of possession of a controlled substance in 1992. (RHT 1515.)

10. Hope Black

Hope Black (Hope) was the daughter of Ora Trimble and knew petitioner in 1983 because he had a relationship with her sister, Elizabeth. (RHT 1565.) On February 25, 1983, Hope saw petitioner and her sister at her house at "1:30, 2:00 o'clock." (RHT 1567.) She was willing to testify at petitioner's trial but no one contacted her or asked her to go to court. Hope had felony convictions for robbery and "sales of drugs." (RHT 1570-1571.) November 30, 2001, was the first time she had been interviewed about the events of February 25, 1983. (RHT 1579.) Hope had no reason to have a particular memory of February 25, 1983, because it was "just like any other" day in February. (RHT 1586.) Hope knew Otis Clements, but she never saw petitioner and Clements together. (RHT 1572.)

11. Zarina Asrani

Zarina Asrani's maiden name was Zarina Khwaja. (RHT 1594.) In February 1983, her brother Anwar Khwaja operated a 7-11 store and maintained an account at a Bank of America branch in Long Beach. (RHT 1608-1609.) On February 25, 1983, her brother was waiting in his car for Ms. Asrani and their mother, Gulshakar Khwaja. (RHT 1595, 1597.) Ms. Asrani was reaching for the passenger door of the car when she heard the shooting. (RHT 1595.) She

then saw that her brother had been shot and was bleeding, and she further saw a Black man holding a gun in one hand and a bank bag in the other hand. Ms. Asrani was "nervous" and "scared" when she saw her brother bleeding, and she did not have a "chance to see other things." (RHT 1596, 1598.) When the gunman left the scene, Ms. Asrani went to attend to her brother. She then discovered that her mother had also been shot and was lying in the street. (RHT 1595-1597.)

Ms. Asrani could not identify anyone because she did not see the gunman's face. (RHT 1596, 1598, 1604, 1608.) At the preliminary hearing, Ms. Asrani testified that she did not see the face of the man who shot her brother and that she would therefore be unable to identify anyone as the perpetrator. (RHT 1604.)

12. William Collette [2/]

Long Beach Police Detective William Collette and his partner, Detective John Miller, investigated the Khwaja robbery and murder. (RHT 1686, 2035.) The two defendants in the case were petitioner and Otis Clements. (RHT 1686-1687.)

Detective Collette spoke to Elizabeth Black on February 26, 1983. He did not tell Elizabeth that, if she testified for petitioner, he would have her arrested because she had helped petitioner count the money. Detective Collette recalled that Elizabeth "didn't know anything about anything and didn't want to get involved in it." As to Elizabeth and her mother, "nobody wanted anything to do with this." (RHT 1720-1721.)

On February 28, 1983, Detective Collette showed a photographic lineup to Lisa Searcy and Margie Heimann. The lineup contained two pictures

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2. Detective Collette was called as a witness by both petitioner and respondent.

of petitioner; one picture was from 1981 and the other picture was from 1979. Detective Collette used older photographs rather than the booking photograph from petitioner's February 26, 1983 arrest because that photograph was not immediately available at the time of the lineup. (RHT 1697-1699.)

Detective Collette had a vague recollection that he heard a comment about petitioner asking Ora Trimble to lie for him while he was out in the courthouse hallway after the verdict. Ms. Trimble and petitioner's mother were in the hallway at the time, but Detective Collette could not recall any other specifics about the incident. (RHT 1691-1692, 1715.)

It was Detective Collette's habit and custom to write police reports about statements that he obtained from witnesses or potential witnesses. (RHT 1689-1690.) There were no reports in the file concerning a conversation that he had with Ora Trimble in which she stated that petitioner had asked her to lie for him, and there were no reports that indicated that Elizabeth Black told Detective Collette that she did not know petitioner's whereabouts on the day of the charged crimes. (RHT 1690-1691.)

In July 2001, Detective Collette told Deputy District Attorney Brian Kelberg that, to the best of his recollection, Elizabeth Black did not tell him that she did not know petitioner's whereabouts at the time of the charged homicide, and that he did not tell Mr. Slick that she had made such a statement. Detective Collette also told Mr. Kelberg that Ms. Trimble did not tell him that petitioner had asked her to provide a false alibi, and that he did not tell Mr. Slick that Ms. Trimble had made such a statement. (RHT 1695, 1710-1712, 1716.)

13. Petitioner

Petitioner was 19 years old when he was arrested in February 1983, and Mr. Slick was appointed as his lawyer. (RHT 1857.) Mr. Slick met with petitioner at the courthouse whenever petitioner was brought to court, and Mr. Slick met with petitioner one time in county jail. (RHT 1858.) Petitioner told

Mr. Slick what he was doing at the time of the charged crimes, and he further told Mr. Slick that he did not confess. (RHT 1858-1859.)

Petitioner spoke to Kristina Kleinbauer about the case. (RHT 1859.) Ms. Kleinbauer's report of her interview with petitioner was accurate, with the only exception that Ms. Kleinbauer did not mention that petitioner also went to his mother's house. (RHT 1860.)

Petitioner wrote a letter to Mr. Slick (Pet. Exh. 15). (RHT 1860.) Mr. Slick did not tell petitioner that Mr. Slick would not present a defense. (RHT 1861.) Petitioner told Mr. Slick that he wanted to represent himself because the investigation had not been completed. Petitioner then asked the trial judge for permission to represent himself. (RHT 1862.)

Petitioner admitted that he committed two residential burglaries in Long Beach in May 1977, and that he attempted to rob a man in a restroom in Long Beach on June 23, 1978. (RHT 1871-1873.) Petitioner did not remember whether he told a police officer that he committed the attempted robbery with a gun. (RHT 1872-1877.) Petitioner admitted that he attempted to forcibly take a purse from a woman in Long Beach in April 1979. (RHT 1877.)

The preliminary hearing was the first time petitioner saw Mr. Slick. He did not talk to Mr. Slick at all prior to the preliminary hearing. (RHT 1878.) Petitioner remembered that Ms. Asrani testified at the preliminary hearing, but he did not recall Robert Cordova's testimony or Detective Miller's testimony. (RHT 1878-1879.)

Petitioner wrote the letter to Mr. Slick (Pet. Exh. 15) after the preliminary hearing, but he did not remember exactly when he wrote it. (RHT 1882.) The letter was written before he asked the court to represent himself. (RHT 1883.) Ms. Kleinbauer gave petitioner information about how to request self-representation on the day that he first requested to represent himself (August 10, 1983). (RHT 1883-1884.) Petitioner did not remember if he saw any portion of Ms. Kleinbauer's report before he requested self-representation, and

he did not remember if Ms. Kleinbauer had told him about witnesses she had interviewed before he requested self-representation. (RHT 1885.) Petitioner did not remember if Mr. Stewart was the person he was referring to in his April 1985 declaration, wherein he stated that he wanted to know why a witness who gave a different description of the suspect was not subpoenaed to court. (RHT 1885-1888.) Petitioner did not remember if he learned about Mr. Stewart by the time he made his request to represent himself. (RHT 1888.)

Petitioner told Mr. Brodey all of the things that showed that Mr. Slick had neglected his case and treated him improperly, including that petitioner wanted a defense presented, and that he told Slick he wanted alibi witnesses presented. (RHT 1890-1891.) Petitioner then testified that he did not tell Mr. Brodey that Mr. Slick did not present the witnesses or the type of defense that petitioner told Mr. Slick to present. (RHT 1894-1895.) He claimed that he would have gone into further depth if Mr. Brodey had succeeded in obtaining a new trial. (RHT 1895.)

Petitioner claimed that he did not know of Susana Camacho's identification of the perpetrator as White before he was represented by Mr. Brodey. (RHT 1892-1893.) He did not remember if Ms. Kleinbauer told petitioner about Camacho's description of the suspect as White. (RHT 1893.) Petitioner did not remember if he told Mr. Brodey that he told Mr. Slick that he wanted the case defended on the grounds of misidentification. (RHT 1893.) Petitioner agreed that the declaration he signed (and prepared by Brodey) did not state that he told Mr. Slick that he wanted alibi witnesses, such as Ora Trimble, Gloria Burton, Denise Burton, Elizabeth Black, presented. (RHT 1896-1897.)

