No. S034725

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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In re
ANDRE BURTON,

On Habeas Corpus.

_____

# PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS

MARCIA A. MORRISSEY
State Bar No. 66921
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

LISA M. ROMO
State Bar No. 134850
2342 Shattuck Ave., PMB 112
Berkeley, CA 94704
(510) 644-2621

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State Bar No. 66921
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(310) 399-3259

LISA M. ROMO
State Bar No. 134850
2342 Shattuck Ave., PMB 112
Berkeley, CA 94704
(510) 644-2621

**PETITIONER'S REPLY TO**

**RESPONDENT'S BRIEF ON THE MERITS**

In *People v. Frierson* (1985) 39 Cal.3d 803,[1] this Court held that "defense counsel does not have authority to refuse to present a defense at the guilt phase of a capital trial 'in the face of a defendant's openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense.'" (*People v. Burton* (1989) 48 Cal.3d 843, 856, citing 39 Cal.3d at pp. 812, 817-818.)

Petitioner has read *Frierson* to mean that a defendant has been denied his constitutional right to present a defense if: 1) he has openly or clearly expressed his desire to present a defense at the guilt phase and 2) that defense is supported by some credible evidence. Respondent argues that petitioner has failed in these reference proceedings to show either that he expressed his desire to defend or that there was credible evidentiary support for the defense(s) within the meaning of *Frierson*. For the reasons that follow, respondent's arguments should be rejected by this Court.

**A. Trial Counsel Ronald Slick Overrode Petitioner's Clearly Expressed Desire To Put On A Guilt Phase Defense.**

Respondent claims that petitioner failed to prove at his evidentiary hearing that defense counsel Ronald Slick overrode a clearly expressed

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[1] Hereinafter cited as "*People v. Frierson*" or "*Frierson*."

demand by petitioner to put on a guilt phase defense. (Respondent's Brief on the Merits [hereinafter "RBM"] pp. 39-49.)

Respondent is incorrect in asserting that petitioner has not met the first prong of *People v. Frierson*. The evidence overwhelmingly shows that petitioner, a young and poorly educated lay person who had little access to his counsel directly, did all that could be expected and more to make clear that he was not guilty and that he wished to have defenses presented at trial.

**1. What *Frierson* Requires.**

Initially, petitioner points out that the language respondent uses to frame the issue is not completely in accord with *Frierson*. Respondent argues in its brief on the merits that the evidence does not show a clearly expressed *demand* by petitioner for a guilt phase defense. (See, e.g., RBM pp. 39, 48.) *Frierson* speaks of a clearly or openly expressed *desire* to defend (see 39 Cal.3d at pp. 812, 815), however, which suggests that respondent expects a more forceful and definitive articulation of a defendant's wish to defend than does this Court.

Moreover, respondent appears to believe that a criminal defendant must demand that his attorney present a particular legal defense or call specific witnesses in order to exercise his constitutional right to defend. (See, e.g., RBM pp. 40-41.) Although petitioner believes that the weight of evidence introduced at the reference hearing indicates that he did request

particular defenses, including those of alibi and misidentification, as well as the presentation of specific witnesses who could support these defenses, petitioner asserts that the relevant case law does not require a criminal defendant to explicate legal defenses or demand the presentation of particular witnesses in order to exercise his constitutional right to present a defense.[2]

In *People v. Frierson*, *supra*, the defendant simply told the trial court that he wanted "a defense." (39 Cal.3d at p. 811.) It was Frierson's attorney who explained that his client wanted to present a defense of diminished capacity. Frierson himself neither articulated the particular defense he wanted to present nor named specific witnesses supporting that defense; he said only that his lawyer told him he was going to call a psychiatrist and other witnesses. (*Ibid*.) In *Brookhart v. Janis* (1966) 384 U.S. 1, the U.S. Supreme Court required even less from the defendant therein in order to invoke his right to present a defense. In that case, Brookhart, who had previously agreed to a prima facie proceeding in which guilt is indirectly conceded, stated in the trial court that he did not want to plead guilty. The high court found that this was enough to express

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[2] The right to counsel (see *Gideon v. Wainwright* (1963) 372 U.S. 355) would have little meaning if defendants facing even ordinary criminal charges were required to tell their lawyers all the available legal defenses and name all of the witnesses who could support them.

Brookhart's desire to contest the charges and present a defense. (384 U.S. at pp. 6-7; see also, Petitioner's Brief on the Merits [hereinafter "PBM"] pp. 79-85; 73-78.)

It is appropriate that the courts in *Frierson* and *Brookhart* did not require the specificity respondent demands in petitioner's case from the defendants in those cases. To require that a criminal defendant demand a particular defense supposes that the defendant understands what constitutes a defense under the law. It is simply unrealistic and unfair to require such legal precision from a lay defendant. In the instant case, for example, it was enough that petitioner wanted to prove his innocence and told his attorney that he was elsewhere when the crimes were committed. Petitioner did not need to request an alibi and/or misidentification defense (although the evidence shows that he requested both). It was for Slick, not petitioner, to determine what legal defenses were supported by the facts petitioner supplied.

Respondent's position that a defendant must identify witnesses to support his defense and then demand that his attorney call those witnesses is also illogical. Often a defendant will not know who can aid in his defense. In the instant case, for example, petitioner was not in a position to identify witnesses who could support a misidentification defense. In fact, it was not until petitioner was informed that investigator Kristina Kleinbauer had

interviewed Michael Stewart, and learned that Stewart had observed someone who looked very different from petitioner, that he could have asked that Stewart be called to testify.[3]

Moreover, it is unfair to make a defendant's exercise of his right to present a defense contingent upon demanding the presentation of particular witnesses since that defendant presumably does not have the power to insist that any specific witness be called at trial. As recognized in *Frierson*, as a matter of ordinary trial strategy, it is counsel rather than the defendant who decides whether a particular witness should be called. (39 Cal.3d at p. 813, citing *People v. Beagle* (1972) 6 Cal.3d 441, 458.) Although *Frierson* also recognized that a defendant's exercise of his right to present a defense "will impinge on defense counsel's handling of the case" (39 Cal.3d at p. 816), nothing in that opinion suggests that defense counsel must cede the power to control which witnesses are called to support the desired defense. In fact,

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[3] Even after petitioner learned of Stewart's existence, it is unreasonable to condition petitioner's right to present a defense upon whether he asked Slick to call Stewart at trial. It is the attorney, not an unschooled defendant, who is in the best position to assess which witnesses can support a particular defense. When petitioner told Slick that he was not at the crime scene, Slick was on notice that petitioner had been misidentified. That required Slick to conduct an investigation adequate to determine which witnesses could best support a misidentification defense. Such an assessment requires, inter alia, an understanding of the factors which speak to the reliability of an eyewitnesses identification. (See PBM pp. 279-280 [discussing factors].) Petitioner undoubtedly was ignorant of these factors and therefore not in a position to determine who should be called in support of a misidentification defense.

the attorney's obligation "is simply to provide the best representation that he can under the circumstances." (*Id*. at p. 817, italics omitted.) If it is true that the defendant cannot control which witnesses are called in support of the defense he desires, then it follows that he should not have to demand the presentation of particular witnesses in order to exercise his right to defend.

As petitioner will now demonstrate, the great weight of the evidence is that he openly and clearly expressed his desire to defend within the meaning of *Frierson*.

**2. The Reference Hearing Record Contains Powerful, Credible Evidence That Petitioner Expressed His Desire to Defend.**

Although the evidence that petitioner clearly expressed his desire to defend is overwhelming, respondent attempts to minimize the persuasiveness of this evidence. Respondent begins by mischaracterizing the nature of that evidence, asserting that "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." (RBM p. 39.) The evidence was not so limited, however. While is true that petitioner and Slick gave conflicting testimony on the issue of whether petitioner requested a defense, there was powerful, credible evidence – quite apart

from the testimony of petitioner and Slick – that petitioner had made clear his desire to defend.[4] This evidence, discussed below in turn, includes a letter petitioner wrote to Slick prior to trial, the statements petitioner made to defense investigator Kristina Kleinbauer, and his remarks in the trial court during the proceedings on his four *Faretta* motions. (See PBM pp. 85-92.)

**a. Petitioner's Letter to Slick.**

The undated letter petitioner wrote to Slick, introduced into evidence at the reference hearing as exhibit 15, strongly demonstrated his desire to defend. In the letter, petitioner told Slick that he was not guilty and was home with his family. Petitioner challenged the state's identification case. Referring to the witnesses presented by the prosecution at the preliminary hearing, petitioner indicated that one [Robert Cordova] admitted he saw the perpetrator's face only from a side view. Petitioner stated that the "main witness" [Zarina Khwaja] testified that she had never seen him before. Petitioner indicated that he had not been in a live lineup for the K-Mart victims and that he believed they had identified him based on his dark skin tone. Petitioner also told Slick that he had not made any inculpatory statements to the police. (Exh. 15; see also, HT 556-559.)

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[4] As petitioner demonstrates in subsection A.3, *post*, respondent also errs in asserting that the Referee correctly credited Slick's testimony over petitioner's.

Respondent acknowledges this letter, but dismisses it as petitioner's "critique of the prosecution witnesses who had testified at the preliminary hearing . . . ." (RBM p. 47.) Noting that the letter was written in the early stages of the attorney-client relationship, before the "primary investigation" had begun (*id*. at p. 47), respondent concludes, "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*." (*Id*. at p. 48.)

Respondent ignores, however, parts of the letter which show that petitioner was not simply suggesting possible defenses but rather asking his attorney to defend against the guilt charges because he was innocent. In the letter, petitioner asked for Slick's help to prove his innocence, stating "After all you can look into it you will see that I'm not the one who commit this crime and *I'm looking to you to help me win* – and we can win . . . ." (Exh. 15; italics added.) Petitioner also declared his unwillingness to concede guilt when he told Slick, "know [sic] way in the world I'm willing to take the falls of the real member Mr. Otis." (*Ibid*.)[5] Petitioner asked

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[5] Petitioner was referring to his alleged co-perpetrator, Otis Clements, who sought to exculpate himself by blaming petitioner for the charged crimes after he was caught driving the get-away vehicle shortly after the Khwaja shooting. (See, e.g., CT 46-48, 48-54.)

Slick to prove that he did not confess, stating, "and with your help we together can work to fight that [the police] are trying to frame me with Otis case, and I'm willing to fight for my freedom." (*Ibid*.) Petitioner again expressed his unwillingness to admit guilt, and expressed his belief that they could defeat the charges. He stated, ". . . I'm not willing to take know [sic] deals for I know I'm not the person[. A]lso I feel if you can get the court to give you a highly educated group of people, being the jury there's a good chance that I can get the people to understand I'm not the person." (*Ibid*.)

These statements did more than merely alert Slick to possible defenses. In fact, the letter put Slick on notice that petitioner would not concede responsibility for the charged crimes and that he wanted Slick to help him prove his innocence to the jury – in essence, to defend at the guilt phase.

Respondent apparently believes that the letter does not satisfy the first prong of *Frierson* because petitioner wrote it early in the course of Slick's representation of him, before Slick had begun to investigate the facts of the case. (RBM 47-48.) Although petitioner agrees with respondent that petitioner wrote it after the preliminary hearing in March, 1983, but likely before Kleinbauer met with him in June, respondent fails to

explain how that changes the nature of letter. In fact it does not; the letter clearly evinces petitioner's desire to defend.

Respondent also complains that 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." (RBM pp. 47-48.) As petitioner has established above, however, a defendant need not demand a particular defense or witness(es) in order to exercise his constitutional right to present a defense. (See subsection A.1., *ante*.)

Moreover, the letter provided Slick with enough information to understand that petitioner wanted to prove he had an alibi, had been misidentified, and that his confession had been falsified, even if he did not explicate these defenses in legalistic terms. Even a non-lawyer would understand that a person asserting innocence as petitioner did in the letter – by claiming that he was with other people at the time, that he was not present at the crime scene, that he was being framed, and that he had not confessed – was expressing a desire to defend against the charges. *No* reasonable person could conclude, from this letter, that petitioner wished to concede guilt.

Finally, respondent's complaint that petitioner's letter did not specifically identify any witnesses to support a mistaken identification defense (RBM p. 48) is curious, since respondent does not explain how petitioner would be able to name such witnesses. Slick did not provide him with the police reports in the case until trial began. (RT 8, 15.) Since petitioner was not at the scene of the crimes, he had no way of knowing whether there were eyewitnesses who could support his claim of misidentification. In fact, petitioner went beyond what should be expected of a criminal defendant who wants his counsel to defend on the basis of misidentification. Petitioner emphasized that Zarina Khwaja had been unable to identify him as the man who shot her brother Anwar. Petitioner also claimed, in essence, that Robert Cordova and the K-Mart victims had incorrectly identified him, and even offered reasons why their identifications were vulnerable to challenge. Respondent does not indicate how petitioner could have been any more specific about a misidentification defense than he was in the letter.

In sum, respondent's complaints about the letter, which evinced petitioner's desire to defend, are without merit.

**b. Petitioner's Statements to Kleinbauer**.

The statements petitioner made to defense investigator Kristina Kleinbauer prior to trial also provide evidence that he openly expressed his

desire to present a defense at the guilt phase. Although respondent faults petitioner for not identifying specific witnesses who would support an alibi defense in his letter to Slick (RBM p. 48), there is no question that petitioner gave a reasonably full accounting of his whereabouts and provided these names when he spoke to Kleinbauer. As shown below, when petitioner's statements to Kleinbauer are considered in combination with the letter petitioner wrote to Slick, it is abundantly apparent that petitioner made clear his desire to present a defense at trial.

Prior to trial, Slick directed Kleinbauer to "take a statement" from petitioner to determine his participation in the charged crimes. Kleinbauer interviewed petitioner on June 15 and 17, 1983. During these interviews, petitioner told Kleinbauer that he was not involved in the charged crimes. Petitioner told her where he had been and who he had seen on February 25, 1983. (PBM 119-120.) In brief, petitioner informed Kleinbauer that several persons could attest to having seen him at various key points throughout the day of the crimes, including Elizabeth Black, Ora Trimble, Hope Black, Shirley Cavaness and his mother, Gloria Burton. (Exh. 1; see also, PBM pp. 85-86; 119-121.)

Petitioner also told Kleinbauer – as he had informed Slick via letter – that he had not made an inculpatory statement to Long Beach police. Petitioner told Kleinbauer that after his arrest, he explained to the police

that he had nothing to do with the crimes, but the police kept telling petitioner they "had him." Petitioner informed Kleinbauer that he took a polygraph test, but the results were not discussed in front of him. He continued to insist to the police that he was not involved. The police did not record this interview. Petitioner told Kleinbauer that he had never confessed to anyone and that he felt like he was being asked to take the fall for somebody else. Petitioner also told Kleinbauer that if anyone had identified him, it was a misidentification because he was not there, and that he was not put into a lineup for identification purposes. (Exh. 1; see also, PBM p. 121.)

As petitioner has set forth in his merits brief, after receiving this information from petitioner Kleinbauer began to interview persons who had seen him on the day of the crimes. She also interviewed two eyewitnesses to the Khwaja shootings identified by police reports. Kleinbauer memorialized the information provided by petitioner and the witnesses she spoke to into a report, which was admitted into evidence at petitioner's hearing as exhibit 1. (See PBM pp. 121-122.) Slick received and read the report prior to trial. (HT 539; see also, PBM p. 122.) At petitioner's evidentiary hearing, Slick admitted that the information he received from Kleinbauer indicated to him that the witnesses named by petitioner could support a guilt phase defense or defenses. (HT 717; see also, PBM p. 124.)

