

SUPREME COURT
FILED

ORIGINAL

NOV - 5 1997

Robert Wandruff Clerk
[Signature]
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION)
PETITIONER,)

ON HABEAS CORPUS.)
_____)

S065575

No. _____
(Related Appeal:
People v. Champion,
Crim. No. 22955.)

PETITION FOR WRIT OF HABEAS CORPUS

**PETITION
VERIFICATION
PROOF OF SERVICE**

(Volume 1 of 2 volumes)

KAREN KELLY
ATTORNEY AT LAW
California State Bar No. 118105
P.O. Box 520
Ceres, California 95307
Telephone: (209) 537-9270

Attorney for Petitioner
by Appointment of the California
State Supreme Court

DEATH PENALTY

TABLE OF CONTENTS

PETITION FOR WRIT OF HABEAS CORPUS

I. STATEMENT OF UNLAWFUL CONFINEMENT Page -1-

II. STATEMENT OF JURISDICTION Page -2-

III. PROCEDURAL HISTORY Page -2-

IV. THIS PETITION IS TIMELY Page -4-

V. INTRODUCTION TO PETITIONER’S CLAIMS FOR RELIEF Page -17-

VI. INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS RELATING TO THE TAYLOR HOMICIDE Page -23-

VI. A. Defense counsel provided constitutionally ineffective assistance
in failing to discover, present, and argue evidence that petitioner
could not have been involved in the Taylor crimes as he was in the
company of friends who were never considered viable suspects and
were detained by Los Angeles County Sheriff’s Department deputies
at the time the Taylor crimes were being committed, did not match
the description of any suspect who law enforcement saw exiting the
suspect vehicle, and approached the officers from an area which
would have made it very difficult, if not impossible for him to have
been involved. Page -25-

VI. B. Defense counsel provided constitutionally ineffective assistance in
failing to discover, present, and argue evidence which indicated police
and the prosecutor had reliable information that four other persons were
actually responsible for the Taylor crimes. Page -32-

Robert Simms was one of the four men who
committed the Taylor crimes. Page -33-

The forth man involved in the Taylor crimes was Michael Player. Page -36-

VI. C. Defense counsel provided constitutionally ineffective assistance in
failing to discover, present, and argue evidence that the physical
and clothing descriptions offered by witnesses did not fit that of
petitioner on the night of the Taylor crimes. Page -39-

VI. D. Defense counsel provided constitutionally ineffective assistance by failing to object to the prosecution's attempts to have witnesses identify petitioner as one of the men who entered the Taylor residence, in spite of the fact that the prosecution had assured both the court and counsel that it had no evidence that petitioner was present inside the Taylor home.	Page -43-
VI. E. Defense counsel failed to discover and present evidence that there was no physical or other evidence of petitioner's involvement in the Taylor crimes and that to the contrary, numerous pretrial identification attempts failed to identify petitioner as a suspect, fingerprint analysis did not implicate petitioner, and a secretly taped conversation between Evan Mallet and petitioner failed to yield any evidence that petitioner was involved in the Taylor crimes.	Page -48-
VI. F. Defense counsel failed to object to or impeach Cora Taylor's identification of petitioner.	Page -52-
VI. G. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue (1) evidence that the graffiti which purportedly implicated petitioner in the Taylor crimes was authored by someone other than petitioner and did not represent that petitioner had been or would soon be involved in the Taylor robbery or otherwise implicate him in that offense and (2) that Deputy Williams' opinion that petitioner was associated with the crime through his association with alleged Crips and particularly Craig Ross was based on false information	Page -54-
VI. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the motive for the Taylor killing was personal retribution, undercutting the prosecution theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers.	Page -65-
Trial Counsel had not Tactical Reasons for the Acts and Omissions Complained of Above	Page -68-
VII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE HASSAN HOMICIDE	Page -72-

VII. A. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that the jewelry in petitioner’s possession at the time of his arrest did not belong to Bobby Hassan. . . . Page -75-

VII. B. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that petitioner at the time of the Hassan crimes was at home or picking up his pay check Page -80-

VII. C. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that the identifications by Elizabeth Ms. Moncrief were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief do not match petitioner. . . . Page -83-