Petitioner gave the names of Denise Burton, Ora Trimble, and Elizabeth Black to Mr. Slick as alibi witnesses he wanted called at trial. (RHT 1908-1909.) Petitioner did not give the name of Hope Black as a potential alibi witness that he wanted called at trial because Hope Black became a possible

witness through Ms. Kleinbauer's interview of other witnesses. (RHT 1909-1910.) He did not expect Hope Black to be called as a witness because she had not been interviewed. (RHT 1897.) In 1983, he believed that Hope Black was a potential alibi witness, and he gave that name to Ms. Kleinbauer but not Mr. Slick. (RHT 1906-1908.)

Petitioner told Ms. Kleinbauer during the initial interview that Hope Black returned to the apartment with cheese and butter when petitioner was present (prior to going to Trade Tech) and that Hope was at the apartment at 1:30 p.m. when he returned to the apartment from the school. (RHT 1911-1912, 1914-1915.) Thus, petitioner provided the name of Hope Black as a possible alibi witness to Ms. Kleinbauer. (RHT 1915.)

Before Mr. Slick informed the court that the defense was resting its case without calling any witnesses, he showed Ms. Kleinbauer's report (Pet. Exh. 1) to petitioner during the trial. (RHT 1911.)

Petitioner did not give the names of all of the alibi witnesses to Mr. Slick at one time; rather, petitioner provided the names over the course of several visits when petitioner went to court. (RHT 1916-1917.) He did not remember when he first provided the names of alibi witnesses to Mr. Slick. (RHT 1917.)

In the letter petitioner wrote to Mr. Slick (Pet. Exh. 15), petitioner was suggesting ways for Mr. Slick to attack the preliminary hearing identifications made by Mr. Cordova, and the two women from the K-Mart robberies. (RHT 1920-1921.) Petitioner did not write any letters to Mr. Slick where he set forth his demand for a defense, and he did not remember whether he sent any letters that set forth the names of alibi witnesses he wanted to be called. (RHT 1921-1922.)

Petitioner told Ms. Kleinbauer that he wanted to represent himself, but he did not remember when he told her so. (RHT 1925.) Petitioner met with Ms. Kleinbauer on June 17 and 28, 1983. (RHT 1926.) He did not remember

whether he asked Ms. Kleinbauer to tell Mr. Slick about his desire to go pro per. (RHT 1926-1927.)

Petitioner told Ms. Kleinbauer that he wanted certain alibi witnesses called at trial before he told Mr. Slick that he wanted certain alibi witnesses called. (RHT 1927.) He did not remember whether he told Ms. Kleinbauer to tell Mr. Slick. (RHT 1927.) Petitioner told Ms. Kleinbauer that he wanted the alibi witnesses called before he requested to represent himself. (RHT 1930.) He did not remember how many times he met with Mr. Slick prior to the return of the guilty verdict. (RHT 1929.) In the first three requests for self-representation (August 10, 11, 16, 1983), petitioner did not tell the court that he wanted to go pro per because Mr. Slick was not going to call the alibi witnesses that petitioner wanted Mr. Slick to call. (RHT 1933.) He also did not tell the court that he wanted to go pro per because Mr. Slick would not call any witnesses about misidentification. (RHT 1933.) Petitioner told the court that he wanted to go pro per because he felt that additional investigation was needed. (RHT 1933.) At the time of petitioner's final request for self-representation, he knew that Mr. Slick had not called any alibi or misidentification witnesses before the parties had completed presenting the evidence. (RHT 1936-1937.) The trial judge asked petitioner whether he had anything left to add and petitioner replied that he did not. (RHT 1940.) Petitioner claimed that he was "never" angry or upset at Mr. Slick because Mr. Slick did not present a defense. (RHT 1940.) Rather, he was simply disappointed. (RHT 1941.)

Petitioner did not tell Mr. Slick that he had been with Otis Clements on the day of the offenses. (RHT 1943, 1945.) When petitioner read the declaration that Mr. Brodey prepared for his signature, he knew that the declaration did not set forth a number of the areas of disappointment that petitioner had with Mr. Slick. (RHT 1955.) Petitioner, however, did not tell Mr. Brodey that the declaration did not contain these areas of disappointment with Mr. Slick's representation. (RHT 1955.)

14. Lynda Larsen

Ms. Larsen was the lead investigator for petitioner's counsel with respect to the instant proceedings. (RHT 1958.) Ms. Larsen conducted an interview of Hope Black on November 30, 2001. (RHT 1959.) Hope stated that she worked at a day care center in 1983, but she was not certain whether she worked at the day care center on February 25, 1983. (RHT 1963, 1965.) Hope also stated that she had been in school for two or three hours in the morning and then went home. (RHT 1967-1969.) When she arrived home, she saw petitioner and Elizabeth at the table. (RHT 1970, 1973.) Ms. Larsen did not remember whether Hope mentioned that Denise Burton was at the house, and Ms. Larsen's notes of her interview did not reflect that Hope had made that statement. (RHT 1974.) Hope was a prison inmate at the time of the interview and she was hostile. (RHT 1976.)

15. Ilene Chase

Ms. Chase was an investigator with the California Department of Justice in 1998. (RHT 1984.) On April 15, 1983, Ms. Chase spoke to Hope, and Hope stated that she did not want to be interviewed. (RHT 1985-1986.) Hope specifically stated, "I don't know anything about it and I don't want to talk about it." (RHT 1987.)

On April 23, 1998, Ms. Chase interviewed Denise Burton in prison. (RHT 1988.) Denise Burton stated that, on February 25, 1983, she saw her brother at the catering truck during the lunch break at her school, between 11:00 a.m. and 1:00 p.m. (RHT 1991.) Petitioner was alone at the time. (RHT 1992.) Denise Burton spoke to petitioner that day, but she could not remember the contents of the conversation. (RHT 1992.) She also stated that she and petitioner did not live at the same place. (RHT 1992.) She further stated that she did not know whether or not petitioner attended the school, that she could

not remember whether she had seen Elizabeth Black that day, and that she did not know whether Elizabeth attended that school. (RHT 1994.) Ms. Burton further stated that she went to pick up her child after school, and that she did not think she saw petitioner later that day. (RHT 1995.)

Ms. Chase interviewed Ora Trimble on April 15, 1998. (RHT 2001.) Ms. Trimble stated that she could not remember and did not want to remember anything. (RHT 2001-2002.) Ms. Chase showed Ms. Trimble a declaration prepared by Ms. Kleinbauer, and Ms. Trimble disagreed with several aspects of the report. (RHT 2003.) Contrary to the declaration, petitioner did not live at Ms. Trimble's home and he did not move in with her because petitioner did not get along with his mother. (RHT 2003.) She stated that she did not know if petitioner got along with his mother. (RHT 2003-2004.) Ms. Trimble stated that she could not remember going to the park with Hope to get cheese and butter with petitioner at the apartment at the time, but that those events could have happened. (RHT 2004.) Ms. Trimble disagreed with the statement in Ms. Kleinbauer's declaration that she saw petitioner washing the dishes because she never saw him wash a single dish in her house. (RHT 2004-2005.) Ms. Trimble also stated that she could not recall who may or may not have come by the house that day. (RT 2005.)

On May 20, 1998, Ms. Chase also interviewed Elizabeth Black in prison. (RHT 1996, 1999.) Elizabeth stated that petitioner walked her to school in the morning. (RHT 1997.) She left school at 12:30 p.m. because school let out early that day. (RHT 1997.) On a regular school day, she would have lunch at 12:00 p.m. (RHT 1998.) Elizabeth stated that she walked home alone and that she got home at about 1:00 p.m. (RHT 1999.) Ora Trimble and Gloria Burton were at the house when she arrived, and petitioner arrived five to ten minutes after she arrived. (RHT 2000.) Petitioner told her that he went to the park to get some cheese and butter, and then fixed a flat tire on his bicycle. (RHT 2000.)