In short, Kleinbauer's report shows that petitioner had informed the defense team that he had not committed the charged crimes, that he had not confessed to police, and that he had been misidentified by the state's witnesses. Petitioner had also provided the names of witnesses who could support his claim that he was not at the scene of either crime. Kleinbauer's investigation established that the witnesses petitioner identified, as well as others she learned of, did support his claim of innocence. When Kleinbauer's report is coupled with petitioner's letter to Slick, it is without question that petitioner made his desire to defend clear.

Respondent downplays the value of what petitioner related to the defense investigator in the June 1983 interviews, by asserting that Kleinbauer's report only "alert[ed] Mr. Slick to possible guilt phase defenses during the early stages of Mr. Slick's representation of petitioner" but did not "constitute a clearly-expressed demand for a guilt phase defense within the meaning of *Frierson*." (RBM p. 46; see also, p. 47.)

In fact, exhibit 1, especially when considered in conjunction with petitioner's earlier letter, did more than that. Petitioner had already informed Slick in writing that he wanted Slick to help him prove to the jury he was not guilty of the charged crimes. Petitioner asked Slick in the letter to contact him soon, stating "other things we will talk about later." (Exh. 15.) Instead of going to see petitioner himself, however, Slick sent

investigator Kleinbauer, delegating to her the task of inquiring about petitioner's involvement in the charged offenses. (See exh. 8; see also, Referee's Report p. 15.)[6] Thus, when petitioner explained to Kleinbauer where he was when the crimes occurred and told her who could verify his account, he was doing more than just altering his defense team to possible guilt phase defenses. Rather, by providing detailed factual support for his claim of innocence to Slick's agent, petitioner was adding flesh to the bones of his previously-communicated request that Slick aid him in proving to the jury that he was not responsible for the charged offenses.[7]

Again, no reasonable person could interpret the information petitioner gave Kleinbauer as communicating anything other than a desire to defend against the capital charges. Nothing in Kleinbauer's report suggests a willingness by petitioner to concede guilt.

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[6] Slick eventually saw petitioner on July 1, 1983, his one and only jail visit with petitioner. (HT 528; see also, exh. 13.) During this brief visit, Slick told petitioner he did not believe in his innocence (exh. D.) and that petitioner would lose at trial (HT 765-766).

[7] Although respondent characterizes the interviews of June 15th and 17th as occurring in the "early stages" of Slick's representation of petitioner (RBM p. 46), petitioner's entire case proceeded so rapidly that it is hard to pinpoint an early stage in the case. In fact, Kleinbauer's June interviews of petitioner preceded Slick's declaration that he was ready for trial by just over a month and the guilt phase trial by only two months. Slick announced ready on July 26, 1983. (RT 8A; CT 105.) Jury selection began on August 11, 1983 (CT 109) and the prosecution presented its guilt phase case on August 16th (CT 112).

Moreover, although respondent claims what petitioner told Kleinbauer was nothing more than preliminary information that might support one or more defenses, respondent's interpretation of the facts is at odds with what Kleinbauer understood petitioner to be saying. The investigator believed that petitioner, who consistently professed his innocence and his desire that the investigation be completed before trial began, was communicating his desire to present a defense. Kleinbauer testified that petitioner made it clear that he wanted to defend and to call witnesses. (HT 313; exh. H, ¶ 4; see also, PBM pp. 91-92; 270.) And, as petitioner has shown in his brief on the merits, the evidence supports a finding that Kleinbauer related petitioner's desire for a defense to Slick. (PBM pp. 272-274.)[8]

In sum, respondent's arguments that petitioner's letter and Kleinbauer's report do not satisfy the first prong of *Frierson* are not persuasive.

**c. Petitioner's Remarks in the *Faretta* Hearings.**

Petitioner's remarks during the *Faretta* proceedings provide additional and very strong evidence of his openly expressed desire to defend. As shown in his merits brief and discussed below, when petitioner

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[8] Petitioner addresses respondent's challenges to the credibility of Kleinbauer's testimony (see RBM pp. 41-43) later in this brief.

informed the trial judge, inter alia, that he wanted to represent himself so that he could investigate his case fully and prove his innocence to the jury, Slick was put on notice that petitioner wanted to defend. (PBM pp. 88-91; 127-129.)

In the hearing on petitioner's first *Faretta* motion, on August 10, 1983, petitioner told the trial court that he wanted to represent himself because Slick had shown a lack of interest in his case, had failed to investigate adequately and had not spent enough time with petitioner communicating about the case. (RT 1-2.)

In the second *Faretta* hearing the following day, petitioner again told the trial court he was moving for self-representation because of Slick's lack of interest in his case. Petitioner again complained about Slick's lack of communication with him. He indicated that Slick had only that day given him the police and defense investigation reports in his case. Referring to his alibi, petitioner took issue with the incomplete state of the investigation. Petitioner said he was still working with the investigator and had recently provided her with additional witness contact information. Petitioner insisted that he was not guilty. He explained that he had not confessed to police and that alleged co-perpetrator Otis Clements was trying to "frame" him. (RT 8-20; see also, PBM 17-20.) Petitioner clearly indicated that he wanted to prove his innocence when he stated: "I feel, if I represent myself,

I can show to the people that I am not the person who should be taking the fall in this case. . . [I]f I represent myself, I am going to show the court that I am not the person who should be takin' the fall." (RT 8-9.) He later added, "And I know for sure that I shouldn't take the fall in this case." (RT 10.)

On August 16, 1983, after the prosecution presented its case, petitioner sought a third time to relieve Slick and represent himself, referring to a conflict of interest he had with his attorney. (RT 391.) Petitioner requested self-representation a fourth and final time at the beginning of the next day's proceedings on August 17th. Petitioner had asked Slick to prepare written papers expressing his desire to go "pro per," but Slick declined to do so. (RT 393.)

Petitioner's efforts to remove Slick as his attorney and his remarks during the *Faretta* proceedings should have made it abundantly clear to Slick that petitioner wanted to defend. There is simply no other way Slick could have reasonably understood his client's actions and words.[9]

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[9] Petitioner asserts that how Slick should have understood his remarks during the *Faretta* hearing is a very different question from how the trial judge would have understood them. Slick had the benefit of much additional information, which put petitioner's remarks in context, including petitioner's letter and the information petitioner had provided to Kleinbauer. Slick knew, and the trial judge did not, that Kleinbauer had uncovered information supporting defenses, and Slick also knew that Kleinbauer had not even completed the initial investigation he himself requested.

Petitioner's statements to the trial court informed Slick that shortly before and during trial, petitioner was still vehemently asserting that he had not committed the crimes, had not confessed, and had an alibi defense – assertions consistent with what petitioner had told both Slick and Kleinbauer from the beginning. Petitioner's statements in the trial court made it clear to Slick that petitioner wanted to continue the investigation in his case and to prove his innocence to the jury – that is, to defend against the guilt charges in his capital case.[10]

Moreover, the unwillingness petitioner expressed during the *Faretta* proceedings to "take the fall" for the crimes informed Slick that petitioner did not wish to follow Slick's intended "strategy" of not defending at the guilt phase of trial which in effect conceded guilt .[11] This is not a case

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[10] Respondent relies on Slick's testimony that he advised petitioner he would not defend and that petitioner did not object to this plan. (See RBM p. 40.) Slick could not say when or where he so advised petitioner or what petitioner's reaction was. (See PBM p. 45.) In fact, the *Faretta* proceedings made it clear that petitioner *did* object to Slick's strategy because petitioner wanted to prove his innocence.

[11] As petitioner has established in his merits brief, Slick never informed him that he had settled on a strategy of not defending in the guilt phase. Petitioner did not know what Slick intended to do at trial. When Slick told the trial judge after the close of the prosecution's case that he had not decided whether to call any witnesses, petitioner had reason to believe that his attorney might present some semblance of a defense. Petitioner knew, however, that the investigation was not finished and that his attorney was therefore not in a position to present a complete defense. (PBM pp. 213-226; see also, pp. 227-235.)

where counsel chose to forego an affirmative defense at the guilt phase because he believed his client's best chance to win at that phase was to argue that the prosecutor had failed to prove guilt beyond a reasonable doubt. Instead, Slick chose not to contest petitioner's guilt in order to save his own credibility with the jury in the penalty phase. (HT 794; see also, HT 922, 944; PBM pp. 55-56.)[12] Prior to trial Slick told petitioner that he believed petitioner would lose the guilt phase. (HT 765.) In closing argument, Slick did not even bother to ask the jury to find a reasonable doubt that petitioner was guilty of the charged crimes. (See RT 407-411; see also, PBM p. 24.) Thus, he indirectly conceded petitioner's guilt. Petitioner's unwillingness to concede guilt, as expressed in both the *Faretta* hearings and his earlier letter (exh. 15), however, alerted Slick that his client wanted to defend.

In sum, the evidence discussed above clearly put Slick on notice that his client refused to concede responsibility for the crimes, directly or indirectly, and wanted to present a defense to the guilt charges. Even if it can be argued that any one piece of this body of evidence was insufficient

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[12] This Court did not inquire in its reference order about the reasonableness of Slick's alleged strategy, because strategic concerns are legally irrelevant to a claim of denial of the right to defend. Had the reasonableness of Slick's claimed strategic motivation for dispensing with a guilt phase defense been at issue, petitioner would have produced evidence showing that Slick's tactical decision-making was manifestly unreasonable. (See PBM pp. 266-267, n. 198.)

alone to clearly express petitioner's desire to defend, in combination this evidence proves that petitioner has met his burden under *Frierson*.

### 3. Petitioner's Testimony Was Far More Credible Than Slick's Testimony.

Finally, petitioner strongly disagrees with respondent's claim that the Referee properly credited Slick's testimony at the reference hearing over petitioner's. (See RBM p. 39.) Respondent's assertion that the Referee's credibility findings are supported by substantial evidence (*ibid*.) is not correct. As petitioner has shown in his merits brief, petitioner's testimony was consistent with, and corroborated by, a wealth of other evidence – in fact, by all of the evidence produced at the hearing except Slick's own belated recollections. (See, e.g., PBM pp. 147-148.) By contrast, Slick's testimony was extremely vague and generally unworthy of belief. It was unsupported by any other evidence, including his own files and the trial transcript. (See PBM pp. 92-101.)

#### a. Petitioner's Testimony Was Consistent With and Corroborated by Other Credible Evidence.

Petitioner testified at the reference hearing that he told Slick he wanted Slick to present a defense at trial. (HT 1861; see also, HT 1890-1891, 1927, 1930.) He told Slick that he wanted the alibi witnesses called

to the stand. (HT 1908-1909; see also, HT 1891, 1927, 1930.) Once petitioner learned that Michael Stewart was an eyewitness who could assist his defense, he asked Slick to call Stewart as a witness as well. (HT 1885; exh. D; see also, PBM p. 127, 130-131.)

Although respondent claims that the Referee had reason to reject petitioner's testimony, petitioner has shown in his briefing that his testimony was consistent with, and corroborated by, a great deal of evidence. This evidence includes that discussed above, i.e., petitioner's undated letter to Slick, his statements to Kleinbauer, and his remarks during the *Faretta* hearings. It also includes testimony from Kristina Kleinbauer, Marshall Smith and Jeffrey Brodey, and a declaration petitioner signed in support of a new trial motion filed by substitute counsel Brodey shortly after trial (exh. D). (See PBM 85-92; 127-143, 147-151.) Respondent attempts to diminish the great weight of this evidence by picking away at each piece of it in isolation but refuses to acknowledge the consistency and volume of the evidence overall. (See RBM pp. 41-49.) Respondent's arguments are not supported by the evidence, however, and are therefore unpersuasive.

**i. Kristina Kleinbauer's Testimony.**

As set forth above, defense investigator Kristina Kleinbauer testified that petitioner told her he wanted defense witnesses to be called at trial.

(HT 313.) Kleinbauer also stated that she understood from her conversations with petitioner that he wanted to present a defense. (Exh. H, ¶ 4; see also, HT 451.) Petitioner never told Kleinbauer that he agreed with a strategy of not presenting a defense at the guilt phase. (HT 319-320, 436.) As petitioner has explained, Kleinbauer's testimony that petitioner wanted to defend was consistent with, and corroborated by, that of the other witnesses and contemporaneous documentary evidence.

The fact that petitioner made clear to Kleinbauer his desire to defend tends to prove that petitioner also made it clear to Slick, as there is no reasonable explanation why petitioner would have expressed his wish to present witnesses on his behalf to the defense investigator but not to his attorney.

Respondent seeks to diminish the value of Kleinbauer's testimony by unleashing a barrage of attacks on her. Respondent asserts that Kleinbauer's testimony was "sparse" and "devoid of any specifics as to what petitioner actually said or when he made the purported statements." (RBM p. 41.) Respondent claims that Kleinbauer's recollection at the time of the hearing of her conversations with petitioner "was virtually non-existent" and she was "often confused and distracted." (*Ibid*.) Respondent also avers that Kleinbauer's testimony resulted from leading questions, that

she was biased in favor of petitioner and that she tried to "shade her answers in favor of petitioner . . . ." (RBM pp. 41-42.)

None of respondent's complaints about Kleinbauer and her testimony have merit. As petitioner has already demonstrated in his brief on the merits, the mild confusion Kleinbauer experienced during some of her reference hearing testimony was due to the effects of the early stages of Alzheimer's disease. Although Kleinbauer had some difficulties while testifying in court, the record makes clear that her memory was refreshed by documents created at a time when she was not experiencing any memory problems. (See PBM pp. 133-134.)

Although respondent claims that Kleinbauer's recollection of her conversations with petitioner "was virtually non-existent," and that her testimony was "sparse" and "devoid of any specifics" (see RBM pp. 41-42), respondent fails to support these assertions with any discussion of the hearing record or examples from Kleinbauer's testimony. In fact, these claims are ridiculous.

Unlike trial counsel Slick, who had no notes of any contacts with petitioner (see PMB pp. 42-43), Kleinbauer memorialized much of what petitioner told her in a report (exh. 1). The report helped refresh her

recollection of events. (See HT 321.)[13] Kleinbauer remembered that petitioner "was very clear that he wasn't involved in the offenses." (HT 227.) Klenbauer recalled that petitioner "insisted that he had never confessed" and that "he felt that he was being asked to take the fall for somebody else . . . ." (HT 264.) Petitioner also "maintained that he wasn't there; so if anybody had identified him, it was a misidentification." (HT 265.) Petitioner told her he wanted witnesses called at trial. (HT 313.) Although Kleinbauer acknowledged that she was unable to recall 20 years later the exact words petitioner used when he made it clear to her that he wanted witnesses presented, the investigator was certain that petitioner wanted to defend. (See, e.g., exh. H, ¶ 4.) Respondent fails to explain why Kleinbauer should have been more specific than this in recounting her contacts with petitioner.

Respondent's complaint that much of Kleinbauer's testimony came in response to leading questions from petitioner's counsel is unwarranted, given Kleinbauer's medical condition. (See PBM p. 134.) Moreover, respondent has not in its brief even identified these leading questions, much less attempted to show how such questions impugn the credibility of Kleinbauer's responses to them. Instead, respondent merely cites the whole

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[13] Respondent does not challenge the veracity and reliability of Kleinbauer's contemporaneously-prepared reports.

of Kleinbauer's first day of direct examination. (RBM p. 42, citing HT 219-294.) A review of this portion of the hearing record shows, however, that respondent objected only twice that petitioner's counsel was leading the witness. One objection was sustained (HT 237) and one was overruled (HT 242). If respondent's counsel believed that Kleinbauer was being led excessively, he undoubtedly would have objected more often. His failure to do so undercuts respondent's current claim that Kleinbauer's testimony should be discounted because it came in response to leading questions. Furthermore, respondent had full opportunity to test Kleinbauer's version of events during cross-examination, and exercised that right at length. (See HT 321-449, 482-491.)