VII. D. Trial Counsel provided ineffective assistance of counsel by failing to introduce readily available and significantly exculpatory forensic evidence Page -94-

VII. E. Trial counsel failed to request attorney, investigative, and expert support from the trial court, or utilize those funds authorized by the court prior to Skyers appointment.. . . . Page -97-

VII. F. Failure to properly object to the use of a secretly taped conversation between petitioner and Mallet both at pretrial stages and when used by the prosecution during its cross-examination of petitioner . . . Page -100-

VII. G. Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Mr. Ross. Page -105-

VII. H. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence of significant mental impairments from which petitioner was suffering as of the date of the Hassan crimes which would have precluded the jury from finding petitioner, if present at the victims’ residence, possessed the intent to kill required for special circumstance liability Page -113-

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS RELATING TO THE JEFFERSON HOMICIDE Page -122-

VIII. A. Defense counsel provided constitutionally ineffective assistance by failing to discover and produce evidence that the Jefferson case was not similar to either the Hassan or Taylor crimes which would have precluded admission of the Jefferson evidence and undercut the prosecution's theory that petitioner was a participant in or at least had knowledge of all three incidents and its theory that petitioner's alleged knowledge of the Jefferson homicide evidenced the required mental state for finding the special circumstances to be true.	Page -125-
VIII. B Defense counsel provided constitutionally ineffective assistance in failing to object to introduction of the Jefferson crimes on grounds that the introduction of this other crimes evidence violated petitioner's due process rights, and Evidence Code §§ 352 and 1101.	Page -131-
VIII. C. Trial counsel was ineffective in failing to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof.	Page -136-
VIII. D. Trial counsel was ineffective in failing to object to the prosecution's conspiracy evidence and argument.	Page -137-
IX. PENALTY PHASE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL	Page -142-
IX. A. Trial counsel was ineffective in failing to object to the prosecutor's argument that petitioner would kill if sentenced to life without the possibility of parole and that his demeanor should be used as a factor in aggravation	Page -144-
XI. B. Trial counsel failed to object to the prosecution's argument that an alleged lack of a mitigating factor was , as to each factor, to be considered a factor in aggravation.	Page -151-
XI. C. Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial.	Page -155-
X. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR IMPLYING THAT PETITIONER HAD A CRIMINAL RECORD AND BY THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL	Page -220-

XI. DEFENSE COUNSEL’S CONFLICT OF INTEREST PREVENTED HIM FROM RENDERING EFFECTIVE ASSISTANCE OF COUNSEL Page -222-

XII. THE UNCONSTITUTIONAL JOINDER OF PETITIONER’S CASE WITH THAT OF CRAIG ROSS DENIED PETITIONER DUE PROCESS OF LAW AND IN COMBINATION WITH PROSECUTORIAL BAD FAITH, INEFFECTIVE ASSISTANCE OF COUNSEL, AND ERRONEOUS TRIAL COURT RULINGS, RESULTED IN FUNDAMENTALLY UNFAIR GUILT AND PENALTY TRIALS-page -224-

XIII. CLAIMS OF PROSECUTORIAL MISCONDUCT Page -247-

 XIII. A. The prosecutor knowing committed prejudicial misconduct when he secretly, without notice to petitioner’s counsel, applied to the trial court for permission to, and did, specially transport petitioner alone with Evan Mallet and then alone with Craig Ross for the purpose of inducing and tape recording self-incriminating conversations, and further manipulated the trial court’s calendar with a bogus motion to carry out his plan Page -249-

 XIII. B. The prosecutor committed prejudicial misconduct by knowingly misrepresenting to the trial court the purported similarities between the Jefferson killing and the Taylor and Hassan crimes including alleged similarities as to weapon and motive. Page -252-

 XIII. C. The prosecutor knowing committed prejudicial misconduct in that after he had represented to both defense counsel and the court that he had "no direct evidence Mr. Champion was inside the [Taylor] house" he proceeded to elicit and 11th hour identification from Cora Taylor and the inference that petitioner was not only involved in the conspiracy, but was the tallest of the three individuals who entered the residence, from Mary Taylor, knowing the contrary to be true. Page -255-