16. William Collette

Detective Collette arrived at the scene of the offenses at about 3:00 p.m. (RHT 2035.) The photographs of the crime scene showed that it had not been raining at the scene. (RHT 2042-2043.) On February 25, 1983, Detectives Collette and Miller spoke to Michael Stewart. (RHT 2043.) Mr. Stewart provided a description of the gunman, but Mr. Stewart did not describe the gunman as having a beard or that the gunman had gray in his hair or beard. (RHT 2044.) Mr. Stewart did mention the color gray, but it was in reference to a gray jacket rather than a gray beard. (RHT 2044.) As one of the lead investigators, Detective Collette would have expected to have been notified if a witness had identified a suspect. (RHT 2047.) In 1983, police officers who took witnesses to a showup of a possible suspect were required to prepare a report. The police reports for petitioner's case included a report concerning a showup involving Otis Clements and his truck. (RHT 2051.) There were no reports of any other showup. (RHT 2052.) If such a showup had occurred, Detective Collette would have expected the existence of such a report. (RHT 2052.) There was no evidence to document any second showup. (RHT 2055.)

D. Referee's Findings

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?

The referee found that, on June 15 and 17, 1983, petitioner provided to Ms. Kleinbauer the names of five witnesses he believed should be interviewed: Ora Trimble, Hope Black, Elizabeth Black, Gloria Burton, and Denise Burton. The referee also found that it was unlikely that petitioner provided those names directly to Mr. Slick, and that Mr. Slick delegated to Ms. Kleinbauer the job of identifying and interviewing potential defense witnesses. (Ref. Rep. at p. 15.)

The referee further found that the account that petitioner provided to Ms. Kleinbauer suggested an alibi defense and potential alibi witnesses, but that there was no direct evidence that petitioner told Ms. Kleinbauer that those witnesses could support a guilt phase defense. (Ref. Rep. at p. 15.)

The referee concluded that petitioner did not tell Mr. Slick that he (petitioner) "wanted specific witnesses to be called or to have any specific defense, including 'alibi' or 'mistaken eyewitness identification,' presented at trial." (Ref. Rep. at p. 19.)

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 told Mr. Slick that his confession had been falsified, and noted that Mr. Slick remembered that petitioner did so "early on" in the case. The referee further found that Mr. Slick did not have any reason to believe that the officer or officers who took the confession were not credible. (Ref. Rep. at pp. 19-20.)

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 Those Witnesses Would Not Be Credible?

The referee found that Ms. Kleinbauer interviewed Elizabeth Black, Ora Trimble, Denise Burton and Gloria Burton in June 1983, prior to the start of petitioner's trial, and that these individuals provided the following accounts of petitioner's actions on February 25, 1983. Elizabeth told Ms. Kleinbauer that petitioner entered her mother's house at about 1:15 p.m. Ora Trimble told Ms. Kleinbauer that petitioner was at her apartment at about 2:00 p.m. Gloria Burton told Ms. Kleinbauer that she was at Ms. Trimble's apartment in the early afternoon and that petitioner arrived at the apartment at about 1:30 p.m. Denise Burton told Ms. Kleinbauer that she saw petitioner at Ms. Trimble's apartment at about 2:00 p.m. or possibly later. (Ref. Rep. at p. 20.)

The referee also found that, although Mr. Slick did not recall at the reference hearing whether there was potential prosecution rebuttal or impeachment evidence of which he was aware when he developed the trial strategy, there was evidence known to Mr. Slick prior to trial that could be used for prosecution rebuttal or impeachment. The potential prosecution evidence that Mr. Slick was aware of when he developed his trial strategy included evidence that petitioner and Clements were together on the morning of February 25, 1983, that on the morning of petitioner's arrest, Elizabeth Black indicated to Detective Collette an inability to provide an alibi for petitioner, and that petitioner had a history of confessing. (Ref. Rep. at p. 21.)

The referee further found that Mr. Slick had reasonable and valid reasons to believe that the defense witnesses would not have been credible. (Ref. Rep. at p. 21.)

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 Defense 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?**

The referee noted the conflicting testimony between Mr. Slick and petitioner, and found that Mr. Slick did advise petitioner of the trial strategy that he intended to employ. The referee also noted that Mr. Slick had no recollection of when and in what circumstances he advised petitioner of the intended trial strategy. (Ref. Rep. at pp. 22-23.)

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 found that petitioner did not object when Mr. Slick informed petitioner of the trial strategy and that petitioner did not tell Mr. Slick that he wanted a guilt phase defense presented. (Ref. Rep. at p. 24.)

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?

The referee found that Mr. Slick did have reason to believe that petitioner's in-court requests to represent himself were made for the purpose of delay rather than dissatisfaction with Mr. Slick's trial strategy. (Ref. Rep. at pp. 24-25.)

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 found that Mr. Slick was aware of each of the named potential witnesses, and further found that Mr. Slick had reason to believe that each witness would be either incredible or insufficiently probative to justify presenting them at the guilt phase. (Ref. Rep. at pp. 25-28.)

As to Elizabeth Black, the referee found that Mr. Slick had reason to believe that she would be either incredible or insufficiently probative because she was petitioner's girlfriend and alibi defenses were generally unsuccessful in the face of an unchallenged confession and good eyewitness testimony from prosecution witnesses. As to Ora Trimble and Gloria Burton, the referee similarly found that Mr. Slick had reason to believe that these witnesses would be either incredible or insufficiently probative because of their familial or close relationship with petitioner, because of the general lack of success for alibi defenses, and because these witnesses did not adequately cover the relevant time span. (Ref. Rep. at pp. 25-26.)

With respect to Michael Stewart, the referee noted that Mr. Stewart's testimony, taken by itself, might have been probative to a defense of misidentification, but the referee ultimately concluded by a preponderance of the evidence that Mr. Slick had reason to believe Mr. Stewart was insufficiently probative to justify calling him during the guilt phase of trial. The referee noted

that Mr. Stewart had given several accounts of the incident over the course of time, that Mr. Stewart's reference hearing testimony differed in several respects from his 1983 statement to the police and several declarations he later signed, and that there was the possibility that Mr. Stewart might have identified petitioner in court if Mr. Stewart had been called as a witness. (Ref. Rep. at pp. 26-27.)

As to Susana Camacho, the referee found that Mr. Slick had reason to believe that the testimony of Ms. Camacho would be insufficiently probative because her statement to Ms. Kleinbauer in 1983 was vague and unpersuasive, she had never been certain whether the shooter was Black or White, and her observations were made from a distance of 80 feet. (Ref. Rep. at pp. 27-28.)

As to Zarina (Khwaja) Asrani, the referee found that Mr. Slick had reason to believe that her testimony would be insufficiently probative because she did not get a good look at the shooter and her ability to identify or exclude anyone during the trial was minimal. (Ref. Rep. at pp. 28.)

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?

The referee found that petitioner did not tell or make clear to Ms. Kleinbauer that he wanted a guilt phase defense presented. (Ref. Rep. at p. 28.)

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?

The referee concluded that the potential witnesses identified by petitioner would not have been credible and would not have enabled Mr. Slick to put on a credible defense. (Ref. Rep. at p. 28.) The referee further concluded

that Mr. Slick did not believe, and had no reason to believe, that either Mr. Stewart or Ms. Camacho would commit perjury. As to the witnesses identified by petitioner (Ora Trimble, Elizabeth Black, Gloria and Denise Burton), the referee found that Mr. Slick had reason to believe that these witnesses would lie in light of their familial or close relationship with petitioner.