Similarly, although respondent states that Kleinbauer was biased in favor of petitioner, respondent offers no evidentiary support for this claim. (RBM p. 42.) In fact, there is no evidence to support a finding of bias. Kleinbauer had nothing to gain, or lose, in the hearing and thus no reason to aid petitioner. Kleinbauer's conduct as an investigator was not being challenged and there was no suggestion that she had any professional, financial or personal stake in the outcome of the proceedings. (See PBM pp. 137-138.)

Respondent's assertion that Kleinbauer "shaded" her answers to assist petitioner (RBM p. 42) also falls flat. Although respondent does

provide one record citation in support of this contention (*id*., citing HT 444), petitioner sees no evidence of "shading" in the cited portion of Kleinbauer's testimony. Most of page 444 deals with whether Kleinbauer had an independent recollection of seeing petitioner briefly at the jail in addition to the scheduled interviews with him for which she billed. This testimony related back to earlier testimony in both her direct and cross-examinations that she may have seen petitioner "in passing" at the jail and not billed for it. (See HT 286, 354-355.) Respondent does not explain how such testimony favored petitioner, much less how it proves that Kleinbauer was massaging her answers for petitioner's benefit. Her remarks on page 444 are simply consistent with her earlier testimony. In fact, the testimony respondent points to tends to *dispel* any suggestion that Kleinbauer was answering questions in an effort to aid petitioner. After respondent asked, "You'd like to help Mr. Burton, if you can at all do so, within the bounds of legality and ethics?", Kleinbauer responded, "No. . . . I'm telling you what I remember about what happened 20 years ago, Mr. Kelberg." (HT 444.) In light of these facts, respondent's attacks on Kleinbauer's neutrality are without evidentiary support.

Respondent's complaints about the declarations executed by Kleinbauer in 1987, 1993 and 2000, are also unsupported. Respondent claims that the 1987 and 1993 declarations do not include "any direct or

indirect reference to petitioner's purported demand or request for the presentation of a defense at the guilt phase . . . ." (RBM p. 42.) This is not correct. The declarations describe petitioner's consistent insistence that he was innocent, that he was elsewhere when the crimes occurred, that he had been misidentified, and that he had not confessed to police, as well as the investigation Kleinbauer conducted in response to this information from petitioner. (See exhs. F and G.) These matters are relevant to the *Frierson* inquiry and, as petitioner has explained above, speak to petitioner's desire to defend.[14]

Respondent also faults all three declarations for not directly stating that petitioner made clear his desire that witnesses be presented at trial on

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[14] Kleinbauer believed that her declarations expressed petitioner's desire to defend, even if they did not include specific references to witnesses, etc. (See HT 438.)

The Referee also believed they were relevant. When Kleinbauer began to testify about what petitioner had told her, respondent objected, stating: "I believe there's a clear distinction between [petitioner] saying I wasn't involved in the crime, I was here, there, or anywhere, basically giving his alibi, if you will, for where he is versus conversation he had with Miss Kleinbauer about his views on Mr. Slick and what he wanted done with the case as Mr. Slick handled it for him. I believe there is a distinction." (HT 228-229.) The Referee disagreed, stating: "I don't think we can cut it that fine. [¶] I think in order to respond to these questions by the Supreme Court, statements of the type that I didn't do it or I wasn't present are part and parcel of whether it's an alibi defense or something like that, misidentification, as opposed to, for example, the defendant saying, well, maybe I was there, but I don't remember anything about it which could be a precursor to a mental defense; so I think it's all sort of wrapped up in the same question." (HT 229.)

his behalf. (RBM pp. 42, 43.) However, as petitioner has explained in his brief on the merits, he did not know prior to the issuance of this Court's reference order in October, 2000, that whether he requested the presentation of specific witnesses would be at issue. (PBM pp. 134-137.)

Although respondent avers that it is telling that Kleinbauer's first explicit reference to petitioner's desire to defend was in a 2000 declaration (RBM p. 42), this is not surprising at all. Unlike Kleinbauer's 1987 and 1993 declarations, the 2000 declaration was prepared after this Court issued an order to show cause why relief should not be granted pursuant to *Frierson*, an event which intensified the attention paid by the litigants to the elements of a *Frierson* claim. Moreover, given that Kleinbauer was petitioner's investigator and not his attorney, it is not surprising that petitioner's post-conviction counsel had not previously explicitly addressed, prior to the issuance of the order to show cause, the question of whether petitioner had expressed his desire to defend to her.[15]

Although respondent claims that Kleinbauer's understanding that petitioner wanted to defend was "inferential" at best (see RBM p. 43), this

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[15] In exhibit H, paragraph 4, Kleinbauer stated, "I have been asked by Mr. Baruch whether Mr. Burton made it clear that he wanted to present a defense at the guilt phase of trial. . . ." Although Kleinbauer could not recall at the reference hearing when she was first asked by petitioner's counsel what petitioner had said about putting on a defense (HT 448), the phrasing of 2000 declaration suggests that she had not been asked the question previously.

Court has in fact asked whether petitioner told or *made clear* to Kleinbauer his desire to put on a guilt phase defense. (Reference Question no. 8, italics added.) Kleinbauer's declaration stating that "it was always clear" to her that he did (exh. H, ¶ 4) is thus directly responsive to this Court's inquiry. The Referee acknowledged as much during the reference hearing. (See PBM pp. 135-137.) In short, respondent's parsing of Kleinbauer's declarations is not persuasive. In fact, the declarations add to, rather than detract from, the body of evidence indicative of petitioner's desire to defend.

**ii. Marshall Smith's Testimony.**

Petitioner's testimony was also supported by that of L. Marshall Smith, an attorney who represented petitioner during the early stages of his post-conviction proceedings. Smith testified that both petitioner and Kleinbauer told him that petitioner had told Slick that he wanted to present his witnesses. (HT 126, 135, 147-148.) Smith also testified that Slick had told him that petitioner wanted to present witnesses. (HT 60; see also, PBM pp. 37-39, 95, 141.)

Respondent discounts this testimony by faulting Smith for not having notes of the 1985 conversation with Slick. (RBM pp. 43-44.) Respondent fails to acknowledge, however, that Slick had no notes of the conversation

either. And, as the evidence shows, Slick's memory of even far more recent events was abysmal. (See, e.g., PBM pp. 141-142.)

Respondent also claims that Smith was biased in petitioner's favor. (RBM p. 44.) However, as petitioner has demonstrated, there is no evidence to support a finding of bias. (See PBM p. 141.) Respondent bases this claim on the fact that Smith was still petitioner's counsel in federal court. (See RBM p. 44.) Respondent fails to offer any legal authority, however, which suggests that all lawyers are necessarily biased toward their clients, such that they would shade their testimony in a court of law, simply because of their position or duty of loyalty. Unlike Slick, Smith was not trying to defend his own conduct in the case and had no personal stake in the outcome.[16]

Although respondent vaguely refers to Smith's "demeanor" at the hearing as evidence of his bias, respondent cites no examples from Smith's testimony which prove the witness was not neutral. (See RBM p. 44.) What's more, respondent conveniently neglects to acknowledge the substantial record evidence of Slick's bias against petitioner. By his actions, Slick has repeatedly demonstrated extreme bias against petitioner

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[16] Although Slick made it clear that he believed his conduct was under attack at the hearing, as petitioner has repeatedly indicated, the reasonableness of his strategic decisions was not at issue. The fact that he had no need to adopt such a combative and defensive posture provides further evidence of his extreme bias against his client.

during the long course of this litigation. Some notable examples of Slick's bias include his repeated willingness to work with respondent's counsel but not petitioner's counsel and Slick's declaration at the hearing that he felt he was the defendant in the proceedings. (See subsection A.3.c.iv., *post*.)

Any potential bias Smith might have had *for* petitioner pales in comparison to the bias Slick has actually displayed *against* petitioner. Because the Referee and respondent have failed even to acknowledge the facts which demonstrate Slick's bias, their reliance on any bias by Smith is highly questionable. (See PBM p. 141-142.)

**iii. Jeffrey Brodey's Testimony.**

Jeffrey Brodey's testimony provides further corroboration for petitioner's. Brodey indicated that petitioner said he told Slick that he wanted to call witnesses on his behalf. (HT 1187-1188.) When Brodey met with Slick prior to filing a motion for new trial, Slick acknowledged that petitioner wanted to put on a defense, but Slick felt that it would not work. (HT 1173; see also, PBM pp. 39-40.)

Respondent dismisses Brodey's testimony, asserting that the attorney did not have notes of his conversation with Slick. (RBM p. 44.) The lack of notes without more, however, does not demonstrate that Brodey's testimony was inaccurate. The only evidence to contradict Brodey's testimony on this point was Slick's testimony that he did not make such a

statement to Brodey (see HT 823). But Slick did not have any notes of the conversation either, and admitted that he could not even recall speaking to Brodey (HT 821). Thus, Brodey's recollection appears to be more reliable than Slick's.

Respondent also faults Brodey for not including in the declaration he prepared for petitioner's signature to support the new trial motion (exh. D) a claim that Slick had overridden petitioner's desire to present witnesses. (RBM pp. 44-45.) As petitioner has explained in his previous briefing, *Frierson* had not been decided when Brodey moved for a new trial for petitioner. The motion focused on other issues, including ineffective assistance of counsel and the trial court's denial of petitioner's *Faretta* motions. (See PBM pp. 142-143.) Although respondent appears to believe that the declaration should have been more complete, and avers that petitioner's desire to defend and call witnesses would have been relevant to the ineffective assistance of counsel claim (see RBM pp. 44-45), respondent does not provide any legal authority to support this allegation.

Thus, Brodey's testimony provides additional evidence to support petitioner's testimony that he asked Slick to defend.

**iv. Petitioner's 1985 Declaration.**

Petitioner's 1985 declaration (exh. D) was prepared by Jeffrey Brodey, who substituted for Slick as petitioner's attorney prior to

sentencing, in support of a motion for new trial. The motion focused primarily on claims that Slick provided ineffective assistance at trial and that the trial court erroneously denied petitioner's *Faretta* motions. The declaration, which was executed reasonably close in time to the events at issue, included information from petitioner relevant to these claims. Like all the other evidence except Slick's testimony at the hearing – including petitioner's letter to Slick, his statements to Kleinbauer and during the *Faretta* hearings, and the testimony of Kleinbauer, Brodey and Smith – the declaration demonstrated that petitioner desired to defend against the capital charges.

Although exhibit D might have been more precise, it supports petitioner's testimony that he informed Slick he wanted to defend in important respects. In the declaration, petitioner stated that he told Slick he did not commit the crime and did not confess. (HT 1205; exh. D.) When petitioner learned that an eyewitness had been found who described someone very different from him, he wanted to know why that witness had not been subpoenaed. (Exh. D; see also, PBM p. 40.)[17] Although

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[17] Respondent claims that the eyewitness petitioner was referring to in the declaration must have been Susana Camacho because Kleinbauer's last visit with petitioner occurred before her interview with Michael Stewart. (RBM p. 49 at n. 49.) The facts show, however, that petitioner had access to the information Stewart provided to Kleinbauer, even if that information did not come directly from Kleinbauer during a visit.

respondent prefers to focus on what exhibit D does not include, this straightforward reference to petitioner's desire to call a witness who could help to establish that he was not the perpetrator supports petitioner's hearing testimony that he wanted a defense presented.

In sum, petitioner's testimony that he informed Slick of his desire to defend is thoroughly supported by a substantial quantity of credible evidence.

**b. Respondent's Attacks on Petitioner's Testimony Are Not Supported by the Evidence.**

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Petitioner stated in the trial court on August 11, 1983, that he had just received from Slick "the whole file of my case," including a report from the defense investigator. (RT 8.) This presumably included Kleinbauer's summary of her interview of Michael Stewart, which she had given to Slick the previous day (see HT 273-274). Although it is conceivable that petitioner was referring in the 1985 declaration to Camacho, it is much more likely that he was speaking of Stewart, since at least as is reflected in Kleinbauer's report, Stewart appeared to be the more useful witness in proving that petitioner was not the perpetrator.

For purposes of the claim upon which this Court issued an order to show cause, however, it does not matter whether petitioner was referring to Stewart or Camacho; he was undoubtedly referring to one or the other. As petitioner has argued herein, it was not his responsibility to identify every, or even any, witness who could support a defense. In fact, the declaration makes clear that petitioner wanted a witness called who could help to establish that he had been mistakenly identified. Regardless of who that witness was, the declaration shows that petitioner expressed his desire to present a defense.

Despite the voluminous corroboration of petitioner's testimony discussed above, respondent avers that the Referee had "ample grounds" to reject petitioner's testimony. (RBM p. 40.) In making this assertion, respondent relies heavily on what petitioner *did not say* during the four *Faretta* hearings. Respondent asserts:

> Petitioner acknowledged that he did not tell the trial judge during the four *Faretta* 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. (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 defense presented. Indeed, petitioner's final *Faretta* motion on August 17, 1984 [sic] 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.

(RBM pp. 40-41; footnotes omitted.)

These assertions are all premised on an assumption that petitioner knew that Slick would not present a defense at trial. However, as petitioner has demonstrated in his brief on the merits, he did not know prior to the point at which Slick rested without calling any witnesses that his attorney would not present any defense. (PBM 213-226; 227-235.)

Respondent's reliance on petitioner's testimony that he did not tell the trial court during the *Faretta* hearings that Slick was refusing to call alibi witnesses (RBM p. 40, citing HT 1933) is misplaced. This testimony related only to the first three of petitioner's four motions for self-representation. (HT 1933-1934.) As petitioner has shown, all he knew when he made these motions was that Slick had not adequately investigated his innocence, had told petitioner he would lose at the guilt phase, and had failed to adequately communicate with him about the case. (See, e.g., PBM pp. 148-151.) Petitioner's testimony that he did not tell the trial court during these *Faretta* hearings that Slick was refusing to call alibi witnesses thus proves nothing and offers respondent no support, since petitioner could not tell the trial court what he did not know.

Respondent's characterization of what occurred at the fourth *Faretta* hearing on August 17, 1983, is also flawed. Although respondent claims that petitioner acknowledged he knew when he made his last *Faretta* motion that Slick did not *intend* to present a guilt phase defense (RBM p.

41), respondent provides no citation to petitioner's testimony or any other evidence to support this assertion. In fact, there is no testimony from petitioner which supports respondent's assertion that petitioner knew what Slick planned to do.

Nor does the evidence support respondent's argument that petitioner should have told the trial court on August 17th that Slick *had* overridden his request to present witnesses. The record shows that at the time of this final request for self-representation, petitioner had reason to believe his counsel might present at least two witnesses to support an alibi defense. On the previous day, August 16th, after the prosecution rested Slick informed the trial court he would not be prepared to proceed until the next morning. He stated: "I could have two witnesses that will be here [then]. I plan on interviewing them personally before I decide whether or not I will call them as witnesses, but they will not be here until tomorrow morning." (RT 389-390.)

The trial court continued petitioner's trial until 10:00 a.m. the next day (August 17th) so that Slick would have time to interview the witnesses. (RT 390-391.)[18] After the jurors were excused on August 16th, petitioner made his third *Faretta* motion. (RT 391-392.) At 9:26 a.m. on August 17th,

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[18] Slick's file contains August 17, 1983 subpoenas for Elizabeth Black and Gloria Burton. (See exh. 36.)

petitioner made his fourth *Faretta* motion. (RT 393.) After the trial court denied this motion, (HT 393), Slick told the court he was ready to go forward (RT 394). The jurors then entered the courtroom. It was at this point that Slick announced that he would rest. (*Ibid*; see also, PBM 214-215; 148-149.) These facts provide no support for respondent's claim that petitioner knew Slick would rest without calling witnesses when he made his last *Faretta* motion.