XIV. THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL Page -256-

XV. THE CUMULATIVE EFFECT OF THE ERRORS ON THE ISSUES OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY WARRANT REVERSAL Page -261-

XVI. EXECUTION AFTER PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH Page -263-

XVII. EXECUTION BY LETHAL INJECTION CONSTITUTES
CRUEL AND UNUSUAL PUNISHMENT Page -265-

XVIII. PETITIONER'S DEATH SENTENCE VIOLATES
INTERNATIONAL LAW Page -276-

PRAYER FOR RELIEF Page -278-

VERIFICATION Page -280-

TABLE OF AUTHORITIES

CASES

Adamson v. Ricketts (9th Cir. 1988) 856 F.2d 1011257

Arizona v. Youngblood (1988) 488 U.S. 51230

Beck v. Alabama (1980) 447 U.S. 625154

California v. Ramos (1983) 463 U.S. 992257

Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 522149

Chapman v. California (1967) 386 U.S. 18147

Cuyler v. Sullivan (1980) 446 U.S. 335222

Donnelly v. DeChristoforo (1974) 416 U.S. 637137

Fetterly v. Paskett (1991) 997 F.2d 1295150

Fierro v. Gomez (N.D. Cal . 1994) 865 F.Supp. 1387265, 270

Fierro v. Gomez (9th Cir. 1996) 77 F.3d 301.....265

Furman v. Georgia (1972) 408 U.S. 238150, 154, 256

Gardner v. Florida (19) 430 U.S. 358.148

Gomez v. Fierro (1996) 519 U.S. _____265

Greenawalt v. Stewart (9th Cir. 1997) 105 F.3d 12689

Gregg v Georgia (1976) 428 U.S. 153148, 150, 154, 269

Griffin v. California (1965) 380 U.S. 609147

Hamilton v. Nix (8th Cir. 1987) 809 F.2d 463137

Henry v. Estelle (9th Cir. 1993) 993 F.2d 1423133

Herring v. Meachum (2d Cir. 1993) 11 F.3d 347236

<i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343	149
<i>In re Clark</i> (1993) 5 Cal.4th 750	5, 9, 11, 13, 14, 15, 16
<i>In re Duvall</i> (1995) 9 Cal.4th 464	12
<i>In re Hall</i> (1981) 30 Cal.3d 408	223
<i>Johnson v. Mississippi</i> (1988) 486 U.S. 578	148
<i>Keenan v. Superior Court</i> (1982) 31 Cal.3d 424	97
<i>Kotteakos v. United States</i> (1946) 328 U.S. 750	137
<i>Lackey v. Texas</i> (1995) 514 U.S. _____	263
<i>Martinez v. Superior Court</i> (1981) 29 Cal.3d 574	223
<i>McClesky v. Zant</i> (1991) 499 U.S. 467	9
<i>McKenzie v. Day</i> (9 th Cir. 1995) 57 F.3d 1461	274
<i>McKinney v. Rees</i> (9th Cir. 1993) 993 F.2d 1378	133, 139
<i>Panico v. United States</i> (1963) 375 U.S. 29	147
<i>People v. Bacigalupo</i> (1993) 6 Cal.4th 457	259
<i>People v. Boyd</i> (1985) 38 Cal.3d 762	148
<i>People v. Chambers</i> (1964) 231 Cal.App.3d 23	229, 235
<i>People v. Champion</i> (1995) 9 Cal.4th 879	2, 4, 5, 6, 56, 64, 109, 111, 136, 138, 149, 150, 226, 227-230, 234, 236, 239, 241, 244
<i>People v. Chessman</i> (1959) 52 Cal.2d 467	264
<i>People v. Coleman</i> (1985) 38 Cal.3d 69	53
<i>People v. Hogan</i> (1982) 31 Cal.3d 815	62, 63
<i>People v. Jones</i> (1954) 42 Cal.2d 219	146