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 that, when the police found the roll of coins on the morning of petitioner's arrest, Elizabeth Black attempted to distance herself from the crimes and she conveyed to Detective Collette an inability to provide an alibi. This information was then conveyed to Mr. Slick, who memorialized this information in handwritten notes on August 17, 1983. The referee therefore 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 Petitioner's whereabouts on the day in question." (Ref. Rep. at pp. 29-31.)

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 concluded that Elizabeth Black did say something to Detective Collette to the effect that she would not be an effective alibi witness for petitioner, and Detective Collette later conveyed this statement to Mr. Slick. (Ref. Rep. at p. 31.)

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?

The referee concluded that there was a conversation between Detective Collette and Mr. Slick about Ms. Trimble refusing to provide a false alibi for petitioner despite petitioner's request. (Ref. Rep. at pp. 31.)

d. Did Ora Trimble Tell Collette That Petitioner Had Asked Her To Provide Him With A False Alibi For The Charged Homicide?

The referee found that there was no credible evidence adduced at the hearing to conclude that Ms. Trimble either made or did not make the particular statement to Detective Collette. (Ref. Rep. at pp. 31-32.)

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?

The referee concluded that petitioner had failed to prove by a preponderance of the evidence that Mr. Slick overrode a clearly expressed desire by petitioner to put on a guilt-phase defense. The referee further concluded that, even if such a request had been made, the evidence would not have been sufficiently credible or probative. (Ref. Rep. at p. 32.)

STATEMENT REGARDING EXCEPTIONS TO THE REPORT OF THE REFEREE

Respondent does not take any exceptions to the report of the referee.

ARGUMENT

PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO PRESENT A DEFENSE AT THE GUILT PHASE

In *People v. Frierson* (1985) 39 Cal.3d 803 (*Frierson*), a plurality of this Court held that a defense attorney cannot withhold the presentation of any defense at the guilt/special circumstance stage of a capital case "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. 812-815.) Thus, in *Frierson*, this Court reversed the special circumstance findings and the capital judgment because the defense attorney lacked the authority to override the defendant's "clearly expressed desire to present a defense" at the guilt phase. (*Id.* at p. 815.)

In the instant case, respondent submits that petitioner was not deprived of his right to present a defense at the guilt phase because, as properly found by the referee, petitioner did not clearly express a demand to present an alibi and/or misidentification defense at the guilt phase, and there was no credible evidence to support either an alibi or misidentification defense. Accordingly, this Court should adopt the referee's findings and deny the petition for writ of habeas corpus.

A. Burden Of Proof

Petitioner bears the burden of establishing that the presumptively accurate, fair, and valid judgment under which he is restrained is invalid. To do so, petitioner must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *In re Gay* (1998) 19 Cal.4th 771, 790; *In re Visciotti* (1996) 14 Cal.4th 325, 351; *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

B. Standard Of Review For Referee's Findings

A referee's conclusions of law and resolution of mixed questions of law and fact are subject to independent review. (*In re Cudjo, supra,* 20 Cal.4th at pp. 687-688.) The referee's findings of fact, while not binding on this Court, are given great weight if supported by substantial evidence. (*In re Cox* (2003) 30 Cal.4th 974, 998; *In re Malone* (1996) 12 Cal.4th 935, 946.) Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee had the opportunity to observe the witnesses' demeanor and manner of testifying. (*In re Cox, supra,* 30 Cal.4th at p. 998; *In re Malone, supra,* 12 Cal.4th at p. 946.)

C. Mr. Slick Did Not Override A Clearly Expressed Demand By Petitioner To Put On A Guilt Phase Defense

As the referee properly found, Mr. Slick did not override a clearly expressed demand by petitioner to present a guilt phase defense based on alibi and/or mistaken identification.

1. The Referee's Factual Findings Are Supported By Substantial Evidence

The ultimate resolution of the factual issue as to whether petitioner requested or demanded that Mr. Slick present a guilt phase defense essentially hinged on an assessment of the conflicting testimony of petitioner and Mr. Slick. As to these two witnesses, the referee found Mr. Slick credible and gave greater weight to Mr. Slick's testimony, whereas the referee gave little weight to petitioner's testimony. As more fully set forth below, the referee's credibility determinations and factual findings are supported by substantial evidence. Accordingly, this Court should defer to, and adopt, the referee's factual findings.

The referee specifically found that petitioner did not tell Mr. Slick or Ms. Kleinbauer that he (petitioner) wanted particular witnesses called or a particular defense presented at the guilt phase of trial. The referee further found that Mr. Slick advised petitioner that he (Mr. Slick) did not intend to present a guilt phase defense and that petitioner did not object to this advisement or specifically demand the presentation of a guilt phase defense. Thus, the referee concluded that Mr. Slick did not override a clear expressed demand of petitioner to present a guilt phase defense. (Ref. Rep. at pp. 15-19, 22-24, 32.)

These findings are amply supported by substantial evidence. Mr. Slick testified that petitioner did not tell Mr. Slick that he wanted a guilt phase defense presented and that petitioner did not object after Mr. Slick discussed the planned guilt phase strategy of not presenting a defense. (RHT 770, 882, 919-921, 933.) Mr. Slick also testified that he did not believe that Ms. Kleinbauer ever told him that petitioner was directing her to tell Mr. Slick to do a certain thing or present a guilt phase defense. (RHT 810-812.) As noted above, the referee found Mr. Slick a credible witness on these issues.

Moreover, the referee had ample grounds to reject petitioner's contrary reference hearing testimony. Petitioner acknowledged that he did not tell the trial judge during the four *Faretta*[3/] motions immediately before and during trial that Mr. Slick was overriding petitioner's wishes by refusing to call several witnesses or put on a specific defense.[4/] (RHT 1933.) As the referee reasonably concluded, petitioner would have so advised the trial judge if petitioner had actually told Mr. Slick that he wanted specific witnesses called or a particular

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3. *Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562.

4. As this Court explained on direct appeal, petitioner's statements to the trial court only "alluded to possible defenses," that "it is far from clear on this record that [petitioner] did insist on presenting any particular defense," and that the record "did not explicitly indicate there was a conflict over whether to present a defense at all." (*People v. Burton, supra,* 48 Cal.3d at pp. 857-858.)

defense presented. Indeed, petitioner's final *Faretta* motion on August 17, 1984 would have been an opportune time to advise the trial judge that Mr. Slick had overridden petitioner's demand for a guilt phase defense since the defense was about to rest without calling any witnesses, and petitioner acknowledged that he was aware that Mr. Slick did not intend to present a guilt phase defense. Similarly, petitioner acknowledged that he did not tell his second attorney, Jeff Brodey, in 1984 that Mr. Slick had overridden his desire to call certain witnesses or present a defense, and petitioner acknowledged that he did not make such an allegation in his 1985 declaration. (RHT 1894-1897.) Thus, the referee reasonably accorded little weight to petitioner's reference hearing testimony.

The referee also had reasonable grounds to accord little weight to the testimony of Ms. Kleinbauer, Mr. Smith and Mr. Brodey on the issue of whether petitioner told Mr. Slick that he wanted a guilt phase defense presented. As set forth below, none of these witnesses bolstered petitioner's weak reference hearing testimony.

With respect to Ms. Kleinbauer, the referee reasonably declined to credit her reference hearing testimony that petitioner had told her that he wanted defense witnesses called at trial. Ms. Kleinbauer's sparse testimony on this issue was devoid of any specifics as to what petitioner actually said or when he made the purported statements. (RHT 313.) In addition, the record supports the referee's findings that little weight could be given to Ms. Kleinbauer's reference hearing testimony because her current recollection of her conversations with petitioner was virtually non-existent, she was often confused and distracted during her testimony, and much of her testimony resulted from leading questions by petitioner's counsel. (E.g., RHT 219-294.) The record further supports the referee's findings that it was evident from Ms. Kleinbauer's testimony and demeanor at the reference hearing that she was biased in favor of petitioner, and that she tried to shade her answers in favor of petitioner despite her lack of real memory as to events in 1983 (e.g., RHT 444).