Respondent's reliance on the Referee's Report (again, without citation) is also misplaced (see RBM 40-41), because the Referee's findings as to what petitioner knew at the time of the last *Faretta* hearing were based on a misunderstanding of the hearing evidence. The findings are premised on the Referee's belief that Slick had already rested when petitioner made his last *Faretta* motion. (See Referee's Report p. 22.) As petitioner has established above, and in his merits brief, this was incorrect. (PBM pp. 214-215.)

Petitioner presumes that the Referee's error arose from confusion in the record during petitioner's testimony. During cross-examination, respondent asked the Referee to take judicial notice that both sides had rested when petitioner made his last *Faretta* motion on August 17th. (HT 1935.) Petitioner's counsel checked the record, and agreed with respondent's characterization of the evidence. (HT 1935.) After the

Referee took judicial notice as requested, respondent asked petitioner: "Mr. Burton, you knew then at the time you made this fourth request for pro per status that Slick had not put on the alibi witnesses you wanted him to put on; correct?" (HT 1936.) Having just heard the Referee take judicial notice of this "fact," petitioner understandably answered, "Correct." (HT 1936; see also, HT 1936-1937.)

Later in the habeas proceedings, however, petitioner's counsel informed the Referee that she had mis-read the record when she agreed to respondent's request for judicial notice and that the reporter's transcript plainly showed that Slick had rested *after* petitioner's *Faretta* motion. (HT 2386-2388.)[19] Respondent acknowledged that petitioner's counsel was correct and stated that he had no problem withdrawing from the stipulation. (HT 2388-2389.) Thus, petitioner's testimony that he knew Slick had already rested at the time of the final *Faretta* motion was incorrect, although understandably so, as it came in response to an erroneous characterization of the trial record. The Referee's reliance on this part of petitioner's testimony (see Report p. 22), then, was also erroneous.

In sum, respondent's argument that petitioner should have informed the trial court that Slick was refusing to defend is unsupported by any

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[19] The correct sequence of events had been brought out earlier in petitioner's direct examination of Slick. (See HT 574-576.)

credible evidence that petitioner knew Slick would not defend until his attorney rested without calling any witnesses.

Respondent also argues that the Referee was warranted in rejecting petitioner's testimony that he told Slick he wanted witnesses called in his defense because, respondent asserts, "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.)" (RBM p. 41.) The record does not support respondent's argument, however.

Respondent reads too much into petitioner's testimony. Petitioner testified that he told Brodey he had told Slick he wanted a defense put on, including alibi witnesses. (HT 1890-1891.) Petitioner also testified that he told Brodey about his differences with Slick. (HT 1893.) Respondent then elicited from petitioner testimony that Slick had not called alibi witnesses at trial, had not called any of the witnesses petitioner wanted him to call and did not put on any defense of the type petitioner had requested. (HT 1894.) After establishing these facts, respondent asked: "And you told *all of these things* to Mr. Brodey when he represented you, right?" (HT 1894-1895, italics added.) Although petitioner responded "no" (HT 1895), respondent's poorly-phrased question was so broad that petitioner's answer

cannot fairly be read as a concession that he did not tell Brodey he asked to present witnesses, as respondent argues, particularly in light of petitioner's earlier testimony to the contrary. In fact, petitioner's testimony that he informed Brodey that he asked Slick for a defense is supported by Brodey's testimony, described above, that petitioner told him that he had told Slick he wanted to call witnesses. (HT 1187-1188.)

Moreover, although petitioner acknowledged that the declaration Brodey filed with the new trial motion did not say that petitioner had demanded that Slick call witnesses Ora Trimble, Gloria Burton, Denise Burton and Elizabeth Black (HT 1896-1897), the absence of a specific reference to these witnesses is understandable. As petitioner has set forth above, Brodey prepared the declaration, not petitioner. *Frierson* had not been decided when the new trial motion was filed. Brodey, who then believed it was counsel's decision whether to call witnesses, therefore did not include a *Frierson*-type claim in the motion, but rather focused on other issues. Finally, as explained above, the declaration did refer to petitioner's request that a misidentification witness be called at trial.

**c. Slick's Testimony Was Impeached, Vague, Illogical and Generally Unworthy of Belief.**

In contrast to petitioner's well-supported testimony that he told Slick he wanted a defense presented is Slick's testimony that petitioner did not

ask him to call particular witnesses or present a particular defense at the guilt phase of trial. Respondent contends that the Referee's decision to credit Slick's testimony over petitioner's is supported by substantial evidence. (RBM p. 40.) It is not.

As petitioner has shown in his brief on the merits, Slick's testimony that petitioner did not ask for a defense or for witnesses to be called was not credible. It was directly contradicted by Slick's admissions to attorneys Brodey and Smith soon after trial that Slick knew petitioner had wanted to defend. Slick's testimony was further impeached by petitioner's letter and his statements to Kleinbauer and during the *Faretta* proceedings which, as petitioner has explained, all evinced his desire to defend.

Moreover, the likelihood that Slick could accurately recall whether petitioner wanted to defend was undercut by Slick's limited contact with petitioner and Slick's inability to provide many specifics about his interactions with his client, including their discussions of case strategy. Slick's own files failed to confirm that he had any substantial contact with petitioner, much less that Slick had advised his client of his intended strategy of not defending and that petitioner had acquiesced to this plan.

In general Slick's testimony was suspect because his memory was exceedingly poor, rarely refreshed even with materials from the trial file or the trial record, and often impeached. And, Slick's testimony that petitioner

did not ask for a defense was illogical and unconvincing. Finally, Slick harbored obvious bias against petitioner. (See PBM pp. 92-101; see also, PBM pp. 57-60, 138-139, 144-147, 220-221, 222-226.)

**i. Slick's Testimony That Petitioner Did Not Request a Defense Was Impeached.**

As petitioner has previously demonstrated, Slick's testimony to the effect that petitioner did not express a desire to present a defense was impeached by his admissions to the contrary to attorneys Jeffrey Brodey and Marshall Smith. (See PBM pp. 94-95.) Brodey testified that Slick told him in a 1985 meeting that petitioner said he wanted to put on a defense, but Slick felt the defense would not work. (HT 1173.) Smith testified that when he met with Slick in 1985, Slick said that petitioner had wanted to present a defense and call witnesses. Slick believed the case was a "slam dunk" as to guilt, however, and saw no point in calling any witnesses. (HT 60, 152, 48, 53.)

The consistency between this testimony from Brodey and Smith as to admissions made by Slick not long after the time of trial strongly tends to discredit Slick's testimony that petitioner did not request a defense.

Petitioner's own statements on the trial record – that he wanted his case fully investigated so that his innocence could be proven to the jury – as

well as his letter to Slick and Kleinbauer's report of what petitioner had told her further impeached Slick's belated and self-serving testimony that petitioner never asked for a defense.

**ii. Slick's Contacts With Petitioner Were Limited and His Recollection of the Content of Those Contacts Was Poor.**

The likelihood that Slick could accurately recall 20 years after the fact whether petitioner had requested a defense must be evaluated in the context of Slick's extremely limited contact with petitioner, his inability to recall much about those contacts, and the glaring absence of any documentation memorializing them in the trial file. (See generally, PBM pp. 42-46, 93-94, 145-147; see also, PBM pp. 213-226.)

As petitioner has demonstrated in his merits brief, Slick made only one visit to the county jail while representing petitioner. At the reference hearing, Slick had no memory of what was said in that meeting and no notes of it. Slick's other contact with petitioner was limited to a few brief meetings at court appearances. Slick could produce no documentation of these contacts, either. (See PBM pp. 42-43, 93-94, 230-232.)

Moreover, Slick's recollection of these contacts was poor. For example, although Slick testified that he told petitioner he would lose early on, he could not recall when he so advised petitioner. (HT 765-766.)

Significantly, Slick could not remember whether petitioner's reaction to hearing he would lose demonstrated that petitioner disagreed with Slick's assessment of the case. (HT 767.) Although Slick claimed that he informed petitioner he would not present witnesses because presenting a defense might damage his (Slick's) credibility in the penalty phase, Slick admitted that he could not recall details of the discussion or when it occurred. Slick had no notes of this conversation and could not say what petitioner's reaction was when Slick told him that he would present no defense. (HT 763-764.)

Given these circumstances, there is no reason to believe that Slick would be able accurately to recall whether petitioner had requested a defense.

**iii. In General, Slick's Memory of What Occurred at Petitioner's Trial Was Extremely Poor, Often Impeached, and Rarely Refreshed.**

As petitioner has shown in his brief on the merits, Slick's memory of events prior to and during petitioner's trial in general was abysmal. (See, e.g., PBM pp. 59-60, 95-97, 220-221.) To demonstrate this point, petitioner sets forth below some examples of Slick's inability to remember significant facts or events relating to petitioner's case.

Slick did not recall whether he interviewed petitioner on the day of the preliminary hearing. (HT 512-515.) He did not recall whether he interviewed petitioner on the day of petitioner's arraignment. (HT 515-516.) Slick did not recall if petitioner expressed dissatisfaction with his representation during the first *Faretta* hearing. (HT 546.) Slick did not recall receiving exhibit 15, a letter from petitioner, which was in his file. (HT 560; see also, HT 934.) Slick did not know whether petitioner gave him or Kleinbauer the names of witnesses petitioner believed should be interviewed. (HT 714; see also, HT 716-717 [Slick did not know where he got the witness names from].) Slick did not recall whether he gave petitioner a copy of the police reports. (*Ibid*.) Slick did not remember in detail what petitioner told him about potential defense witnesses. (HT 721.) Slick could not recall whether petitioner had stopped talking to him. (HT 1105.)

Slick had no idea what he said to Kleinbauer about the case, including whether petitioner had denied to him involvement in the crimes. (HT 523; see also, HT 531.) Slick was unable to recall whether he had received Kleinbauer's report (exh. 1) before he met with petitioner at the jail on July 1, 1983. (HT 537.) Slick did not remember whether Kleinbauer had completed the tasks he assigned to her when he announced ready for trial. (HT 663.) Slick did not recall that Kleinbauer communicated to him

that petitioner said he was not at the scene of the crimes. (HT 722.) Slick did not recollect that Kleinbauer's account of what petitioner told her included a statement about his contact with the police. (HT 915.) Slick did not recall the details of what Kleinbauer told Slick she thought he should do at trial. (HT 1022.)

Although his bill reflected a conference with witnesses on August 8, 1983, Slick could not recall who those witnesses were. (HT 542.) He had no independent recollection of the content of an interview with petitioner's mother. (HT 528.) Slick did not remember whether he was aware before trial of any potential prosecution impeachment or rebuttal evidence relating to the witnesses petitioner had identified. (HT 736-737.) Although Slick found notes purporting to document the receipt of information about alibi witnesses Elizabeth Black and Ora Trimble from detective Collette, Slick did not recall having such a conversation with the officer. (HT 797-799; see also, HT 845.)

Slick did not recall that two photographs of petitioner were included in the lineup that was shown to K-Mart victims Searcy and Heimann. (HT 686.) Slick did not remember whether the other eyewitnesses were asked to make identifications prior to trial. (HT 690, 747-748.) Slick did not recall that eyewitness Michael Stewart had reported that one of the Cordova brothers identified someone other than petitioner as the shooter. (HT 701.)

Slick had no memory of talking to Stewart. (HT 780.) Slick did not recall whether Anwar Khwaja's trial testimony varied from the information he had previously given to police. (HT 787.) Although Slick had a note in his file which indicated that the prosecution had available two additional good eyewitnesses, Slick did not recall who the witnesses were. (HT 800.)

Slick did not recall that he told the trial judge during one of the *Faretta* hearings that he had completed an investigation of Otis Clements. (HT 666; see also, HT 930.) Slick did not remember whether he formed any opinions after listening to Clements' recorded confession. (HT 669.) Slick did not remember what Clements said on the tape. (HT 671.) Slick had no memory as to whether Clements' taped statement was consistent with reports of his two previous unrecorded statements to police. (HT 1079.) Slick did not recall why petitioner's trial was severed from that of Otis Clements. (HT 1069.)

Slick could not recall what Dr. Maloney told him. (HT 1018.) Slick did not recall the content of a conversation with Dr. Sharma. (HT 549-550.) Slick did not remember whether he thought the investigation of the physical evidence in the case was adequate. (HT 728.)

Slick had no memory of talking to attorney Jeffrey Brodey. (HT 821.) Slick did not know if he gave petitioner's trial file to post-conviction counsel Marshall Smith during their 1985 meeting. (HT 821; see also, HT

1084.) Slick had no idea where his original trial file was. (HT 994; see also, HT 1059.)

Significantly, Slick's memory was rarely refreshed by documents from petitioner's trial file or the trial record. (See PBM pp. 59-60, 96; see also, PBM pp. 146.) For example, Slick testified that the memorandum he wrote to investigator Kleinbauer did not refresh his recollection of what he directed her to do. (HT 521.) Slick claimed that Kleinbauer's report would not refresh his recollection as to whether she informed him that petitioner said he was not at the scene of the crimes. (HT 722.) Petitioner's letter would not refresh Slick's recollection as to whether petitioner communicated to him that he wanted Slick to defend on the ground of mistaken identification. (HT 724.) In fact, reading petitioner's letter did not refresh Slick's memory of even having received it. (HT 560.)

The booking photograph of Otis Clements did not refresh Slick's memory of what Clements looked like. (HT 784.) Looking at police reports would not help Slick recall how witnesses described the gun used in the K-Mart robbery. (HT 785.) Reading the preliminary hearing testimony of Zarina Khwaja did not refresh his recollection about whether she had seen the gunman's face. (HT 841-842.) A declaration signed by Dr. Maloney did not refresh Slick's recollection of what the doctor had told him in 1983. (HT 1018.) Reading the transcript of the August 11, 1983,

*Faretta* hearing did not refresh Slick's recollection of giving petitioner the police reports in the case. (HT 714-715.) Looking at the *Faretta* transcripts would not help Slick recall whether petitioner referred directly or indirectly to witnesses when he requested self-representation. During questioning on this point, Slick stated: "you keep asking me if it refreshes my memory, and it doesn't." (HT 726, see also, HT 777.)[20]

Slick's testimony often was based, or seemed to be based, on a recent review of documents rather than an actual recall of events, which further undermined the reliability of his testimony in general. For example, when asked whether he received information from Kleinbauer that petitioner questioned the eyewitness identifications made of him, Slick responded, "I believe there's a note to that effect." (HT 723.) Slick had a "vague" recollection of seeing the *Miranda* waiver signed by petitioner, adding "I've seen it recently." (HT 744.) Slick had recently read that one of the Cordova brothers had identified someone other than petitioner as the shooter. (HT 760.) A note in his file led Slick to believe that he had spoken with Michael Stewart prior to trial but he did not actually remember doing so. (HT 780.) Slick remembered reading recently that Detective Miller had testified at the preliminary hearing that Clements had confessed,

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[20] In fact, respondent acknowledged at the hearing that Slick's memory was "basically not subject to even being refreshed by looking at the record." (HT 919-920.)

but he did not have any memory of that occurring in 1983. (HT 930.) Slick had recently read that Kleinbauer reported that Stewart claimed to have been involved in a second showup. (HT 1006.) When asked whether he recalled that police reports indicated coin wrappers were found in a search of Elizabeth Black's home, Slick responded: "From my now memory, no. [¶] I mean, from trying to reconstruct what I was remembering back then, no. [¶] I read it recently, but I don't remember." (HT 1030.)