<i>People v. Ortiz</i> (1978) 22 Cal.3d 38	101, 232, 250
<i>People v. Ozuna</i> (1963) 13 Cal.App.2d 338	139
<i>People v. Poulin</i> (1972) 27 Cal.App.3d 54	132
<i>People v. Proce</i> (1991) 1 Cal.4th 390	229
<i>People v. Rivera</i> (1985) 41 Cal.3d 388	132
<i>People v. Sheldon</i> (1994) 7 Cal.4th 1163	263
<i>People v. Stanworth</i> (1969) 71 Cal.2d 820	263
<i>People v. Taylor</i> (1990) 52 Cal. 3d 719.....	144
<i>People v. Terry</i> (1970) 2 Cal.3d 362	146
<i>People v. Sergill</i> (1985) 138 Cal.App.3d 34	62
<i>People v. Williams</i> (1971) 22 Cal.App.3d 34	53
<i>People v. Williams</i> (1988) 44 Cal.3d 883	8
<i>Rose v. Lundy</i> (1982) 455 U.S. 509	9
<i>Ruffin v. Dugger</i> (11 th Cir. 1988) 848 F.2d 1512.	146
<i>Sanders v. Ratelle</i> (9th Cir. 1994) 21 F.3d 1446	222
<i>Sochor v. Florida</i> (1992) 112 S.Ct. 2114.....	153
<i>Strickland v. Washington</i> (1984) 466 U.S. 668	8
<i>Taylor v. Kentucky</i> (1979) 436 U.S. 478	139
<i>Thiel v. Southern Pacific Co.</i> (1972) 328 U.S. 217	154
<i>United States v. Carroll</i> (4th Cir. 1982) 678 F.2d 1208	147
<i>United States v. Douglas</i> (9 th Cir. 1986) 780 F.2d 1472	229
<i>United States v. Marion</i> (1976) 404 U.S. 307	230

<i>United States v. Solivan</i> 937 F.2d 1146 (6th Cir. 1	62
<i>Wade v. Calderon</i> (9 th Cir. 1994) 29 F.3d 1312	260
<i>Williams v. Superior Court</i> (1984) 36 Cal.3d 441	222
<i>Winkler v. Keene</i> (1995) 7 F.3d 304	222
<i>Woodson v. North Carolina</i> (1976) 428 U.S. 280	148
<i>Zant v. Stephens</i> (1983) 462 U.S. 862	257, 258

CODES

CALIFORNIA CODES

Evidence Code section 352.	122, 131, 134, 139
Evidence Code section 720, subdivision (a)	62
Evidence Code section 780.	146
Evidence Code section 801, subdivision (a)	63
Evidence Code section 1101.	110, 111, 122, 131, 134
Evidence Code section 1102.	110, 111
Evidence Code section 1220	64, 104
Evidence Code section 1223	64, 104
Penal Code section 187	2
Penal Code sections 189	166, 167, 256
Penal Code section 190.2, subd. (a)(3)	3, 129
Penal Code section 190.2, subd. (a)(17)(i)	3, 129
Penal Code sections 190.2, subd. (a)(17)(vii)	3
Penal Code Section 190.3	151, 152

Penal Code Section 190.3	151, 152
Penal Code section 211,	2, 3
Penal Code section 459	2
Penal Code section 987.9	97
Penal Code section 1098	232
Penal Code § 1239, subd. (b)	173
Penal Code section 1473, subdivision (a)	2
Penal Code section 1538.5	100
Penal Code section 3604	175, 177, 179, 180
Penal Code Section 12022	3, 4

UNITED STATES CODES

28 U.S.C. section 2244(b)	9
---------------------------------	---

CONSTITUTIONAL PROVISIONS

CALIFORNIA

Article I, section 1	22, 23, 72, 122, 142, 224, 225, 247, 256, 263
Article I, section 7	22, 23, 72, 122, 142, 224, 225, 247, 256, 263
Article I, section 15	22, 23, 72, 122, 142, 224, 225, 247, 256, 263
Article I, section 17	22, 23, 72, 122, 142, 224, 225, 247, 256, 263
Article I, section 24	22, 23, 72, 122, 142, 224, 225, 247, 256, 263

Article VI, section 102

UNITED STATES

First Amendment22, 23, 72, 122, 142

Fifth Amendment22, 23, 72, 122, 142, 147, 247, 256, 263

Sixth Amendment22, 23, 72, 122, 131, 134, 136, 141, 142,
147, 148, 150, 247, 256, 263