Furthermore, the declarations that Ms. Kleinbauer signed in 1987 and 1993 failed to contain any direct or indirect reference to petitioner's purported demand or request for the presentation of a defense at the guilt phase, whether described in broad terms as a general desire for the presentation of a guilt phase defense or specifically described as a demand or request for alibi and/or mistaken identification witnesses to be called at the guilt phase. (RHT 448-449.) Given that Ms. Kleinbauer signed these declarations at points in time more contemporaneous to the events in question than her testimony at the 2003 reference hearing, and given that these declarations were actually attached as exhibits to habeas petitions raising the *Frierson* issue, the conspicuous absence of any references to petitioner's demand or request for a guilt phase defense in these declarations clearly undercuts the reliability of Ms. Kleinbauer's reference hearing testimony.

Notably, Ms. Kleinbauer's first reference to petitioner's purported desire to have a defense presented at the guilt phase was contained in a declaration she signed on May 15, 2000, about 17 years after her last professional contact with petitioner.[5/] (RHT 447-448.) In light of the significant lapse in time between the events in question and the preparation of this declaration, the referee had ample reason to give little weight to the contents of the declaration. (Ref. Rep. at p. 17.) In addition, this declaration also failed to state that petitioner advised Ms. Kleinbauer (or asked Ms. Kleinbauer to convey to Mr. Slick) that he wanted to present a specific defense (e.g., alibi and/or mistaken identification) or that he wanted particular witnesses called at trial. (RHT 437-438.) Indeed, a fair reading of the declaration shows that Ms. Kleinbauer's "understanding" of petitioner's desire to present a defense was

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5. In this declaration, Ms. Kleinbauer noted that petitioner consistently denied the commission of the charged offenses and denied confessing to the police, that petitioner expressed his concern that the trial would start before the investigation was complete, and that from these conversations, she "understood that he wanted to present a defense." (Resp. Exh. H.)

actually based on her inferential interpretations of petitioner's statements as to his denial of culpability and his concern regarding the completion of the investigation. (Resp. Exh. H.) Thus, the referee reasonably declined to give much weight to Ms. Kleinbauer's statements in her 2000 declaration as support for her reference hearing testimony. (Ref. Rep. at p. 17.)

As to Mr. Smith, the referee had reasonable grounds to give little credence to Mr. Smith's reference hearing testimony that Mr. Slick had told Mr. Smith in a December 1985 meeting that petitioner had wanted Mr. Slick to call witnesses at the guilt phase. First, Mr. Smith did not take any notes during this meeting with Mr. Slick, and Mr. Smith then waited until October 1987 (i.e., 22 months after the meeting), before he drafted and completed a declaration for Mr. Slick's signature that purported to reflect the statements made by Mr. Slick during the meeting. (RHT 73-74.) This declaration, which Mr. Slick ultimately refused to sign because it was inaccurate, was drafted without the assistance of notes from the 1985 meeting and was based solely on Mr. Smith's memory of Mr. Slick's statements during the meeting. (RHT 74-75.) At the reference hearing, Mr. Smith then relied on the contents of this unsigned declaration to refresh his recollection as to whether Mr. Slick stated that petitioner had told Mr. Slick to present witnesses at the guilt phase. (RHT 59-60.) Given the suspect accuracy and dilatory preparation of the unsigned Slick declaration, and given Mr. Smith's heavy reliance on this declaration for his reference hearing testimony about Mr. Slick's purported statements at the December 1985 meeting, the referee reasonably declined to give much weight to Mr. Smith's testimony. Furthermore, the referee found that Mr. Smith was biased in favor of petitioner since Mr. Smith was still petitioner's counsel in petitioner's federal habeas case, and that Mr. Smith's demeanor at the reference hearing was that of an advocate for petitioner rather than a neutral witness. (Ref. Rep. at p. 18.)

Similarly, the referee had reasonable grounds to give little weight to Mr. Brodey's testimony that petitioner told him in 1984 that Mr. Slick had

refused to call witnesses at the guilt phase. At the time of the reference hearing, Mr. Brodey no longer possessed any notes of his conversations with petitioner, and his reference hearing testimony was based solely upon his memory of these conversations that had occurred about 18 years earlier. Moreover, in April 1985, Mr. Brodey prepared a declaration signed by petitioner that was submitted in support of the motion for new trial, and this declaration did not include any statement that petitioner had told Mr. Slick that he wanted to put on a defense, nor did the declaration include any reference to alibi witnesses that petitioner had purportedly demanded Mr. Slick call at trial. (RHT 1193-1194, 1198.)

Indeed, Mr. Brodey acknowledged that, if petitioner had told Mr. Slick that he wanted a defense presented, if petitioner had identified to Mr. Slick specific witnesses to be called, and if petitioner had wanted to testify on his behalf but was rebuffed by Mr. Slick, such information would have been a significant aspect of a motion for new trial. (RHT 1188-1193.) He further acknowledged that, as to the state of the law in 1985, it would have been helpful to a motion for new trial to include a statement that the client had asked trial counsel to present witnesses if there was evidence that the client told the attorney that he wanted certain witnesses called and there was a basis to show that the failure to call these witnesses amounted to ineffective assistance of counsel. (RHT 1233.) Thus, the referee reasonably accorded little weight to Mr. Brodey's testimony.

2. In Light Of The Factual Findings, The *Frierson* Rule Was Not Violated In The Instant Case

As *Frierson* demonstrates, a defendant's rights are violated when defense counsel, "in the face of defendant's express demand" and "over defendant's express objection," refuses to present any defense at the guilt phase of trial. (*Frierson, supra*, 39 Cal.3d at pp. 805, 809.) In *Frierson* itself, the defense attorney had informally advised the trial court during the prosecution's

case-in-chief that the defendant wanted a defense of diminished capacity presented at the guilt phase and that counsel strongly disagreed with that position. (*Id.*, at pp. 810-811.) Later, at the conclusion of the prosecution's case-in-chief, and after the defense attorney indicated that the defense would be resting without presenting any evidence, the defense attorney again informed the court that he and the defendant had continued to disagree about the decision to not present a diminished capacity defense at the guilt phase. (*Ibid.*) The next day, after closing argument had been presented and the case had been submitted to the jury, the defendant advised the trial court that he had wanted a defense presented and that he was surprised when his attorney had rested the defense case without presenting a defense. (*Id.* at p. 811.) Thus, the record showed that the defendant "made it clear" that he wanted to present a diminished capacity defense at the guilt phase, that he "openly expressed" a desire to present a particular guilt phase defense, and that he "steadfastly maintained" his desire to present a guilt phase defense. (*Id.* at pp. 811-812, 815; see also *id.* at p. 816 [counsel cannot override a defendant's right to "insist" on the presentation of a guilt phase defense].)

Here, by contrast, the record supports the referee's factual findings that petitioner did not demand, steadfastly maintain, or insist that Mr. Slick present a guilt phase defense based on alibi and/or mistaken identity, and that petitioner did not object when Mr. Slick informed him of the trial strategy of not presenting a guilt phase defense in order to maintain credibility for the penalty phase. Given the absence of a clearly-expressed demand for a guilt phase defense based on alibi and/or mistaken identification, petitioner's *Frierson* claim must therefore fail because Mr. Slick did not refuse to present a guilt phase defense "in the face of defendant's express demand" and "over defendant's express objection." (*Frierson, supra,* 39 Cal.3d at pp. 805, 809.)