Moreover, Slick's responses were often based on his current assessment of petitioner's case, rather than on a recollection of his thinking at the time of trial. For example, Slick testified that he did not believe it was suggestible to have a lineup with two photographs of the same person in it, but he was not sure what he thought about the issue in 1983. (HT 687.) After looking at a note in his file purporting to document why he chose not to call certain witnesses, Slick said, "I can't put myself back there; so I'm giving you an analysis of now as opposed to an analysis I had 20 years ago 'cause I can't remember." (HT 800.) After testifying that he had reason to believe that Ora Trimble's testimony would be insufficiently credible or probative to justify presenting at the guilt phase, Slick indicated that this was based on his current review of the evidence, but that he could not recall his thinking in 1983. (HT 803.) The same was true as to his

testimony about the potential testimony of Denise Burton, Elizabeth Black, and Susana Camacho. (HT 816, 808.)

After testifying at length about the contents of petitioner's CYA records and how that information influenced his thinking at trial (HT 860-877), Slick admitted that he could not say he recalled the details in the file. He further admitted ". . . I'm not sure that . . . I'm remembering from now rather than then." (HT 904.) He explained:

> I just want to say I remember reading those files . . . from the California Youth Authority. . . . And my problem I'm having through these whole proceedings is trying to reconstruct my thinking at the time versus what I feel now, and it's not as easy as what anybody may think. It's a very difficult thing to do. [¶] And in reading the reports, I can't say that it's refreshing my memory or it's now justifying the decisions that I made looking at the perspective from now.

(HT 904.) Later he acknowledged, "I can't even remember what's in the [CYA] files." (HT 1121; see also, HT 924-925 [Referee sustained petitioner's motion to strike Slick's testimony concerning what he was probably thinking when he directed Kleinbauer to investigate Clements]; HT 937-943, 1005 [Slick acknowledged that he could not say whether he

thought in 1983 that Stewart might have been impeached because the police reports did not note his description of a gray beard].)

Later in Slick's testimony, when respondent suggested reasons why Slick might have concluded that Stewart's description of the perpetrator could be attacked as unreliable (HT 1003-1004), Slick stated: "you're asking me this analysis that I'm making at the time, and I don't remember those kind of things. I don't remember it to that detail. [¶] I remember it from reading it in the – in the reports recently or whenever I first read them." (HT 1004.)

The Referee recognized Slick's memory deficits, stating: "I continue to be concerned about the extent to which this Court is receiving the benefit of Slick's actual thinking and memory from 20 years ago. (HT 892; see also, HT 857-858.)[21] Although the Referee indicated that it was understandable that Slick could not recall specific events which had occurred 20 years earlier (HT 892), the fact remains Slick's memory was extremely poor during the evidentiary hearing.

Slick's testimony was also of limited credibility because he was impeached several times, in addition to the impeachment discussed in

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[21] See also, HT 943 [Referee says that Slick's testimony not entitled to "much weight" where Slick can give only a probability that he considered an analysis of Stewart's potential testimony suggested by respondent].)

subsection A.3.c.i., *post*. (See, e.g., PBM pp. 97-98.) For example, although Slick claimed that petitioner's statements during the four *Faretta* hearings did not indicate to him that petitioner was dissatisfied with Slick's representation (HT 790), Slick acknowledged that the transcripts showed otherwise (HT 564). Although Slick testified that he had concluded that co-defendant Otis Clements was a liar (HT 668), Slick admitted that he had previously stated that he found Clements' confession to be credible (HT 669). Slick had previously stated that petitioner never said he was being framed (HT 1081-1083), but Slick admitted at the hearing that petitioner told him he had been framed (HT 561, 666; see also, RT 9, 11). And, although Slick told the trial court that he had investigated petitioner's claim that Clements was framing him (RT 11), Slick admitted at the hearing that he had done no investigation of Clements (HT 667-669; see also, PBM p. 98).

In light of these facts, Slick's ability to truly recall whether petitioner requested a defense is highly doubtful and his testimony that petitioner did not must be viewed with extreme caution.

**iv. Slick's Testimony That Petitioner Did Not Request a Defense Was Illogical and Unconvincing.**

Respondent's attorney acknowledged the weaknesses in Slick's hearing testimony by asking Slick at the reference hearing: "And I suppose the question's got to be asked in this frame: [¶] How can you be so certain [that petitioner never asked for a defense] and say as you've said that your recollection of other things is basically not subject to even being refreshed by looking at the records?" (HT 919-920.) Slick responded, "It's a whole lot easier to remember specifically what didn't happen than what did, and it's just a human function, I think." (HT 920.)

After Slick claimed that petitioner did not tell him that he wanted the alibi witnesses interviewed by Kleinbauer called at trial, respondent asked, "And again, how can you be so specific in your recollection of that if you've had difficulty having other aspects of your memory even refreshed?" (*Ibid*.) Slick repeated, "Well, again, it's easier to remember something that didn't happen than something that did." (*Ibid*.)

Slick's reasoning is flawed: using this logic Slick would be unlikely to recall that petitioner *had* asked for a defense because it is more difficult to remember what has actually occurred. Using Slick's thinking, his failure to recall that petitioner requested a defense proves nothing.

Petitioner is aware of no legal or psychological support for the proposition that a person can generally recall what has *not* occurred better than what *has* occurred, and respondent has cited none. In any event,

Slick's assertion defies ordinary human experience. For these reasons, Slick's testimony is illogical and provides no basis whatsoever for ignoring the convincing evidence that petitioner made clear his desire to defend.

**v. Slick Was Biased Against Petitioner.**

Respondent also completely ignores – as did the Referee – abundant evidence that Slick was biased against petitioner. As petitioner has demonstrated in his brief on the merits, there was substantial evidence that Slick was not a neutral witness. (See, e.g., PBM pp. 57-58, 99-101, 137-130; see also, p. 93, citing *Bolius v. Wainwright* (5th Cir. 1979) 597 F.2d 986, 989 [testimony of trial counsel cannot be treated as coming from a totally disinterested witness].) This evidence shows that Slick repeatedly cooperated with respondent by providing the state with petitioner's complete and original trial file, by executing two declarations on respondent's behalf and by repeatedly consulting with respondent's attorneys over the years. In contrast, Slick refused to assist petitioner's initial post-conviction counsel in preparing a declaration, to provide them with a complete copy of the file, or even to meet with petitioner's current counsel prior to the reference hearing.

Slick's lack of neutrality was also demonstrated when he approached witness Michael Stewart in the restroom during a break in the reference proceedings, and suggested to Stewart that they had spoken previously,

although whether they had done so was an open question at the hearing. (HT 659-661; see also, PBM pp. 263-264, n. 196.)

Finally, Slick's bias was amply demonstrated during the hearing when he stated, with considerable emotion, that he viewed himself as the "defendant" in these proceedings. (HT 1152.)

**vi. There Is No Reason to Credit Slick's Testimony That Petitioner Never Requested a Defense.**

Given the myriad reasons to doubt the reliability of Slick's testimony that petitioner did not express a desire to defend and the convincing evidence that petitioner did in fact request a defense, it stands to reason that Slick's testimony on this point should not be credited unless there exists some highly compelling reason to believe that he was able to remember accurately this one particular fact among all others. However, respondent has not provided any basis, compelling or otherwise, for believing that Slick, whose memory was so lacking that it was rarely refreshed by trial transcripts or even documents he himself prepared, was accurately able to recall that petitioner did not request a defense.

Respondent fails to point to any corroboration of Slick's testimony on this point. There is none.

Although the Referee suggests in his Report that Slick's testimony is credible because Slick had no reason to ignore petitioner's request for a defense (Referee's Report at p. 18), petitioner has shown otherwise in his merits brief. Slick overrode his client's desire to present a defense because he believed that the defense would not succeed, and that it would damage his credibility with the jury in the penalty phase. Slick also appeared to believe that it was his decision whether to call witnesses, which is not surprising given that petitioner's trial occurred before this Court's opinion in *Frierson* was issued. (PBM pp. 144-145.) Although petitioner strongly disagrees with Slick's assessment of the case, it nonetheless explains why Slick would have disregarded his client's desire to present a defense.

Petitioner has also shown that Slick had a habit and custom of disregarding his clients' wishes in deciding whether to present a defense. (PBM pp. 222-226.)

In short, there is simply no reason to cast aside the voluminous evidence of petitioner's openly expressed desire to present a defense in favor of Slick's unsupported, illogical, impeached, and wholly unbelievable testimony that petitioner never asked for a defense.

**d. In Summary, the Evidence Overwhelmingly Shows that Petitioner Made Clear His Desire**

**to Present a Guilt Phase Defense Within the Meaning of *Frierson*.**

The record evidence convincingly demonstrates that petitioner's testimony that he wanted Slick to call witnesses and to present a defense at the guilt phase of his capital trial was far more credible than Slick's testimony to the contrary.

Petitioner's testimony was well-supported by a wealth of other evidence, including the testimony of Kristina Kleinbauer, Marshall Smith and Jeffrey Brodey. It was also corroborated by his undated letter to Slick, his contacts with Kleinbauer and his statements during the four *Faretta* hearings.

Slick's testimony, in contrast, was impeached, sparse in detail, uncorroborated and illogical. Moreover, Slick's memory of the events at issue was so poor that it was rarely refreshed, even by documents Slick himself had created. And, Slick's bias against petitioner was clear.

There was ample evidence that petitioner made clear his desire to defend even apart from his own testimony on this point. This evidence includes petitioner's letter, his contacts with Kleinbauer and his *Faretta* statements. Despite this evidence, Slick claimed at the reference hearing that petitioner *never* asked for a particular defense or witnesses. Slick's testimony is patently unbelievable.

Because respondent has offered no persuasive reason to reject the compelling body of evidence which demonstrates that petitioner clearly expressed his desire to present a defense, petitioner respectfully asks this Court to find that petitioner has met his burden of establishing the first prong of *Frierson*.

### B. There Was Credible Evidentiary Support For A Guilt Phase Defense Based On Alibi And/Or Mistaken Identification.

#### 1. Respondent Misconstrues *Frierson* By Demanding Too Much.

Respondent asserts that petitioner has failed to show that there was credible evidentiary support for a guilt phase defense based on either alibi or mistaken identification. (RBM p. 49.) However, respondent has misinterpreted *Frierson* in two critical respects. First, it is evident from respondent's brief on the merits that respondent expects a showing of evidentiary support much greater than that required by *Frierson*. Second, in assessing the value of the evidence supporting petitioner's defenses by weighing it against the prosecution's evidence, respondent has engaged in an analysis not conducted in or required by *Frierson*.

Although this Court in *Frierson* did not precisely define the quantum of evidence which must support a defendant's desired defense, it made clear

that the evidentiary showing required is a minimal one. For example, this Court framed the issue presented in *Frierson* by asking, inter alia, whether "some credible evidence" existed to support the desired defense. (39 Cal.3d at p. 812.) In granting defendant Frierson relief, the Court stated that "It is also clear that there was *at least some evidence* – of which counsel was aware – to support such a defense." (*Id*. at p. 811; italics added.) This Court differentiated this minimal quantum of evidence from that which no competent counsel would present (*id*. at p. 815, n. 3) and indicated that a defendant has a constitutional right to present such evidence, even where it may ultimately be harmful to his case (see *id.* at pp. 815-816). The facts of *Frierson* and this Court's treatment of them thus indicate that a defendant need only show that there existed some evidence to support the defense which was not so lacking in value that no reasonable lawyer would present it, and no reasonable juror would consider it.

Respondent appears to believe that petitioner must show that the evidence he could have presented would have convinced the jury not to convict him. In its brief, respondent offers various reasons why petitioner's jury might have rejected the evidence Slick could have presented in support of his client's innocence. (See, generally, RBM pp. 50-59.) For example, respondent asserts that the jurors would have rejected the testimony of Elizabeth Black and the other potential alibi witnesses because, according

to respondent, they were biased in petitioner's favor. (RBM p. 50.) Respondent avers that eyewitness Michael Stewart's testimony would not have convinced the jurors that petitioner was not the man Stewart saw fleeing after the East Pleasant Street shooting. (RBM pp. 56-59.)

Although petitioner will show below that these assertions are not well-supported by the record evidence, at this point petitioner emphasizes that respondent's arguments about whether the evidence would have persuaded the jury are misplaced. *Frierson* makes clear that petitioner need not prove that the jurors likely would have been convinced of his innocence but only that there was some credible evidence to support a defense. In *Frierson* the evidence of diminished capacity defense counsel chose not to present at the guilt phase failed to convince even one juror to spare the defendant therein of a death sentence. (39 Cal.3d at pp. 808, 809, 811-812.) Thus, it is highly unlikely that the same evidence would have persuaded Frierson's jury to find the special circumstance not true had it been presented in the first phase of trial. In the instant case, setting aside the question of whether Slick was professionally competent in choosing not to the present the alibi and misidentification witnesses (an issue not presented by the reference questions), the hearing record demonstrates that the evidence supporting either an alibi defense, a misidentification defense, or

both, was credible enough that Slick would have been acting within the range of competent conduct by presenting it.

Respondent further misapplies *Frierson* by considering the evidence the prosecution did present and, respondent claims, could have presented at trial in assessing the evidentiary value of the testimony Slick could have presented on petitioner's behalf. (See e.g., RBM p.49-50.) This Court did not engage in such an exercise in *Frierson*. Therein the Court simply stated that there was "at least some evidence" that could have been presented in support of a diminished capacity defense at the guilt/special circumstance phase of trial. (39 Cal.3d at p. 811.) Although the Court went on to discuss the lay and expert witnesses who might have testified in the earlier phase (and who did testify at the penalty phase), it did not analyze this evidence in light of the prosecution's guilt phase case. (*Id*. at pp. 811-812.) There was no suggestion in *Frierson* that relief was granted because the diminished capacity evidence was stronger than the state's evidence tending to show that Frierson had premeditated and deliberated the charged killing as then required by the special circumstance alleged (see *ibid*).

In sum, respondent has fundamentally misapplied the requirements of *Frierson*. As petitioner now demonstrates, the evidence which could have been adduced in his favor met the minimal standard set therein.

### 2. Mistaken Identification Evidence.

As petitioner has shown in his brief on the merits, the testimony homicide eyewitness Michael Stewart could have given at petitioner's trial constituted some credible evidence to support petitioner's claim that he was mistakenly identified as the perpetrator of the Khwaja crimes. (See PBM pp. 102-104, 255-265.) Testimony from Susana Camacho could have added some support to the defense, as well. (See PBM pp. 104, 267-268.)

Respondent offers a variety of reasons why the jury might have chosen not to believe the testimony of these witnesses. (RBM pp. 55-59.) As petitioner will show, respondent's contentions are not well-supported by the hearing record. Moreover, none of the weaknesses respondent claims to be present in the potential testimony of Stewart and Camacho make it so lacking in evidentiary value that Slick would have been incompetent had he decided to call the witnesses to the stand on petitioner's behalf. Reasonable jurors could have accepted this testimony, and reasonable capital trial counsel could have presented it.

As petitioner has previously demonstrated, Michael Stewart had an excellent opportunity to observe the man who shot Anwar Khwaja and his mother. Stewart saw the man exit the red truck before the shootings, return to it after the shootings, and flee in the truck from the scene. Stewart's description of the gunman strongly tended to exculpate petitioner. Stewart

told investigator Kleinbauer that the man he saw was in his late thirties, with a beard that had gray in it. Stewart was definite about the beard with gray. Petitioner was 19 years old in February 1983, and had no beard and no gray hair. Stewart also described to police someone who was taller and much heavier than petitioner, with a short afro hairstyle. Petitioner had a Jheri Curl hairstyle, not an afro, on the day of the offenses. (See PBM pp. 103, 255-257.)