Eighth Amendment22, 23, 72, 122, 134, 142, 148, 153, 154,
222, 246, 247, 256, 263

Fourteenth Amendment22, 23, 72, 122, 142, 147, 153, 246,
247, 256, 263

OTHER

CALJIC No. 1.00261

CALJIC No. 6.13261

CALJIC No. 8.80113

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION)	No. _____
PETITIONER,)	(Related Appeal:
)	<i>People v. Champion,</i>
)	Crim. No. 22955.)
ON HABEAS CORPUS.)	
_____)	

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

In this verified petition for a writ of habeas corpus, petitioner Steve Allen Champion, by and through his attorney of record, Karen Kelly, alleges that his convictions of first degree murder, robbery, and burglary, and sentence of death were obtained in violation of his state and federal constitutional rights as set forth below:

I.

STATEMENT OF UNLAWFUL CONFINEMENT

1. Petitioner, Steve Champion, is presently unlawfully confined on death row in San Quentin State Prison, as a result of a sentence of death imposed by the Honorable William B. Keene, on December 10, 1982, following jury trial in Los Angeles County Superior Court case number A365075.

II.

STATEMENT OF JURISDICTION

1. "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." (California Penal Code section 1473, subdivision (a).)¹ This Court by virtue of article VI, section 10 of the California Constitution has original jurisdiction in habeas corpus proceedings.

2. On September 12, 1986, during the pendency of petitioner's direct appeal, a single-issue habeas petition was filed on petitioner's behalf. The petition, which was filed in response to respondent's contention that an appellate issue concerning the voir dire process had been waived, alleged that if trial counsel had waived the issue, counsel, in so doing, had provided ineffective assistance of counsel. This Court, in its direct appeal opinion, assumed that the voir dire issue had been preserved and denied the claim on its merits, thereby rendering moot the single-issue habeas petition. (*People v. Champion* (1995) 9 Cal.4th 879, 907-908.)²

III.

PROCEDURAL HISTORY

1. Petitioner and co-defendant Craig Anthony Ross were charged by amended Information, filed September 13, 1982, with the December 12, 1980, murders of Bobby and Eric Hassan (section 187, two counts), burglary (section 459, one count), and robbery (section 211,

¹ All further statutory references are to the California Penal Code unless otherwise specifically indicated.

² A formal order denying the petition was issued 5/31/95. (*In re Champion*, Crim. 25478.)

two counts). In connection with the murder counts, the Information alleged the special circumstances of multiple murder (two allegations), robbery (two allegations) and burglary (two allegations (sections 190.2, subd. (a)(3), subd. (a)(17)(i), and subd. (a)(17)(vii).) As to each crime, it was further alleged that the perpetrators were armed with a handgun. (Section 12022, subd. (a).)

2. In addition, the Information charged Mr. Ross with the December 27, 1980, murder of Michael Taylor, and burglary, robbery, and rape perpetrated in connection with Mr. Taylor's death. As to the Michael Taylor homicide, four special circumstances were alleged: burglary, robbery, rape and multiple murder. (CT 530-544.)

3. Petitioner was arrested on January 9, 1981. He was eighteen years old. (CT 39, 115.)

4. Trial began on September 28, 1982. In addition to evidence of the Hassan crimes charged against both defendants and the Taylor crimes charged against Mr. Ross, the prosecution introduced evidence of a third homicidal incident, the November 1982 murder of Teheran Jefferson. On October 19, 1982, petitioner was found guilty as charged of the Hassan offenses. (CT 725-735.) But for a single Taylor incident robbery count, the jury also found Mr. Ross guilty as charged of both the Hassan and Taylor offenses. (CT 742-763.) The arming and special circumstance allegations were each found to be true. (CT 725-763.)

5. The penalty phase was conducted before the same jury. The penalty phase began on October 21, 1982. (CT 781.) The jury returned verdict of deaths as to both Mr. Ross and petitioner on October 27, 1982. (CT 798.)