Furthermore, although petitioner did alert Mr. Slick to possible guilt phase defenses during the early stages of Mr. Slick's representation of petitioner, this

notice of possible defenses did not constitute a clearly-expressed demand for a guilt phase defense within the meaning of *Frierson*. For instance, in his June 1983 interviews with Ms. Kleinbauer, petitioner discussed his whereabouts on the day of the murder and either mentioned by name or referenced by description Elizabeth Black, Ora Trimble, Hope Black, Denise Burton, and Gloria Burton. But as the case proceeded closer toward trial, petitioner did not thereafter specifically request or demand that the individuals he had previously mentioned actually be called as witnesses at the guilt phase to support an alibi defense. Indeed, it is particularly significant that petitioner did not object or demand a guilt phase defense after Mr. Slick advised petitioner that Mr. Slick did not intend to present a guilt phase defense, especially since such a discussion regarding trial strategy would have been the most opportune time for petitioner to object to Mr. Slick's guilt phase strategy and demand the presentation of a particular guilt phase defense or the calling of specific witnesses.[6/] Thus, petitioner's initial reference to certain individuals during the course of investigation merely alerted Mr. Slick to potential witnesses for a possible alibi defense, and did not constitute a clearly expressed demand for the actual presentation of an alibi defense at the guilt phase.

Similarly, the undated letter that petitioner wrote to Mr. Slick (Pet. Exh. 15) did not constitute a request or demand for Mr. Slick to call specific witnesses or present a particular guilt phase defense. This letter was probably written shortly after the March 14, 1983 preliminary hearing because the letter primarily set forth petitioner's critique of the prosecution witnesses who had

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6. Although Mr. Slick could not specifically recall when he told petitioner that he did not intend to present a guilt phase defense, the record demonstrates that the discussion must have occurred after petitioner mentioned possible alibi witnesses in his June 1983 interviews with Ms. Kleinbauer because Mr. Slick testified that he evaluated the probative value of the potential defense witnesses (including the possible alibi witnesses mentioned by petitioner) in determining whether to present a guilt phase defense. (RHT 740-741.)

testified at the preliminary hearing, such as Robert Cordova, Zarina Khwaja Asrani, Margie Heimann, and Lynn Searcy.[7/] In addition, this letter was probably written before Ms. Kleinbauer began her investigation because the letter contains no reference to Ms. Kleinbauer or her interviews of petitioner wherein he described his whereabouts and the individuals he encountered on the day of the crimes. Thus, petitioner most likely sent this letter during the early stages of the attorney-client relationship, before the primary investigation had begun and before Mr. Slick had the opportunity to determine whether any possible defenses would be credible. Moreover, the letter notably failed to include any demand by petitioner that a defense involving alibi and mistaken identification witnesses actually be presented at trial, nor did the letter specifically identify any witnesses to support a defense based on alibi and/or mistaken identification. (Pet. Exh. 15; RHT 555-559.) Accordingly, this letter merely alerted Mr. Slick to possible guilt phase defenses that would need to be subsequently investigated and did not constitute a clearly expressed demand for a guilt phase defense within the meaning of *Frierson*.

Lastly, petitioner's brief reference to a witness in his 1985 declaration -- "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 subpenaed [sic] to come to court" -- did not demonstrate that petitioner made a clearly-expressed demand for a guilt phase defense. First, as the referee properly found, petitioner did not clearly demand the presentation of a particular defense or the calling of specific witnesses, and it is highly questionable as to whether petitioner actually made the statement to Mr. Slick. Moreover, even assuming arguendo that

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7. In the letter, petitioner also stated that Otis Clements was the actual perpetrator, that he [petitioner] "was at home with my family," that he would have been nervous and armed with a weapon had he actually committed the crime, and that he did not confess to the police. (RHT 556-559; Pet. Exh. 15.)

petitioner did ask Mr. Slick about this unnamed witness, there is nothing to indicate that the act of merely inquiring as to why the witness had not been subpoenaed was a clear demand for Mr. Slick to actually call this witness at the guilt phase. For instance, there is no indication as to *when* petitioner purportedly asked this question of Mr. Slick, i.e., before or after Mr. Slick rested without presenting a guilt phase defense. Indeed, is significant that petitioner did not state in his declaration that he had previously requested or demanded that Mr. Slick call this witness at the guilt phase, a particularly notable omission since such a prior request or demand would have indicated that Mr. Slick had actually overridden petitioner's express wishes by not subpoenaing the witness. In other words, in light of the absence of a prior demand, petitioner's subsequent question to Mr. Slick about this unnamed witness simply involved hindsight questioning of a tactical decision to which petitioner had never objected. Thus, petitioner cannot show that he made an actual demand for the presentation of a guilt phase defense within the meaning of *Frierson*.[8/]

In sum, in light of the referee's well-supported factual findings, petitioner's claim must fail because petitioner did not clearly demand that Mr. Slick present a guilt-phase defense based on alibi and/or mistaken identification within the meaning of *Frierson*.

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8. In light of the evidence that Ms. Kleinbauer's last professional contact with petitioner at the county jail was on July 29, 1983, and that Ms. Kleinbauer did not interview Mr. Stewart until August 1983, the witness referenced in this declaration must have been Susana Camacho. As will be fully set forth in detail, *post*, Ms. Camacho was not a credible witness on the issue of misidentification.

D. Moreover, There Was No Credible Evidentiary Support For A Guilt Phase Defense Based On Alibi And/Or Mistaken Identification

Petitioner's *Frierson* claim is also without merit because the evidence adduced at the reference hearing also demonstrates that there was no credible evidentiary support for a guilt phase defense based on either alibi or mistaken identification.

First, as explained by Mr. Slick at the reference hearing, he could not simply assess the credibility of the potential defense witnesses in a vacuum, rather he needed to assess their credibility and the probative value of their possible trial testimony within the context of all of the available evidence, including the compelling evidence that could be presented by the prosecution at trial, i.e., petitioner's confession to the detectives (which was not subject to direct challenge since petitioner refused to testify at either a suppression hearing or at trial to allege the confession was fabricated), the potential admission of petitioner's second confession to the jailers (RHT 858-859; Resp. Exh. K at pp. 59-63), Ms. Searcy's and Ms. Heimann's identifications of petitioner as the robber who took their property at gunpoint one hour before the Khwaja robbery/murder, and the potential testimony of Rev. Handy Vining which placed petitioner and Clements together on the morning of the offenses two hours before the Searcy/Heimann robberies when they went to Rev. Vining's auto shop and attempted to borrow the truck that was later identified as the getaway car used in the Khwaja offenses (RHT 368-369; 802; Resp. Exh. K at p. 79).

Moreover, as more fully set forth below, Mr. Slick had reason to believe that the testimony of each of the possible defense witnesses would have been insufficiently probative to justify presenting them at the guilt phase.

1. Petitioner's Family And Close Friends Would Not Have Provided Credible Evidentiary Support For An Alibi Defense

In light of their familial, romantic, and personal relationships with petitioner, possible witnesses Elizabeth Black (petitioner's girlfriend), Hope

Black (Elizabeth Black's sister), Ora Trimble (Elizabeth Black's mother), Denise Burton (petitioner's sister), and Gloria Burton (petitioner's mother) all had an obvious bias in favor of petitioner. Given this inherent bias as to *all* of the possible witnesses who would testify about petitioner's whereabouts at the time of the charged offenses, their testimony was of insufficient probative value to credibly support an alibi defense, especially when the suspect credibility of the possible alibi witnesses was weighed against the backdrop of the compelling prosecution evidence. Furthermore, an examination of the testimony of these witnesses at the reference hearing[9/] revealed the lack of credible evidentiary support for an alibi defense.

Ora Trimble's testimony at the reference hearing showed that she would not have provided sufficiently probative evidence at trial to support an alibi defense. Significantly, Ms. Trimble's testimony that petitioner left her home at 10:45 a.m. and returned to her home at 2:00 or 2:30 p.m. (RHT 1251-1256, 1293, 1298) would not have provided petitioner with an alibi because her timeline account of petitioner's whereabouts did not exclude petitioner as the perpetrator of the charged offenses. Because the Searcy/Heimann robberies occurred at about 1:00 p.m., the Khwaja robbery/murder occurred at about 1:55 p.m., and the arrest of Clements in the driveway of his home while alone in the getaway car occurred at about 2:15 p.m. (RHT 406, 952), Ms. Trimble's testimony that petitioner was gone between 10:45 a.m. and 2:00 or 2:30 p.m. provided sufficient time for petitioner to commit the charged offenses and return to the Trimble home, especially since the crime scenes, the Trimble home, and the site of Clements' arrest were all within the same general geographical area

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9. Gloria Burton did not testify at the reference hearing because she had died prior to the commencement of the hearing.