Stewart, who had been a law enforcement officer, was a credible witness with no reason to aid petitioner in his defense. Stewart's ability to accurately recall what he saw was demonstrated by the fact that he provided police with the first three numbers of the red truck's licence plate. His account of the events which occurred on February 25, 1983, has remained materially consistent over 20 years. (See PBM pp. 103-104, 255-259.)

Despite these facts, respondent avers that Stewart would not have provided credible support to petitioner's defense because, inter alia, he told Kleinbauer in August 1983, that he saw the gunman only briefly and did not think he could identify him. (RBM p. 56.) Respondent states, "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." (RBM p. 57.)

This contention is without merit. As petitioner has demonstrated, Stewart's opportunity to see the gunman was far better than any other known witness. As set forth above, Stewart observed the gunman before the shooting, after the shooting, and while the man was fleeing the scene. The man passed right by Stewart, within a foot or two. (Exh. 1; exh. K. pp. 1-2, 22-23; HT 590-591.) Stewart estimated that he saw the gunman's face for a total of about 30-60 seconds. (HT 632.) Stewart believed he had seen the man sufficiently well to accurately describe him. (HT 618; see also, PBM p. 257.) In contrast, Robert Cordova saw the gunman's full face for just a second, from a distance of at least 60 feet. (See PBM pp. 257-258.) Anwar Khwaja saw the gunman for perhaps a second or two before the man shot at and severely wounded him. (See PBM p. 258.) Although both Cordova and Khwaja saw the perpetrator while under stress, a circumstance the courts have recognized tends to diminish the reliability of an identification, Stewart saw the man before any crime had occurred. (See PBM pp. 257-259.)

Moreover, although Stewart did tell Kleinbauer that he saw the gunman briefly, he also stated that he was "definite about the fact that the man must have been older because of the gray in his beard." (Exh. 1.) His

certainty that the man was older and had a beard with gray was strong evidence that petitioner was not the person he saw. And, although Stewart described the length of his observation of the man as brief, as petitioner has explained above it was much longer than that of the other witnesses. Regardless of how Stewart himself characterized his opportunity to see the gunman, the facts make clear that he was in a position to exclude petitioner.

Respondent's reliance on Stewart's statement to Kleinbauer six months after Mrs. Khwaja's death that he did not think he could identify the gunman (RBM p. 56) is also misplaced. At the evidentiary hearing Stewart put this statement into context when he explained that he could have made a positive identification of the shooter if the police had shown him the correct person immediately after the shootings. (HT 632-633.)[22] It is understandable that Stewart did not feel he could correctly identify someone he had seen for a minute or less after six months had passed. However, Stewart's reference hearing testimony that petitioner did not look like the man he saw (see PBM p. 261) leaves no doubt that the witness would have testified at trial that petitioner was *not* the man he had seen running down East Pleasant Street on February 25, 1983. As petitioner set forth in his earlier briefing, this Court has recognized that a witness, although unable to

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[22] Of course, the police chose not to show petitioner to Stewart either in a live lineup or a photographic one, although petitioner was in police custody less than 24 hours after the crimes.

affirmatively identify a suspect, may provide powerful, probative defense evidence by excluding the defendant as the perpetrator. (See PBM p. 260, citing *People v. McDonald* (1984) 37 Cal.3d 351, 358-360, 375-376.) Thus, any inability by Stewart to positively identify the shooter by the time of trial would not have diminished the value of his testimony.

Respondent also claims that the probative value of Stewart's testimony "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." (RBM p. 57, footnote and citations omitted.) This claim is simply not true.

While it is correct that the police reports did not include Stewart's description of the perpetrator as having a beard with gray in it (see exh. K), respondent is incorrect in characterizing as uncontradicted the evidence pertaining to whether Stewart gave the police this description. Stewart has consistently stated that he told police the gunman was older, with gray in his beard. (See PBM p. 262.) Kleinbauer's 1983 report states: "[Stewart] told the police that the man he saw running past him looked older than the driver, in his late thirties, because he had gray in his beard." (Exh. 1.) In a 1990 declaration, Stewart stated: "I told the police at that time [of the second showup] that the second black male looked older than the driver because he had gray in his beard." (Exh. 11 p. 6.) In his hearing testimony,

Stewart said that he told the police on February 25, 1983, that the man he saw had a beard with gray in it. (HT 646.) Thus, respondent's assertion that the evidence on this point was "uncontradicted" is inaccurate.

Moreover, the absence in police reports of Stewart's account of a beard with gray would not have fatally undercut his testimony. There is ample to reason to believe that the omission was due to the inability of Long Beach police to accurately report the information they received rather than to Stewart's failure to offer the information. As shown below, Stewart was repeatedly interviewed and not all of what he said was written down. Given the extremely poor quality of the police reporting in this case, it is reasonable to conclude that Stewart did tell one or more of the officers that the man he saw had a beard with gray but that the officer(s) neglected to report that fact.

Stewart testified at the reference hearing that he spoke to a number of officers on the day of the crimes. He described what he saw four to six times to different investigators. (HT 594-595; see also, exh. 1 [same].) Stewart further testified that the police did not write down everything he said and did not ask him to review a report of what he told them. (HT 612, 647.)

Stewart's testimony about his contacts with Long Beach police is supported by other evidence in the hearing record. Police reports and

testimony by detective William Collette confirm that several officers spoke to Stewart on the day of the crimes, including but not limited to Valles, Miller, Collette and possibly Workman.[23] Stewart's testimony that the officers did not write down everything he told them was corroborated by testimony from Collette, who testified, "I did not have a detailed interview where I took notes." (HT 2091; see also, HT 2093 [Collette could not recall whether he took notes].) Collette also confirmed that the Long Beach Police Department did not have a practice in 1983 of having witnesses review reports of their statements for accuracy. (HT 2116; see also, HT 2114.) Stewart's ability to accurately remember that he was repeatedly interviewed but that not all of what he said was written down increases the likelihood that he was correct when he said that he told police about the beard with gray.

Moreover, the haphazard manner in which police reports were prepared in this case provides further reason to believe that Long Beach police failed to accurately record the description of a beard with gray

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[23] Officer Valles interviewed Stewart at the scene and also escorted him to the showup of Otis Clements. (Exh. K. pp. 22-25; HT 2089.) Detective Miller interviewed Stewart as well. (*Id*. at pp. 47, 67; HT 2043.) Detective Collette testified that he spoke to Stewart at the scene. (HT 2043, 2089.) It is also possible that officer Workman either interviewed Stewart directly or was present when Stewart was interviewed by Valles, as he [Workman] reported a substantial amount of information purportedly provided by Stewart, including information which conflicted with or differed from that Valles reported. (See exh. K. pp. 11-12.)

provided by Stewart. At the reference hearing, Collette stated that the "formal" interview of Stewart was done by patrol officer Valles, who prepared a report. (HT 2089.) This report contained a physical description of the suspect provided by Stewart, but did not include the beard with gray. (Exh. K p. 22.)

At the hearing, Collette testified that it was not department policy to duplicate reports. (HT 2101.) He explained that if a witness spoke to more than one officer, department practice would not require each officer to prepare a report of what the witness said. (HT 2114.) Despite this policy, officer Workman also prepared a report of an interview with Stewart. Workman's reporting was so confused, however, it is unclear whether the information he memorialized came second-hand from Valles or directly from Stewart. In any event, either Valles or Workman made a grave error, as their reports conflicted as to whether Clements had been identified by the eyewitnesses.[24] Moreover, Workman's report did not include a physical description of the man Stewart saw, other than to note that he was a black male. (Exh. K pp. 11-12.)

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[24] As fully set forth in petitioner's earlier briefing, Valles, who transported Stewart and the Cordova brothers to look at Clements, reported that the witnesses were *unable* to identify him. In contrast, Workman reported that Clements was positively identified, but he neglected to state by whom. (See PBM pp. 159-160.)

Although Detective Miller did not prepare an interview report after speaking to Stewart, he did prepare search and arrest warrant affidavits which included information he received from the witness. Neither affidavit included a physical description of the gunman beyond the fact that he was a male Negro, however – a description notably lacking in any personally identifying characteristics beyond gender and race. (Exh. K. pp. 47, 68.) Finally, Collette testified that he did not prepare a report of his talk with Stewart. (HT 2092.)

These facts demonstrate that not all of the Long Beach police officers who spoke to Stewart on February 25, 1983, documented what the witness told them. Those who did prepared documents which were incomplete and contradictory.[25] Given this state of affairs, it is reasonable to conclude that Stewart did tell one or more of the officers that the man he saw had a beard with gray but that the officer or officers neglected to memorialize this part of his description.

Ignoring these fact, respondent relies on Collette's testimony that Stewart did not tell him that the gunman had a beard with gray in it. (RBM

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[25] As petitioner has explained in great detail, the quality of the investigation and the police reports in this case overall was extremely poor. (See PBM pp. 159-165; see also, PBM pp. 165-180.) In fact, during the hearing the Referee recognized that the reports were "sparse" and "pretty pathetic." (HT 1436.) Respondent fails to explain why a jury would choose to credit the police reports over Stewart, given these facts.

p. 57, n. 17.) Collette's testimony on this point was patently unbelievable, however. Collette claimed that his testimony that Stewart did not report a beard with gray was based solely on his memory of events occurring 20 years earlier; he had no notes or report to refresh his recollection of what Stewart had told him. (HT 2100-2102.) The idea that Collette, who had likely conducted thousands of witness interviews over his long career,[26] could recall such a detail without the aid of notes or a report strains credulity. In fact, Collette's inability to recall whether Stewart had described to him what the shooter was wearing (HT 2106-2107) suggests that his memory for 20-year-old events was not as keen as he believed it to be. Moreover, Collette indicated in his testimony that he did not have a full report from Valles when he spoke with Stewart at the crime scene and that he would not have realized it if Stewart had told him something different from what he had told Valles. (HT 2107.) Thus, Collette had no particular reason to take note of a beard with gray, since the detective would not have known then that it was a fact not documented in Valles' report. Finally, even if this Court accepts Collette's testimony that Stewart did not mention a beard with gray, that does not preclude the possibility that Stewart gave this description to one of the other officers who spoke to him.

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[26] Collette had been a police officer since 1968. He had been a homicide detective since 1976. (HT 1709.)

Respondent also claims that Stewart inconsistently described the gunman's age. (RBM pp. 57-58.) Again, in asserting that there is an inconsistency, respondent is relying on the police reports. As petitioner has shown, these reports contained many errors and omissions and hardly demonstrate that Stewart's testimony had no value. Moreover, respondent fails to acknowledge that the prosecution's eyewitnesses were also subject to impeachment by these reports. As petitioner has explained, Robert Cordova could have been impeached at trial because he told police that the shooter weighed 200-220 pounds, was in his thirties and had pock marks or scars on his face. Petitioner weighed 160, was 19, and had a clear face. (See PBM p. 281.) Anwar Khwaja could have been impeached at trial with reports that he told police that he was on his way to the bank and was robbed of cash receipts from his store. (See PBM pp. 295-286.) Respondent does not suggest that Cordova and Khwaja had no value as witnesses for the prosecution because they could have been impeached with the police reports. Accordingly, respondent's claim that Stewart's testimony was without value falls flat.

In a similar vein, respondent claims that Stewart's testimony would have been of minimal value because he told Kleinbauer in August 1983, of a second showup, although only one showup was documented in the police reports provided to the defense. Respondent asserts that "the reference

hearing evidence . . . demonstrates that no such second showup ever occurred." (RBM p. 58.) Thus, Stewart's belief that this undocumented showup had occurred, respondent claims, proves that the accuracy of Stewart's recall of events was seriously diminished by the time he was interviewed by Slick's investigator. (See RBM pp. 58-59.)

Petitioner wholeheartedly disagrees that the hearing evidence shows that no second showup occurred. While it is true that the police reports given to petitioner in this case do not document a second showup, this fact hardly demonstrates that Stewart was mistaken in his belief that it had occurred. As petitioner has shown, the police reports in this case were conflicting, misleading and incomplete in many respects. (See PBM pp. 159-168.)[27] In addition, these evidentiary proceedings have established that the homicide book prepared by the Long Beach Police Department did not include other favorable and potentially exculpatory evidence.[28] Thus, it would not be a stretch to conclude that a report documenting an eyewitness

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[27] As petitioner has indicated, these reports were of such poor quality that they conflicted as to whether Clements was positively identified by witnesses during the first showup. (See PBM pp. 159-160.) If the police were not competent enough to accurately record the results of the first showup, it is not hard to believe they might have neglected to record the occurrence of the second showup.

[28] The homicide book does not include a report which indicated that none of the latent fingerprints lifted from the crime scenes were petitioner's. This report was not turned over to petitioner until after the order to show cause issued in this case. (See PBM pp. 171-172.)

identification of someone *other* than petitioner as the gunman was also withheld.

In support of its claim that no second showup occurred, respondent relies on testimony by detective Collette that as one of the lead investigators, he would have expected to have been notified if a witness had identified a suspect at a showup. (RBM pp. 58-59.) Collette's expectations, however, do not prove that the second showup did not occur. Moreover, petitioner has shown that Collette's credibility in general is questionable. As petitioner has explained, the investigation conducted by him and his partner John Miller was so incomplete and unobjective that it tended to diminish their credibility. (See PBM pp. 158-177.) Collette's credibility was further tarnished by evidence that he lied to and threatened witnesses who might have been called on petitioner's behalf. (See PBM pp. 177-178.) Indeed, this Court is already familiar with Collette's questionable integrity from his conduct in *People v. Morris* (1988) 46 Cal.3d 1. Therein this Court found that Collette's testimony in Morris' trial was "clearly misleading" and possibly false. (46 Cal.3d at p. 33; see also, PBM pp. 178-180.) Finally, a recent spate of cases involving misconduct by Long Beach police, including Collette, suggests that reliance on the

detective's testimony to conclude that there was no second showup would be unwarranted. (See PBM pp. 196-199.)[29]

In contrast to the unreliable evidence respondent relies upon, Stewart's testimony that there was a second showup was consistent and credible. Respondent suggests that Stewart inaccurately remembered the second showup because his memory had dimmed after six months. This is unlikely, given his consistent recall of the showup over 20 years. (See PBM p. 262.) Moreover, Stewart provided the kind of detail that one would not expect from a witness who is describing an event that did not actually occur. He told Kleinbauer that the second showup took place 30-45

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[29] The Ninth Circuit yet again has recognized that the Long Beach Police Department may have committed egregious misconduct. In *McSherry v. City of Long Beach* (9th Cir. 2005) __ F.3d __, 2005 U.S.App. LEXIS 19367, the appellate court reversed the trial court's determination that qualified immunity applied and remanded for a trial to determine whether officers deliberately fabricated evidence in the case. Fourteen years after McSherry's conviction for a child molest, DNA evidence proved he had not committed the crime. The true perpetrator, as identified by the DNA evidence, then confessed and McSherry was released from prison. In McSherry's civil rights case against the City of Long Beach and two police officers, he sought to show that investigating officer Turley had create false evidence to inculpate him. Turley had testified at trial that the young victim gave him a detailed and accurate description of the home of McSherry's grandparents, where the prosecution alleged the molest took place. Because subsequent events proved that the crime had occurred elsewhere, McSherry alleged that Turley lied on the stand. The circuit court concluded that the facts alleged by McSherry supported a claim of deliberate fabrication. Although the court did not pass on the validity of the allegations, the fact that McSherry has already been exonerated strongly suggests that the evidence was indeed fabricated.

minutes after the first one. Stewart remembered that it was held at the same location as the first, and that he was transported with "the same three young Mexicans" [the Cordovas]. (Exh. 1.) Stewart recalled that police told them that the second suspect was the first suspect's brother. Stewart also told Kleinbauer that one of the Cordovas "thought it was him because he said the suspect looked at him like he thought the shooter had looked at him as he ran past." (*Ibid*.) This detail provided Stewart's account with an indicia of reliability.[30]

In sum, the evidentiary hearing evidence shows that there is conflicting evidence concerning a second showup, with the most direct evidence coming from witness Stewart, who recalls attending the showup. At most, the lack of a police report documenting the second showup created a disputed issue of fact for the jury to resolve. It did not, however, so diminish the value of Stewart's testimony that no competent attorney would have presented it.