6. On December 10, 1982, Judge Keene sentenced petitioner and Mr. Ross to death. (RT 3807-3808.)

7. On April 6, 1995, this Court affirmed petitioner and Mr. Ross' convictions and sentences on automatic appeal. The duplicative multiple-murder special circumstance findings were ordered stricken. (*People v. Champion, supra*, 9 Cal.4th 879.)

8. On June 1, 1995, rehearing before this Court was denied. On January 8, 1996, the United States Supreme Court denied a petition for writ of certiorari filed by petitioner.

9. On October 7, 1997, after the District Court's ruling on exhaustion of claims presented in a petition to that court on April 21, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. (*Champion v. Calderon* case number CV 96-2845.) Said petition contains only exhausted claims, i.e. claims based upon the appellate record and presented to this Court on petitioner's automatic appeal. That court ordered petitioner file any unexhausted claims, including extra record claims be presented to this Court by November 6, 1997.

IV.

THIS PETITION IS TIMELY

1. On May 23, 1983, R. Charles Johnson was appointed to represent Steve Champion on his direct appeal from the convictions described above and the judgment of death. (Exhibit 1 -- California Supreme Court Order Appointing R. Charles Johnson.)³ At the time of Mr. Johnson's appointment, appellate counsel was under no obligation to investigate factual and legal grounds

³ The exhibits for this petition EXCLUSIVE OF THOSE EXHIBITS WHICH ARE REFERRED TO IN CLAIM XI. C. (Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial) are contained in Exhibit Volumes 1-4, numbered 1-84, entitled *Guilt Phase Claims and other Claims (excluding Penalty Phase Ineffective Assistance of Counsel Claims.)* The exhibits to Claim XI.C. are contained in Volumes 1-13, numbered 1-240 entitled *Exhibits to Claim of Ineffective of Counsel at Penalty Phase.*

for the filing of a petition for writ of habeas corpus and Mr. Johnson's understanding when he accepted the appointment was that he would be performing only appellate work. (Exhibit 2 — Declaration of R. Charles Johnson.)

2. In June, 1989, almost three years after the filing of petitioner's direct appeal reply brief, this Court promulgated capital habeas standards which, for the first time, imposed upon counsel representing appellants in capital cases an obligation to investigate possible bases for habeas relief.⁴ On September 20, 1989, Mr. Johnson, explaining that he was not competent to conduct a habeas investigation or represent petitioner in habeas proceedings,⁵ moved the Court for appointment of second counsel to investigate and pursue potential habeas corpus issues. (Exhibit 3 -- Confidential Motion for Appointment of Second Counsel.) On March 1, 1990, Mr. Johnson was informed by the Court that his request for second counsel had been tentatively granted. (Exhibit 2.) On August 20, 1992, when second counsel still had not been appointed, Mr. Johnson wrote the Court to again request appointment of such counsel. (Exhibit 4-- Letter from Mr. Johnson to Chief Justice of the California Supreme Court renewing request for appointment of second counsel.) On September 22, 1992, this Court granted the request and appointed James Merwin as associate counsel to represent petitioner on his automatic appeal, including any related habeas proceedings. (Exhibit 5 -- Order of the California Supreme Court appointing James

⁴Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions (hereinafter "Habeas Standards"), standard 1-1; see also, *In re Clark* (1993) 5 Cal.4th 750, 783-785.

⁵Mr. Johnson had filed a single-issue habeas petition on petitioner's behalf on September 12, 1986, but, as indicated above, this petition was intended simply as a mechanism to insure the the reviewability of an appellate issue and required no extra-record investigation.

Merwin as second counsel.)

3. Mr. Merwin was associate counsel from September 22, 1992 through June 28, 1995. (See Exhibit 8 - California Supreme Court order relieving Mr. Merwin and appointing Karen Kelly for purposes of post-conviction proceedings.) During his involvement with the case, Mr. Merwin was able to identify in broad terms a number of potentially meritorious habeas claims and to request funding to pursue them; but because of serious personal problems, financial and health-related, he was ultimately unable to plan in any detail or complete any substantial portion of the necessary investigation or to pass on to successor counsel drafts of any potential claims or supporting declarations, or any other documentary support.