(RHT 407-408; Resp. Exh. K).[10/] Thus, Ora Trimble's testimony at trial would not have provided credible evidentiary support for an alibi defense.

The reference hearing also demonstrated that Elizabeth Black would not have been a credible witness to support an alibi defense at trial; indeed, her reference hearing testimony fully supported Mr. Slick's belief that she would have been willing to lie at trial for petitioner, whom she was still in love with at the time of the reference hearing. For instance, in an obvious attempt to exculpate petitioner by distancing him from Otis Clements, Elizabeth testified at the reference hearing that, to her knowledge, Clements did not know petitioner and there was thus no reason for petitioner to have been together with Clements on the day of the charged offenses. (RHT 1317, 1334, 1343.) However, in an earlier attempt to distance petitioner from Clements, Elizabeth inconsistently stated in a 1990 declaration that Clements and petitioner had a grudge against each other before the murder.[11/] (RHT 1342-1343.) In addition, Elizabeth's timeline account of petitioner's whereabouts (i.e., that petitioner arrived at the Trimble home at about 1:15 p.m.) substantially differed with the account provided by Ms. Trimble (i.e., petitioner arrived at the Trimble home at 2:00 or 2:30 p.m.). Also, in contrast with her reference hearing testimony, Elizabeth Black told Investigator Ilene Chase in 1998 that she walked home *alone* from school on the day of the murder. (RHT.) Accordingly, in light of Elizabeth Black's inherent bias, which was fully demonstrated by her

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10. Ms. Kleinbauer testified that 10 minutes would be a reasonable amount of time to travel by car between the Khwaja murder scene and the Trimble home. (RHT 408-409.)

11. Both of Elizabeth Black's attempts to distance petitioner from Clements were actually contrary to petitioner's admissions to Ms. Kleinbauer that he had been with Clements on the day of the murder and that they had attempted to borrow a truck (i.e., the same truck used as the getaway car at the Khwaja robbery/murder) from Clements' uncle at the auto shop. (Pet. Exh. 1 at p. 4.)

willingness to tailor her testimony to benefit petitioner, Mr. Slick had ample reason to believe that her testimony at trial would be insufficiently probative to support an alibi defense at trial.

The reference hearing further showed that Denise Burton would not have provided credible evidentiary support for an alibi defense. As petitioner's sister, Denise Burton had an obvious bias, and this bias noticeably manifested itself during her hostile cross-examination at the reference hearing. (e.g., RHT 1518-1524.) Indeed, Denise Burton had a sudden ability to remember details favorable to petitioner that she could not recall during a 1998 interview, including the important detail of whether she saw petitioner again after she first saw him at her school. (RHT 1524-1532, 1988-1995.)

Moreover, the substance of Denise Burton's reference hearing testimony demonstrated the minimal probative value that her trial testimony would have added to an alibi defense. Denise Burton testified that, on the day of the offenses, she saw petitioner and Elizabeth Black at her school at about 12:30 p.m., she ran some errands for about two hours and thereafter saw petitioner at the Trimble home at "probably about 2:00, somewhere after 2:00 o'clock." (RHT 1511-1513, 1534.) However, in light of the time periods when the charged offenses were committed, Denise Burton's testimony would not have excluded petitioner as the perpetrator, especially if she saw petitioner after 2:00 p.m. because she took about two hours to complete her errands (i.e., placing her at the Trimble home at about 2:30 p.m.). Accordingly, Mr. Slick had ample reason to believe that her testimony at trial would be insufficiently probative to support an alibi defense at trial.

Similarly, the referee correctly recognized that Gloria Burton would not have provided credible evidentiary support for an alibi defense. Gloria Burton told Ms. Kleinbauer that she saw petitioner for a brief time shortly before 11:00 a.m., and that she and Ora Trimble were drinking two quarts of beer at the Trimble home when petitioner arrived at the Trimble home at about "1:30 or so

by himself." (Pet. Exh. 1 at p. 10.) Even aside from her inherent bias as petitioner's mother, Gloria Burton could not account for petitioner's whereabouts for a continuous span of two to three hours. Furthermore, given Gloria Burton's vague estimate of petitioner's arrival time at the Trimble home ("1:30 or so"), especially when viewed in light of her shared consumption of two quarts of beer at the time, Gloria Burton's testimony would have had minimal probative value to support the inference that petitioner could not have committed the charged offenses because he was at the Trimble home at the time. Thus, Mr. Slick had ample reason to believe that Gloria Burton would not have provided credible evidentiary support for an alibi defense.

Likewise, Hope Black would not have provided credible evidentiary support for an alibi defense. Hope's estimate that she saw petitioner at the Trimble home at "1:30, 2:00 o'clock" was vague, and, as previously explained, the 2:00 p.m. estimate did not exclude petitioner as the perpetrator of the charged offenses. (RHT 1567.) Furthermore, according to her reference hearing testimony, Hope Black would not have provided any evidence as to petitioner's whereabouts prior to 1:30 or 2:00 p.m.[12/] (RHT 1566-1567.) Thus, Mr. Slick had reason to believe that Hope Black would not have provided credible evidentiary support for an alibi defense.[13/]

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12. Hope Black's testimony that she was at work between 8:00 a.m. and 12:00 p.m. on the day of the offenses (RHT 1566-1567) and that she and Ms. Trimble went to the park to get free cheese and butter in the *afternoon* (RHT 1576-1577) conflicted with petitioner's statements to Ms. Kleinbauer that Hope spoke to him at the Trimble home in the midmorning hours after she returned from the park (Pet. Exh. 1 at p. 4), and also conflicted with Ms. Trimble's testimony that they went to the park in the morning. (RHT 1249).

13. Hope Black, Elizabeth Black, and Denise Burton had been previously been convicted of felonies involving moral turpitude. Although the witnesses would not have impeached by these felony convictions at petitioner's 1983 trial because the convictions occurred subsequent to the trial, the convictions were highly relevant in assessing the credibility of the witnesses at the reference hearing.

Accordingly, for the foregoing reasons, Mr. Slick's decision not to call these witnesses did not violate *Frierson* because these witnesses would not have provided credible support for an alibi defense.

2. Zarina Khwaja Asrani, Susana Camacho, And Michael Stewart Would Not Have Provided Credible Evidentiary Support For A Mistaken Identification Defense

As the referee properly found, Ms. Asrani would not have provided any credible evidence to support a mistaken identification defense. Ms. Asrani testified at the preliminary hearing that the gunman was a Black male, but that she "didn't see his face." (CT 17.) At the reference hearing, Ms. Asrani similarly testified that the gunman was a Black male, but explained that she could not identify anyone because she did not see the gunman's face. (RHT 1596, 1598, 1604, 1608.) Because Ms. Asrani did not see the gunman's face and therefore could not identify *any* individual as the perpetrator, Ms. Asrani could not exclude petitioner as the perpetrator. Thus, in light of this factual context, her inability to identify petitioner (or anyone else) as the perpetrator had no probative value as to a mistaken identification defense. Accordingly, Mr. Slick's decision not to present Ms. Asrani's testimony did not violate *Frierson* because Ms. Asrani would not have provided credible evidentiary support for a defense.

Similarly, Ms. Camacho would not have provided any credible evidence to support a mistaken identification defense. First, Ms. Camacho's description of the suspect that she gave to Ms. Kleinbauer in July 1983 (i.e., Ms. Camacho "didn't get a good look at the individual who was running" and "she probably told the police he was white because she was white") was, on its face, lacking in credible and persuasive evidentiary value.[14/] Moreover, Ms.