Finally as regards Michael Stewart, respondent claims that the prosecutor would have elicited from Stewart testimony that he had identified Otis Clements as the driver, which would have, according to

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[30] Although respondent *now* claims that Stewart is an unreliable witness, Miller apparently believed otherwise immediately after the offense, because he relied heavily on Stewart's account in order to obtain search and arrest warrants. (See exh. K. pp. 47-48, 68-69.)

respondent, "only added further credibility to petitioner's confession . . . ." (RBM p. 59.) Respondent also states that such evidence would "necessarily undercut a fundamental underlying premise of petitioner's proposed defense, i.e., that Clements was the actual shooter." (RBM p. 59, footnote omitted.) Respondent profoundly misunderstands petitioner's position. Petitioner's defense was that he was not at the crime scenes, was misidentified, did not confess and was not involved. Whether Clements was the driver or the shooter was irrelevant to petitioner's claim that he was not present on East Pleasant Street when the Khwajas were shot.[31] Moreover, evidence that Clements was the driver would not have strengthened the credibility of Collette's testimony that petitioner had confessed. As petitioner has demonstrated in his brief on the merits, the police had Clements in custody before the report of petitioner's purported confession was prepared. Clements had already confessed. (See PBM pp. 295-296.) It is not surprising then that the fabricated statement attributed to

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[31] As respondent notes, there is some evidence which suggests Clements was the shooter rather than the driver. (See RBM p. 59, n. 19.) Such evidence, had it been adduced by Slick at trial, would have given the jury pause in determining whether the prosecutor, who asserted that Clements was the driver, had proven his case. Petitioner's claim that he was innocent was not dependent upon a finding that Clements was the shooter, however. It was the prosecutor's responsibility to prove who shot the Khwajas, not petitioner's.

petitioner would have largely mirrored what Clements had already told the police.

Petitioner also notes that it is unlikely that the prosecutor would have elicited testimony from Stewart that he had identified Clements, since such testimony would have given the defense an excellent opportunity to show the jury how unreliable the police reports were. And, although respondent claims that such testimony would have bolstered the credibility of possible rebuttal testimony from Rev. Handy Vining (RBM p. 59), as petitioner demonstrates later in this brief, the hearing evidence does not tell us what Vining would have said had he been called as a witness (see subsection B.4., *post*).

Respondent also claims that Susana Camacho "would not have provided any credible evidence to support a mistaken identification defense." (RBM p. 55.) Respondent avers that because Camacho told Kleinbauer she did not get a good look at the man she saw running, her testimony was "on its face, lacking in credible and persuasive evidentiary value." (*Ibid*.) Respondent seems to forget, however, that the prosecution witnesses also had very limited opportunities to view the suspect. Respondent emphasizes that in 2003 Camacho estimated the man was 80 feet away from her. (RBM p. 56.) As petitioner has shown, Robert Cordova was at least 60 feet, and possibly 75 feet, away from the gunman

when he made his very brief observation. (See PBM p. 257-258 and n. 188.) Simply because Cordova claimed at trial that he could identify the man he saw did not make his observation any more valuable than Camacho's.[32] The fact remains that prior to trial Camacho described the man as white. (See PBM p. 268.) This description tended to exclude petitioner because his skin is so dark he could not possibly be mistaken for a white person. (See exh. 63.)[33]

Respondent complains that Camacho's description of a white man would have conflicted with other witness descriptions of a black man. (RBM p. 56.) However, a reasonable juror could have determined, had she heard from Camacho as well as the other witnesses, that the perpetrator was likely a light skinned African-American, someone who could be mistaken for white based on only a brief observation. Because petitioner was not such a person, Camacho's testimony could have helped to convince that juror that the prosecutor had not proven his case beyond a reasonable doubt.

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[32] Petitioner made an offer of proof that Robert Cordova would have testified at the hearing that he may have misidentified petitioner since he saw the gunman for only a second, from a "far-away" distance. (Exh. 47 [marked for identification only].) The Referee declined to hear from Cordova. (HT 1623-1624.)

[33] Respondent also claims, in a footnote, that Camacho would have been impeached by a police report stating that she had described the man as black. (RBM p. 55, n. 14.) Petitioner has already shown that the reports were of such poor quality they possessed limited impeachment value.

In sum, although the value of Camacho's testimony was obviously not as great as Stewart's, a competent attorney reasonably could have presented it in support of a misidentification defense that included Michael Stewart. (See PBM pp. 267-268.)

Finally as to the eyewitnesses, respondent asserts that Zarina Khwaja (Asrani) "would not have provided any credible evidence to support a mistaken identification defense." (RBM p. 55.) Although Ms. Khwaja testified at the preliminary hearing that she did not see the gunman's face, she also stated that she had not seen petitioner before. (CT 22.) While this testimony is of limited value, it at least makes clear that the prosecution could not have used Ms. Khwaja as an additional identification witness.

**3. Alibi Witnesses.**

Respondent also claims that the witnesses Slick could have called to testify that they had seen petitioner on February 25, 1983, would not have provided credible evidentiary support for an alibi defense. (RBM pp. 50-54.) Respondent's claims are not supported by the record evidence, however.

As petitioner has shown in his brief on the merits, at least five witnesses could have provided mutually corroborating testimony at trial that would have been highly probative and credible. Testimony from Ora Trimble, Elizabeth Black, Gloria Burton, Denise Burton and Hope Black

would have strongly tended to establish that petitioner was at 1991 Myrtle Street at the time of the Khwaja offense and that he was not at the scene of the K-Mart robbery fifty-five minutes before that. (See PBM pp. 109-111; see also, PBM pp. 246-251; 206-212.)

Respondent claims that all of these potential witnesses were inherently biased, as family and friends of petitioner. Respondent concludes, in light of this alleged bias, that "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." (RBM p. 50.) Respondent's analysis is flawed, for the reasons which follow.

First, as petitioner has made clear, the determination of whether some credible evidence exists to support a defendant's desired defense for purposes of *Frierson* is not dependent upon the strength of the prosecution's evidence. (See, e.g., PBM pp. 276-277, 355-356.) And in any event, as petitioner has repeatedly demonstrated, the prosecution's evidence in this case was not at all compelling but rather weak and vulnerable to a defense challenge. (See PBM pp. 278-299; see also, subsection B.4., *post*.)

Next, as petitioner has already demonstrated, the testimony of the alibi witnesses may not be categorically stamped as incredible simply

because the witnesses were related to petitioner or his then-girlfriend. (See PBM pp. 202-203, discussing *Luna v. Cambra* (2002) 306 F.3d 954, 957-958, as amended by 311 F.3d 928.) Even though petitioner's jury would have been free to conclude that the witnesses were not telling the truth because of their connection to petitioner, these connections did not render their testimony so devoid of value that Slick would have been acting incompetently had he presented it.[34]

In addition to arguing that all of the alibi witnesses were biased toward petitioner, respondent attempts to demonstrate that the testimony of each would not have been sufficiently probative. (RBM pp. 51-54.) Respondent's claims are not supported by the record evidence.

Respondent's effort to minimize the value of Ora Trimble's testimony is unpersuasive. Respondent complains that Trimble "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 crimes." (RBM p. 51.) That is not correct. As petitioner has shown in his earlier briefing, Trimble's account tended to prove that petitioner could not have committed the Khwaja offense. (See PBM pp.

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[34] As petitioner has noted in his merits briefing, respondent conceded in post-hearing briefing that Ora Trimble's connection to petitioner was not of the kind that would make her testimony suspect. (See PBM p. 202.) The same is true for her daughter, Hope Black.

249-251.) Trimble told investigator Kleinbauer prior to trial that petitioner returned to her home at 1991 Myrtle Street at about 2:00 p.m. (Exh. 1.)[35] There was testimony at the reference hearing suggesting that petitioner could not have committed the Khwaja shooting at 1:55 p.m. and returned to Myrtle Street before 2:05 p.m. (See PMB pp. 250-251.)

Moreover, Trimble's account was generally consistent with, and part of, a broader picture of events that strongly suggested petitioner had returned to Myrtle Street closer to 1:30 than 2:00 p.m., which definitely ruled him out as the man who shot the Khwajas. (See, e.g., PBM pp. 201, 207, 249-250.) Although respondent prefers to consider each alibi witness in isolation, it cannot be ignored that together they accounted for petitioner's whereabouts in a manner that was completely inconsistent with the prosecutor's theory that he and Clements had spent the day together looking for victims and committing crimes.

Respondent also claims that Elizabeth Black would not have been a credible witness in support of petitioner's alibi defense. (RBM pp. 51-52.)

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[35] Respondent relies on Trimble's hearing recollection that petitioner returned to her home at 2:00 *or* 2:30 p.m. (RBM p. 51.) Although once during her testimony, Trimble indicated that petitioner returned around 2:30 p.m. (HT 1293), she made it clear that Kleinbauer's report helped her remember that petitioner arrived around 2:00 p.m. (HT 1256, 1298.) In August 1983, Trimble told Kleinbauer that petitioner came back at about 2:00 p.m. (Exh. 1.) Trimble testified at the reference hearing that her recollection of events was fresher at the time Kleinbauer interviewed her. (HT 1262; see also, HT 1263-1268.)

First, respondent refers to Slick's belief that Elizabeth would have been willing to lie on the witness stand for petitioner's benefit. However, as petitioner has emphasized, Slick readily acknowledged he had no "hard evidence" that any of the alibi witnesses would lie and did not feel ethically constrained from calling them. Slick's subjective, personal feeling as to whether any witness was telling the truth is not germane to whether petitioner was entitled to present these witnesses, since a reasonable juror might not have shared Slick's view. (See PBM pp. 299-301.)

Respondent also points to alleged inconsistencies, etc., in Elizabeth's reference hearing testimony. (RBM pp. 51-52.) Respondent claims that Elizabeth was still in love with petitioner at the hearing, and therefore biased in his favor. (*Ibid*.) However, as petitioner explained in his briefing, respondent makes too much of an awkward response to an awkward question. (See PBM p. 210-211.) The fact that Black had had minimal contact with petitioner over the last 20 years (see PBM p. 211), tended to show that she had no reason to lie on petitioner's behalf in 2003. Respondent also emphasizes two inconsistencies between information provided by Black over the years and her hearing testimony in 2003. (RBM p. 52.) These inconsistencies are not surprising given the passage of so much time, however. More importantly, because the statements respondent

finds so revealing did not occur until 1990 and 1998, they could not have been used at petitioner's trial to impeach Black had she taken the stand.

Finally as regards Elizabeth Black, respondent claims that her testimony would not have been probative because her belief that petitioner returned 15 minutes after she did, at 1:15 p.m., conflicts with her mother's estimate that petitioner returned home at 2:00 p.m. (RBM p. 52.) However, as petitioner has previously explained, it is not surprising that several witnesses to an event such as petitioner's arrival might recall it occurring at slightly different times. Such variation in recollection is normal and to be expected. (See PBM p. 201, and n. 140.) Moreover, courts have recognized that alibi testimony may be probative even if it is less than precise. (See PBM p. 249, n. 249, citing *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154, 1157-1158.) In the instant case, the variation in recollection among the alibi witnesses was not great.[36] While the jury was free to reject the alibi testimony, the evidence was not so devoid of probative value that no competent attorney would have presented it.

Respondent further asserts that Denise Burton "would not have provided credible evidentiary support for an alibi defense." (RBM p. 52.) Although respondent again relies on familial bias, the fact that Denise

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[36] The estimates were: 1:15 pm. (Elizabeth Black); 1:20 p.m. (petitioner); 1:30 p.m. (Gloria Burton); 1:30-2:00 p.m. (Hope Black); and 2:00 p.m. (Ora Trimble). (Exh. 1; HT 1567.)

Burton had not spoken to her brother in the 20 years since his arrest (see PBM p. 211) dispels any suggestion that her relationship with petitioner was of the kind which would compel her to lie on his behalf. Moreover, Denise's demeanor at the hearing, which respondent characterizes as "hostile" and indicative of bias (RBM p. 52), was an appropriate response to the very aggressive cross-examination she faced at the hearing from respondent. Respondent's claim that Denise's memory has varied a bit over the years (RBM pp. 52-53) is also insignificant. As petitioner has shown, Denise told Kleinbauer prior to trial that she saw petitioner at her school with Elizabeth Black at 12:30 p.m. (See PBM pp. 66-67, 109, 247.) Any inability by Denise to recall details of what occurred over the years could not have been used at trial to impeach her.

Finally, respondent claims that the testimony Denise could have provided at trial is not probative. (RBM p. 53.) In fact, Denise's account directly contradicts key portions of petitioner's disputed confession. Collette reported that petitioner told him that he left Elizabeth Black's home in the morning and rode his bike to Otis Clements' house. He and Clements then allegedly went to petitioner's mother's house. They checked out some banks and ultimately drove to the K-Mart store at Cherry and Market where they robbed two women. (Exh. K p. 56.) The K-Mart robbery occurred at 1:00 p.m. (*Id*. at p. 74.) Afterward, they went to other banks looking for a

victim, and ended up following Anwar Khwaja to East Pleasant Street. (*Id*. at p. 57.) The Khwaja shooting took place at 1:55 p.m. (*Id*. at p. 1.)

Petitioner's arrival at Trade Tech at 12:30 p.m. – with his bike but without Clements – is completely inconsistent with the events Collette claimed petitioner described, which put petitioner and Clements together continuously from the morning until shortly before 2:15, when Clements was arrested.[37] Moreover, Denise's testimony provides critical corroboration of Elizabeth Black's version of events, including that petitioner met Black at Trade Tech at 12:30 p.m. to walk her home. Thus,

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[37] The chronology of events described by Otis Clements makes it even clearer that if petitioner was at Trade Tech at 12:30 p.m. with his bike, the confessions of both Clements and petitioner were false. Clements claimed that petitioner came to the motel where he was living on his bike. Clements followed petitioner in his car to petitioner's mother's home, where petitioner put the bike away. In Clements' car, the two went to Rev. Handy Vining's home, but no one was home. They went to Gold Coast Mufflers where they spoke to Vining. They then drove back to Vining's home. There they waited for Vining's daughter to come home. Clements ate a sandwich and got the keys to the red truck from Vining's daughter. In Vining's truck, petitioner and Clements returned to Clements' motel and spoke to Clements' sister. They went to Elizabeth Black's Myrtle Street apartment, where petitioner picked up a gun. They then drove around for some time looking for a junkyard, driving all the way to Downey. On their way back to Long Beach, they stopped at a K-Mart, where the first two victims were robbed. (Exh. K pp. 34-35, 39.) It is obvious that all of the events related by Clements could not have occurred between 12:30 and 1:00, when the K-Mart robbery took place. Thus, if Denise's recollection of seeing petitioner at Trade Tech was accurate, Clements was lying to police.

Denise had much to offer petitioner's defense, had Slick chosen to call her as a witness.