4. In beginning his exploration of potential habeas issues, Mr. Merwin was hampered by San Quentin's unwillingness to allow him to have confidential meetings with petitioner. (Exhibit 6 - Mr. Merwin's Motion for Leave to Withdraw as Counsel, p. 9.) Because very little investigation had been done by trial counsel, because the prosecution involved three separate homicidal incidents only one of which was formally charged against petitioner, because the crimes allegedly involved gang activity, and because essentially no penalty phase mitigation case had been presented, there were many sensitive factual issues which needed to be discussed in a confidential setting. On June 18, 1993, Mr. Merwin sought funding from this Court to litigate in the Marin County Superior Court a habeas petition challenging San Quentin's denial of confidential, contact visits with petitioner. On August 25, 1993, the Court denied the funding application without prejudice to Mr. Merwin's filing a habeas petition directly in this Court challenging San Quentin's decision to deny petitioner contact visits with his counsel. (*Ibid.*) While Mr. Merwin was working on this confidential-attorney-client-visit petition, he learned that the same issue was being

litigated in the Marin County Superior Court in *Ayala v. Vasquez*, Case no. SC059289A, and, rather than duplicate the efforts of Mr. Ayala's counsel, Mr. Merwin decided to delay completion of his confidential-visit petition until the superior court ruled. *Ayala* remained pending during the remainder of Mr. Merwin's tenure as petitioner's habeas counsel.⁶ (*Id.* at p.10.)

5. On February 15, 1994 Mr. Merwin applied to this Court for funding to investigate potential habeas issues relating to the guilt and penalty phase verdicts at petitioner's trial. On August 24, 1994, the Court granted the funding request in part, authorizing Mr. Merwin to incur expenses to investigate specified guilt and penalty phase issues.

6. Soon after the authorization order was issued, Mr. Merwin, because of personal financial difficulties, had to close down his private law practice and take a job with the Office of the Public Defender in Orange County, where he began working on October 11, 1994. He did not immediately move to be relieved as petitioner's habeas counsel because the Orange County Public Defender authorized Mr. Merwin to complete his remaining private practice cases on his own time (evenings and weekends) and Mr. Merwin hoped he would be able to find time to conduct the necessary investigation and prepare a petition on petitioner's behalf. However, shortly after Mr. Merwin assumed his position as a Deputy Public Defender, Orange County declared bankruptcy and threatened to lay off 25% of the Public Defender's staff. The Public Defender responded by undertaking to absorb additional case load responsibilities for his office, which resulted in a substantial increase in each deputy's already heavy case load. Further, beginning in October 1994, Mr. Merwin began to have recurrent instances of severe chest pain

⁶The legal issues surrounding petitioner's right to confidential, contact visits with habeas counsel became moot when San Quentin, subsequent to Mr. Merwin's withdrawal from this case, opted to change petitioner's custody status and permit contact visits with counsel.

and both his personal physician and the physician at an Emergency Room to which he went during one of these episodes told him that he had to find some way to reduce the stress in his life. (Exhibit 6, pp.10-11.) Mr. Merwin did no work on petitioner's case after October, 1994.

7. On March 8, 1995, Mr. Merwin forwarded to the Court a motion for leave to withdraw as counsel, citing his change in employment status and personal health problems. (Exhibit 6.) On May 24, 1995, petitioner, with the assistance of R. Charles Johnson, filed a motion for replacement of associate counsel. (Exhibit 7 -- Request to Substitute Associate Counsel.) On June 28, 1995, the Court vacated Mr. Merwin's appointment, and appointed Karen Kelly as associate counsel "for purposes of appropriate post-conviction proceedings in this court." (Exhibit 8.)

8. Because Mr. Merwin had been unable to move forward with the investigation and had been able only to identify very broadly various categories of ineffective assistance of counsel claims (e.g., failure to seek court-appointed investigative, expert and other support; failure to conduct any investigation as to the Jefferson and Taylor homicides; failure to investigate mental defenses; failure to put on more than a token penalty phase defense), it remained for Ms. Kelly to develop the precise nature of these claims and to plan and carry out the investigation which trial counsel should have carried out prior to petitioner's trial, some 13 years before Ms. Kelly's appointment. Conducting such an investigation was essential to pleading prima facie claims of ineffective assistance of counsel, since such claims require a showing not only that trial counsel's performance was deficient, but also a showing of prejudice, i.e., that if counsel had conducted an adequate investigation, there is a reasonable likelihood that a verdict more favorable to petitioner would have been returned. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v.*

Williams (1988) 44 Cal.3d 883, 944-945.)