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14. The police reports reflect that Ms. Camacho told the police that the suspect was a "male Negro." (Resp. Exh. K at pp. 2-4, 9.) Thus, any trial

Camacho's inability to provide any credible evidentiary support for a mistaken identification defense was further demonstrated by her testimony at the reference hearing, wherein she testified that she did not get a good look at the man she saw fleeing from the woman lying on the street, her opportunity to see anything was "extremely limited," she could not tell whether the man was Black or White, she saw the man at a minimum distance of 80 feet, she only saw the back of the man, and at no time did she feel that she could provide a detailed description of the fleeing man. (RHT 1397, 1399, 1407.) Moreover, even if Ms. Camacho had been certain that the suspect was White because of her personal observations rather than her own skin color, such a description would have directly conflicted with the racial description provided by every other witness (including possible defense witnesses Ms. Asrani and Mr. Stewart), and would have only served to undermine Ms. Camacho's own credibility and the overall credibility of a mistaken identification defense. Accordingly, Mr. Slick's decision not to present Ms. Camacho's testimony did not violate *Frierson* because Ms. Camacho would not have provided credible evidentiary support for a defense.

Lastly, Mr. Stewart would not have provided credible evidentiary support for a mistaken identification defense. In August 1983, Mr. Stewart told Ms. Kleinbauer that he did not think he could identify the man who ran past him (i.e., the gunman) "since he saw him very briefly."[15/] (RT 633; Pet., Exh. 1 at

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testimony from Ms. Camacho that the suspect was White would have undoubtedly been impeached by her prior inconsistent statements to the police.

15. By contrast, Mr. Stewart told Ms. Kleinbauer that he was certain of his identification of the other suspect because he got a "good look at the driver." (Pet., Exh. No. 1 at p. 3 of Second Report.) Mr. Stewart also testified that he identified the driver at a showup shortly after shooting. (RHT 628.) The police reports show that Otis Clements, who was the lone occupant in the car when he was stopped by the police, was the individual identified by Mr. Stewart. (Resp. Exh. K at pp. 68-69.)

p. 3 of Second Report.) Mr. Stewart also told Ms. Kleinbauer that he did not "pay much attention" to the gunman or the driver prior to the shooting (Pet., Exh. No. 1 at p. 2 of Second Report), a point that Mr. Stewart reaffirmed at the reference hearing (RT 615-616). Thus, in light of Mr. Stewart's openly-expressed belief that he could not identify the gunman because of his limited opportunity to see the gunman, any inability by Mr. Stewart to identify petitioner as the gunman in 1983 had little or no probative value in support of a mistaken identification defense.[16/]

Petitioner, however, will undoubtedly point to Mr. Stewart's reference hearing testimony that the gunman had graying in his beard and hair, whereas petitioner did not have a beard or graying in his hair at the time of the offenses. But any probative value of this evidence in support of a mistaken identify defense was fatally undercut by the uncontradicted evidence that Mr. Stewart did *not* mention a beard or graying in the beard or hair when he provided the gunman's description to the police on the day of the shooting.[17/] (RHT 611-615; Resp. Exh. K at pp. 22-23, 47-48.) As Mr. Stewart also acknowledged, he provided the gunman's description to the police when the events were "freshest" in his mind (RHT 609-612), whereas the first mention of a beard or the presence of gray in the beard and hair occurred during his August 1983 interview with

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16. For the same reasons, there was absolutely no probative value to Mr. Stewart's reference hearing testimony that petitioner (as reflected by his appearance at the reference hearing) did not look like the person he saw on February 25, 1983. (RHT 250.)

17. At the reference hearing, Mr. Stewart acknowledged that the police reports accurately reflected his statements to the police, and that these statements did not include any mention of the gunman having a beard or the presence of gray in the gunman's hair or beard. (RHT 612-615.) Detective Collette also testified that Mr. Stewart did not describe the gunman as having a beard or that the gunman had gray in his hair or beard, and that Mr. Stewart did mention the color gray, but it was in reference to a gray jacket rather than a gray beard. (RHT 2044.)

Ms. Kleinbauer, more than five months after the offenses occurred. Similarly, Mr. Stewart's statement to Ms. Kleinbauer that the gunman was in his late 30's (an estimate based on the gray in the beard) was inconsistent with his statement to the police on the day of the offenses that the gunman was between 20 to 30 years old. (Pet. Exh. 1 at p. 3 of Second Report; Resp. Exh. K at pp. 22-23.) Thus, it is apparent that the aspects of Mr. Stewart's description of the gunman that tended to deviate from petitioner's actual description (i.e., beard, gray in beard and hair, and age) only arose with the passage of time, whereas the description that he provided to the police a few hours after the shooting was not inconsistent with most characteristics of petitioner's general description.[18/]

Indeed, it appears that the passage of time between the time of the shooting and his interview with Ms. Kleinbauer five months later had significantly affected the overall accuracy of Mr. Stewart's account of the events in question. For instance, Mr. Stewart told Ms. Kleinbauer in the August 1983 interview that the police had taken him and three other witnesses (the Cordova brothers) to a *second* showup a few hours after the shooting, that he was unable to identify the individual in that showup as the gunman because the individual was younger than the gunman, and that one of the other witnesses made a positive identification at this second showup. Mr. Stewart repeated this account in his reference hearing testimony. (RHT 596-598, 601-603.) The reference hearing evidence, however, demonstrates that no such second showup ever occurred. Detective Collette testified that there was no documentary evidence to indicate that a second showup had actually occurred, and he further testified that, as one of the lead investigators, he would have expected to have been

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18. The arrest report for petitioner described petitioner as being 19 years old, 5'11" and 160 pounds. Petitioner's date of birth was listed as March 14, 1963, which meant that he would have turned 20 years old about two weeks after his arrest. (RHT 783; Resp. Exh. K at p. 51.) Mr. Stewart told the police that the gunman was a "male black, 20-30 years, 6'1["] 220, short afro, gray jacket." (Resp. Exh. K at p. 22.)

notified if a witness had identified a suspect at a showup. (RHT 2047, 2052, 2055.)

Finally, respondent notes that calling Mr. Stewart as a defense witness would have undoubtedly led to the prosecutor to elicit Mr. Stewart's testimony that he identified Otis Clements as the driver of the getaway car, and that he identified the truck Clements was driving at the time of his arrest as the getaway car. This identification of Clements and the truck would have only added further credibility to petitioner's confession, wherein he told the police that Clements was the driver, that he was the shooter, and that they used Clements' truck as the getaway car. Likewise, this evidence would have also bolstered the credibility of the possible rebuttal testimony of Mr. Vining, who told the police that petitioner and Clements were together on the morning of February 25, 1983, seeking to borrow the truck that was later used as the getaway vehicle used in the Khwaja offenses. Indeed, Mr. Stewart's identification of Clements as the driver rather than the gunman would have necessarily undercut a fundamental underlying premise of petitioner's proposed defense, i.e., that Clements was the actual shooter.[19/] Thus, Mr. Stewart's identification of Clements as the driver rather than the gunman would have dissipated whatever minimal support that Mr. Stewart's description of the gunman would have added to a mistaken identification defense. Accordingly, Mr. Slick had reasonable grounds to conclude that Mr. Stewart's trial testimony was of insufficient probative value to credibly support a defense of mistaken identification.

In sum, petitioner was not deprived of his right to present a defense at the guilt phase because Mr. Slick did not override a clearly-expressed demand

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19. In petitioner's letter to Mr. Slick, petitioner alleged that Mr. Clements committed the charged offenses. Similarly, at the reference hearing, petitioner's counsel examined Mr. Slick and Elizabeth Black as to whether the description of the shooter provided by the Cordova brothers (i.e., facial scars and pockmarks) matched Mr. Clements rather than petitioner. (RHT 782-785, 1325-1326.)

by petitioner to present a defense, and because there no credible support to a guilt-phase defense. Accordingly, petitioner's *Frierson* claim should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully request this Court deny the petition for writ of habeas corpus.

Dated: June 6, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached uses a 13 point Times New Roman font and contains 17,507 words.

Dated: June 6, 2005

Respectfully submitted,

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