Respondent complains that Gloria Burton "would not have provided credible evidentiary support for an alibi defense" because she "could not account for petitioner's whereabouts for a continuous span of two to three hours." (RBM p. 53.) This assertion is without merit. It is irrelevant that Mrs. Burton did not purport to account for her son's whereabouts for a continuous span of two to three hours. The salient point is that she saw him arrive at Myrtle Street shortly after Elizabeth Black did, at about 1:30 p.m. (Exh. 1.) Because petitioner did not leave the apartment until later that evening (*ibid*.), he could not have committed the Khwaja shooting at 1:55 p.m.

Although respondent claims that Gloria Burton's estimate of petitioner's arrival time was vague (RBM pp. 53), it had indicia of reliability because it was generally consistent with the recollections of the other alibi witnesses and because she was able to relate it to her departure from Trimble's. (See exh. 1.)

Further, respondent's suggestion that Mrs. Burton was unreliable because she was drinking beer is also unsupported by the evidence. Both Ora Trimble and Gloria Burton told Kleinbauer they had two quarts of beer. Although both women indicated they were drinking the beer, neither stated

they drank it all. (See exh. 1.) Moreover, although respondent had an opportunity to question Ora Trimble at the reference hearing, as well as other witnesses who saw Trimble and petitioner's mother that afternoon at Myrtle Street, there was no testimony suggesting that either was inebriated. If anything, their consistent recollections regarding the quantity of beer they had provided an aura of reliability to their memories of that day.

Respondent's assertion that the testimony Hope Black could have given was without value (RBM p. 54) is also unconvincing. Respondent complains that Ms. Black's testimony was vague. (*Ibid*.) Any vagueness in Hope's hearing testimony, however, is attributable to Slick's failure to ensure she was interviewed in 1983 before petitioner's trial. Hope's presence during part of the relevant time period was known to Slick. It is not surprising that in 2003 Hope had some trouble recalling the exact times at which 20-year-old events had occurred. Nonetheless, she remembered that petitioner was at her home with her sister Elizabeth when Hope arrived between 1:30 and 2:00 p.m., a time she was able to reconstruct by reference to her usual schedule in February 1983. Moreover, her testimony was generally consistent with, and corroborated by, that of the other alibi witnesses. (See PBM p. 212.)

Respondent also emphasizes that Hope Black could not have accounted for petitioner's whereabouts prior to 1:30 p.m. (RBM p. 54.)

But there is no reason why Hope would need to be able to say where petitioner was before 1:30 p.m. in order to provide probative evidence in support of his defense.[38]

In sum, this testimony that the alibi witnesses could have given, while not without flaws, had evidentiary value as it tended to establish that petitioner was not responsible for either of the charged offenses. It

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[38] In a footnote, respondent emphasizes that Hope Black, Elizabeth Black and Denise Burton had been previously convicted of felonies. (RBM p. 54, n. 13.) Respondent acknowledges, however, that these felonies occurred after petitioner's trial and therefore could not have been used to impeach the witnesses had they been called to testify in 1983. Respondent nonetheless contends that the convictions were "highly relevant in assessing the credibility of the witnesses at the reference hearing." (*Ibid*.)

First, petitioner asserts that the Referee had no need to assess the credibility of Elizabeth Black and Denise Burton at the hearing (and indeed said he would not). The primary issue to resolve was whether these witnesses would have testified consistently with the information they provided to investigator Kleinbauer prior to trial. Although Hope Black's credibility at the hearing was arguably more significant because there was no report documenting her recollection of the facts in 1983, her testimony was consistent with that of the other alibi witnesses and therefore credible, despite her prior convictions.

Moreover, these convictions were of minimal impeachment value. Denise Burton's conviction was remote. (See PBM pp. 211-212.) Elizabeth Black's convictions for drug offenses were mitigated by the fact that she had been working for two years as a drug counselor and was attending school to become certified in this work. (See PBM p. 210.) The courts have recognized that such factors impact the significance of a prior felony conviction. (See, e.g., *People v. Burns* (1987) 189 Cal.App.3d 734 [discussing factors to consider in determining whether to admit evidence of prior felony conviction].)

certainly was not so lacking in probative value or credibility that no reasonable juror would have considered it. Nor would Slick have provided incompetent representation had he called these witnesses to the stand on petitioner's behalf. Thus, it satisfies the requirement of *People v. Frierson* that some credible evidence exist to support petitioner's desired defense.

**4. The Prosecution's Evidence.**

Finally, as noted above, respondent claims that petitioner's desired defenses were not supported by credible evidence in light of the "compelling" evidence that the prosecution presented, and could have presented, against petitioner at trial. (See subsection B.1., *ante*, citing RBM pp. 49-50.)

As stated above, however, in *Frierson* this Court did not assess the strength of the prosecution's evidence in determining that some credible evidence existed to support that defendant's desired defense.[39] Moreover, petitioner has amply demonstrated that the state's case could have been persuasively deconstructed by Slick, had he honored his client's wish to

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[39] To the extent respondent is arguing that Slick was reasonable in concluding that the potential defense evidence was not credible, petitioner emphasizes that Slick's strategic assessment of the evidence is not relevant under *Frierson*. (See, e.g., PBM pp. 348.) Moreover, petitioner has shown in his brief on the merits that Slick's testimony about his views of the credibility of the potential witnesses, which touched on some of the factors raised by respondent in its brief, was both irrelevant and not credible. (See PBM pp. 193-206.)

defend. (See PBM pp. 278-299.) Out of an abundance of caution, however, petitioner briefly responds herein to respondent's claim that the evidence – which respondent addressed in its merits brief only in summary fashion – was compelling.

Respondent first relies on petitioner's alleged confession to Long Beach detectives. (RBM p. 49.) As petitioner has shown in his briefing, Slick had at his disposal the means to challenge the validity of the confession, with or without petitioner's testimony. Slick could have, in essence, put the Long Beach Police Department on trial by showing the jury how unreliable and partial the investigation into the Khwaja offenses was. This would have impugned both the product of that investigation (including the confession) and the credibility of the detective who testified that petitioner had confessed. (See PBM pp. 153-180, 292-299.)

Respondent claims that the confession was "not subject to direct challenge since petitioner refused to testify . . . ." (RBM p. 49.) Initially, petitioner questions the accuracy of Slick's testimony on this point. Petitioner has repeatedly shown that Slick's memory of what occurred at the time of petitioner's trial was extraordinarily poor. There is nothing in Slick's file or on the trial record which suggests that petitioner would not testify. Accordingly, it is highly unlikely Slick could accurately recall

whether his client had in fact declined to take the witness stand 20 years before.

Perhaps more importantly, as petitioner has explained in his brief on the merits, reliance on Slick's testimony that petitioner refused to testify is nothing more than an effort to divert attention from Slick's failure to honor petitioner's request for a defense. (See PBM pp. 195-196 and notes 133-134.) Petitioner has never asserted that he demanded to take the witness stand. Thus, petitioner's desire or lack of desire to testify himself is irrelevant to the reference questions and to the resolution of the OSC.[40]

Furthermore, it would have not been unreasonable for petitioner to decline to testify in light of the circumstances facing him. At the hearing, Slick candidly admitted that he probably told petitioner he had no chance of winning even if he testified at trial. (HT 769.) Given Slick's failure to adequately investigate the case, communicate with his client, and present alibi and misidentification witnesses, Slick was undoubtedly correct in advising petitioner his testimony would accomplish nothing.

Moreover, regardless of whether Slick "directly" challenged the confession with testimony from petitioner, it remains that the evidence petitioner was elsewhere when the crimes occurred and was misidentified as

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[40] Not surprisingly, respondent did not ask petitioner at the hearing whether he had refused to testify at trial.

the perpetrator *is* evidence the confession was not valid. Had Slick honored petitioner's desire to defend and presented defense witnesses, he could have urged the jury to reject the unrecorded oral confession (documented only by a later-prepared report that was not reviewed by petitioner, and unsupported even by contemporaneous notes of the investigators), even if petitioner did not take the stand. To do so would have been within the range of competent representation.

Respondent also points to "the potential admission of petitioner's second confession to the jailers . . . ." (RBM p. 49.) However, as petitioner has demonstrated in his merits brief, these statements were not compelling. (See PBM pp. 200-201.) Slick himself admitted the statements were "funny," "strange" or "kind of weird" because they were factually inaccurate and were inconsistent with petitioner's alleged unrecorded confession to the homicide detectives. (HT 762-763.) In addition, respondent has not shown that the alleged statements, which according to the police reports were elicited by jail officer Norman without the benefit of *Miranda*[41] warnings, would have been admissible against petitioner at trial. (See exh. K. p. 59.) Finally, the police reports were admitted for non-hearsay purposes only. (See HT 2124.) Neither jail officer testified at the reference hearing. Respondent cannot now use the jailers' reports as proof

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[41] *Miranda v. Arizona* (1966) 384 U.S. 436.

of testimony the prosecutor might have elicited at trial, since petitioner has had no opportunity to cross-examine either officer.

Respondent also relies on identifications by K-Mart victims Lisa Searcy and Margetta Heimann of petitioner. (RBM p. 50.) Only Searcy testified at trial, however. And, as petitioner has shown, her identification of petitioner could have been effectively challenged. Searcy's opportunity to view her assailant was brief and she was under great stress at the time. The jury did not know that Searcy's trial identification was preceded by an equivocal pre-trial identification, which itself was the product of viewing a highly suggestive photographic lineup that included two pictures of petitioner. In addition, Searcy described a gun and clothing which did not match those described by homicide eyewitness. Finally, she was of a different race than the man who robbed her, which the jury did not understand made misidentification more likely. (See PBM pp. 108-109, 287-291.)[42]

Although respondent cites the potential testimony of Handy Vining as evidence that could have been adduced against petitioner at trial, Vining

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[42] Although Margetta Heimann was not called to testify at trial, any identification she might have made could have been challenged on the same basis as Searcy's. Heimann also made an equivocal pre-trial identification, stating only "He looks similar" after picking petitioner's second photograph from the highly suggestive lineup. (Exh. K p. 78.) Heimann was fearful for her life during the brief encounter (*id*. at p. 75) and hers was also a cross-racial identification (*id*. at p. 74).

did not testify at the reference hearing,[43] and he did not testify at any point in the trial proceedings. Thus Vining has never been examined, much less cross-examined. In fact, he has never even signed a statement and Slick did not have him interviewed prior to trial. Respondent has only a police report written by Collette claiming that Vining was shown a single photograph of petitioner and agreed that it was the person he saw with Otis Clements hours before the homicide. Under these circumstances, the report is insufficient to prove that Vining would have identified petitioner at trial.

Even if one assumes Vining would have identified petitioner at trial, the fact that police showed him only a single photograph rather than a lineup undercuts the reliability of any identification Vining might have made at trial. And, in any event, Vining was not an eyewitness to the homicide. At most, Vining could have put petitioner together with Clements in the morning of February 25, 1983, but he could not have testified that the two were still together hours later when the K-Mart and Khwaja crimes were committed. (See PBM p. 252; exh. K at p. 79.)

Although respondent does not include the identifications of petitioner made by Robert Cordova and Anwar Khwaja at trial as part of what it believes to be the compelling prosecution evidence, petitioner

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[43] Rev. Vining died before the hearing took place. (See Return, exh. B, ¶ 17.)

reiterates that both of these identifications were highly unreliable. (See PBM pp. 105-107, 257-258, 279-287.)

As petitioner has established, Robert Cordova saw the perpetrator's full face for only a second, from a distance of at least 60 feet. Cordova was scared at the time. He told police the man he saw weighed 200-220 pounds, was in his thirties and had pock marks or scars on his face. Petitioner weighed 160, was just 19, and had a clear face. Cordova's first opportunity to view the suspect came in a courtroom, an inherently suggestive environment.[44] (See PBM pp. 257-258, 280-283.) His was a cross-racial identification. (See PBM p. 291.)

Anwar Khwaja's cross-racial identification of petitioner at trial was equally suspect. Khwaja had only a brief chance to see the perpetrator before he was shot and seriously wounded. His injury and the damage to his eyeglasses during the assault limited his ability to see the man after the shooting. Khwaja did not provide a description of the man to police. And, his only identification of petitioner came during trial in the courtroom, almost six months after the shooting under extremely suggestive

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[44] Petitioner was not permitted to call Robert Cordova at the evidentiary hearing. (HT 1624.) Petitioner made an offer to proof, via a declaration signed by the witness, that Cordova would have testified at the hearing that the police showed him a single photograph of petitioner prior to his in-court identification and told him that they believed it was of the man who had shot the Khwajas. (Exh. 47 [for identification only].)

circumstances – petitioner was the only African-American man seated at counsel table. (See PBM 258, 283-287.)

Finally, petitioner emphasizes that it would be unfair for this Court to consider the prosecution's evidence in evaluating whether there was some credible support for his desired defense(s) in the manner respondent suggests because he was not permitted at the reference hearing to fully demonstrate that this evidence is far weaker than it otherwise appears to be. As petitioner has thoroughly explained in his brief on the merits, the Referee significantly limited the scope of the hearing. (See PMB pp. 325-331.) The Referee also made it clear that the validity of the alleged confession would not be litigated at the hearing, although petitioner always asserted he had not confessed. (See PMB pp. 345-346.) Petitioner was not allowed to call a number of witnesses whose testimony would have not only strengthened petitioner's alibi and misidentification evidence but also undercut the prosecution's evidence against him. (See PBM pp. 335-347.)

In sum, no evidence is perfect. As petitioner has shown, the prosecution's case was full of flaws. It was based on unreliable eyewitness identification testimony and an unrecorded oral confession that was presented to the jury by a detective of dubious credibility. Respondent does not argue, however, that no competent prosecutor would have presented this evidence.

While the potential defense evidence known to Slick at the time of petitioner's trial was not immune to challenge, it was not so lacking in value that no reasonable juror might have credited it in determining whether the prosecutor had proven that petitioner was guilty beyond a reasonable doubt. Certainly, a reasonable capital defense lawyer could have presented such evidence. Indeed, respondent has failed to provide any credible argument or legal authority to demonstrate that an attorney would be found incompetent for doing so.

In fact, Slick's own testimony provides support for petitioner's argument that the evidence available to him had sufficient evidentiary value. Slick testified at the reference hearing that he "wrestled" with the question of whether to present witnesses at trial, but concluded it was in petitioner's best interest not to do so. (HT 921.) This testimony suggests Slick believed that presenting the evidence was an option available to him and within the range of competent conduct. Slick's decision to present no witnesses was thus a tactical one, based on his desire to maximize the chances of obtaining a life verdict for petitioner. As *Frierson* teaches, however, it was not Slick's prerogative to make that decision, given petitioner's openly expressed desire to defend at the guilt phase.

## CONCLUSION

For the reasons set forth above and in his brief on the merits, petitioner respectfully requests this Court to reverse his convictions and sentence of death.[45]

DATED: October 6, 2005

Respectfully submitted,
MARCIA A. MORRISSEY
LISA M. ROMO

Attorneys for Petitioner
ANDRE BURTON

By: _____
Lisa M. Romo

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

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California and am over the age of 18 and not a party to the within action. My business address is 2115 Main Street, Santa Monica, California 90405.

On October 7, 2005, I served the foregoing document described as:

**PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS**

on the following parties in this action by placing a true copy thereof in the United States Mail addressed as follows:

Chung L. Mar
Deputy Attorney General
300 So. Spring Street, Suite 500
Los Angeles, CA 90013

Andre Burton
P.O. Box C-44728
San Quentin State Prison
San Quentin, California 94749

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, except as to those matters stated on information and/or belief, and as to those matters, I believe them to be true; and that this Declaration was executed at Santa Monica, California on October 7, 2005.

_____
CATHY L. MACKERL