9. Further, as petitioner's habeas counsel, Ms. Kelly was obligated to ensure that the petition she filed on petitioner's behalf was as complete as was reasonably possible. As this Court has made clear, a habeas petitioner is expected to exercise due diligence in pursuing potential claims and if petitioner's counsel, at the time of filing an initial petition, had reason to suspect that an additional basis for habeas relief was available but did nothing to investigate those suspicions, petitioner may be barred from raising the uninvestigated claim in a successor petitioner. (*In re Clark, supra*, 5 Cal.4th at 775.) The rules governing federal habeas review are all the more hostile to successor petitions (see, *McClesky v. Zant* (1991) 499 U.S. 467; and 28 U.S.C. section 2244(b), as recently amended by the Antiterrorism and Effective Death Penalty Act of 1996), and since the federal courts generally require exhaustion of state remedies as to each claim presented (see *Rose v. Lundy* (1982) 455 U.S. 509; *Greenawalt v. Stewart* (9th Cir. 1997) 105 F.3d 1268), the omission of a potentially meritorious claim from the state petition Ms. Kelly filed might also preclude federal habeas review of the claim. Thus to ensure that all bases for relief available to petitioner would be reviewed on the merits by this Court, and if this Court were to deny relief, that all such bases would be reviewable in a federal habeas proceeding, Ms. Kelly had to strive to make sure that no potentially meritorious claim suggested by the records or investigation reasonably available to her was overlooked.

10. To develop the precise nature of the potential habeas claims, to ensure that potential claims were not overlooked, and to plan and begin the necessary investigation, Ms. Kelly had to

review the transcripts and briefs on appeal,⁷ review trial counsel's files⁸, review district attorney files⁹, review Jerome Evan Mallet's pretrial and trial transcripts¹⁰, view trial exhibits¹¹, conduct multiple interviews with petitioner¹² and other persons, obtain signed releases and obtain, review, and analyze medical, educational, psychiatric, correctional, social service, military, and employment records of petitioner and his family members; and arrange for expert testing,

⁷Review of the transcripts on appeal, appellate briefing, and trial counsel's files was essentially completed by August 1996.

⁸Neither trial counsel's files nor the district attorney files provided contained some essential items, such as copies of photographic and live-lineups, audio tapes of petitioner's statements used by the prosecution on direct and cross examination, or photographs of physical evidence and court exhibits. To date, counsel has not yet obtained copies of the three tape recorded statements of petitioner and has not located many essential witnesses.

⁹In February, 1996, after review of trial counsel's files and the transcripts provided in petitioner's case, Kelly requested an opportunity to view the Los Angeles County District Attorney files in the cases of petitioner, Craig Ross and the related case of Evan Mallet. The files provided were photocopied and sanitized versions of the Champion/Mr. Ross files. These files were provided in December 1996. The files provided have been sanitized to exclude all identifying information, such as addresses, telephone numbers, dates of birth, and social security and driver's license numbers. Also eliminated were all probation reports, rap sheets, attorney work-product notes and juvenile records. Essentially, what remained were sanitized police and autopsy reports most of which were contained in trial counsel's files. At no time were the original unsanitized district attorney files made available for review or for copying. The Mallet district Attorney files were provided in late August 1977.

¹⁰ Prior to petitioner's trial, Mr. Mallet was convicted as one of the perpetrators of the Taylor homicide. The files of Mr. Mallet in the custody of trial counsel Charles Gessler's were obtained in December 1996. Following a visit with Mallet in 1997, his transcripts were forwarded to Ms. Kelly in February, 1997.

¹¹In January, 1997, exhibits stored at the Los Angeles County Superior Court were viewed and photographed.

¹²At the time of Ms. Kelly's appointment, petitioner's classification prohibited confidential attorney-client visits. Confidential visits were not possible until September 1995.