

SUPREME COURT
FILED

ORIGINAL

JUN 25 1999

Robert W. Anderson, Clerk
[Signature]
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION
PETITIONER,

)
) No. 5065575
) (Related Appeal:
) *People v. Champion,*
) Crim. No. 22955.)

ON HABEAS CORPUS.
_____)

RECEIVED

JUN 25 1999

INFORMAL REPLY

CLERK SUPREME COURT

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION
PETITIONER,

ON HABEAS CORPUS.

)
)
)
)
)
)
)

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

INFORMAL REPLY

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

2. Petitioner's factual innocence of the Taylor crimes is established by the police reports, Mallet transcripts, declarations and other exhibits attached to this petition.	49
a. Petitioner has presented a prima facie case that effective counsel could have confirmed petitioner's of alibi . .	49
b. Petitioner approached officers from a location which would have made it very difficult, if not impossible for him to have been inside of the suspect vehicle.	57
c. Petitioner did not match the physical or clothing descriptions of the men who exited the suspect vehicle	62

D. 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.	64
1. This claim is not untimely.	64
2. The fact that police and the prosecution had reliable information that four other persons committed the Taylor crimes is supported by the documentary evidence submitted by petitioner.	65
a. Robert Aaron Simms	65
b. Michael Player	66
c. Petitioner has met his burden.	67

E. 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.	68
1. This claim is not untimely	68
2. The fact that the physical and clothing descriptions offered by witnesses did not fit that of petitioner on the night of the Taylor crimes is supported by the documentary evidence submitted by petitioner.	70

TABLE OF CONTENTS

INFORMAL REPLY

I. THE PETITION HAS BEEN TIMELY FILED	1
A. General Reply to Respondent's General Assertion of Untimeliness	2
1. No Substantial, Unjustifiable Delay is Attributable to Mr. Johnson	3
2. No Substantial, Unjustifiable Delay is Attributable to Mr. Merwin	5
3. No Substantial, Unjustified Delay is Attributable to Ms. Kelly	12
B. Miscarriage of Justice Exception to Timeliness Bar	16
II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE TAYLOR HOMICIDE	20
A. Correction of Respondent's Erroneous Factual Allegations Regarding This Claim	23
B. Trial counsel's failure to investigate, discover, and present evidence in defense of the Taylor Crimes was not the product of a reasonable tactical decision	30
C. 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.	43
1. This subclaim is not untimely.	43

1. The claim is timely.	86
2. Trial counsel failed impeach Deputy William's testimony and opinions which followed.	89
3. Trial counsel's failure to adequately review the photograph and properly object to it and to Williams' opinion was prejudicial.	90
4. Trial counsel was ineffective in relying solely on the defense that petitioner did not author the graffiti	92
5. Deputy Williams' qualifications were objectionable	101
6. Petitioner was prejudiced	104

J. 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.	105
1. Factual misrepresentation by respondent	105
2. The claim is timely.	107
3. Trial counsel's failure to discover, present and argue evidence that the motive for the Taylor killing was personal retribution thereby undercutting the prosecution theory that the killing was part of, and motivated by, an ongoing conspiracy to rob and kill marijuana dealers was not a reasonable tactical decision and was prejudicial.	108

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATING TO THE HASSAN HOMICIDES 112

A. Correction of Respondent's Erroneous Factual Allegations Regarding This Claim	115
B. Trial counsel's failure to investigate, discover, and present evidence in defense of the Hassan Crimes was not the product of a reasonable tactical decision.	116

F. 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. 74

1. This claim is not untimely 74

2. Trial counsel's failure to object, and/or move for a mistrial, was both unreasonable and prejudicial. 75

G. 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. 80

1. This claim is timely. 80

2. Factual misrepresentation by respondent 80

3. Trial counsel's failure was not the result of a reasonably tactical decision 82

H. Defense counsel failed to object to or impeach Cora Taylor's identification of petitioner 84

I. 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 86

C. 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 117

 1. This subclaim is not untimely. 117

 2. Counsel’s failings were not the product of a reasonable and tactical decision. 120

D. Defense counsel provided constitutionally ineffective assistance in failing to discover, present and argue evidence that at the time of the Hassan crimes, petitioner was at home or picking up his paycheck. 125

 1. This claim is timely. 125

 2. Trial counsel’s failure to discover and present evidence was not the product of a reasonable tactical decision 128

E. Defense counsel provided constitutionally ineffective assistance in failing to discover, present, and argue evidence that Elizabeth Moncrief’s statements concerning the events she witnessed, the physical appearance of the suspects, and her own actions were so diverse and conflicting so as to be inherently unreliable and that the descriptions by Ms. Moncrief do not match petitioner 130

 1. This subclaim is not untimely 130

 2. Respondent’s factual rendition omits the sequence of conflicting statements. 131

 3. Trial counsel’s failings were not the product of a reasonable tactical decision. 146

F. Trial Counsel provided ineffective assistance of counsel by failing to introduce readily available and significantly exculpatory forensic evidence. 149

 1. This claim has been timely filed. 149

2. Trial counsel’s failure to introduce exculpatory forensic evidence was not the product of a reasonable tactical decision.	149
G. Trial counsel Ronald Skyers, failed to request attorney, investigative, and expert support from the trial court, or utilize those funds authorized by the court or to his becoming counsel for petitioner	151
H. Failure to properly object to the use of a secretly taped conversation between petitioner and Mallet both pretrial and when used by the prosecution during its cross-examination of petitioner.	157
1. This claim was timely filed.	157
2. Trial counsel’s failings were not the product of a reasonable tactical decision.	158
I. Trial counsel failed to properly object to the use of a secretly taped conversation between petitioner and Mr. Ross	160
1. This claim is timely.	160
2. Trial counsel’s failure to object was not the product of a reasonable tactical decision.	161
J. 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 that petitioner, if present at the victims’ residence, possessed the intent to kill required for special circumstance liability.	163
1. This claim is timely filed.	163
2. Respondent misstates petitioner’s claim.	167
3. Trial counsel’s failings were not the product of a reasonable tactical decision.	171

**IV. INEFFECTIVE ASSISTANCE OF COUNSEL
CLAIMS RELATING TO THE JEFFERSON HOMICIDE 177**

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. 179

1. This claim was timely filed. 179

2. Trial counsel's failure to discover and produce evidence that the Jefferson crimes were not similar to the Taylor and Hassan Crimes would not have been futile and his failure to do so was prejudicial. 186

B. Defense counsel provided constitutionally ineffective assistance in failing to object to the 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. 192

C. Trial counsel was ineffective in failing to object on the ground that the evidence was inconsistent with the prosecutor's offer of proof. 197

D. Trial counsel was ineffective in failing to object to the prosecution's conspiracy evidence and argument. 199

1. Petitioner's claim is not procedurally barred. 199

2. Counsel's failure was not the result of a reasonable tactical decision. 200

3. Any objection would not have been futile. 203

4. Petitioner was prejudiced by trial counsel's ineffective assistance.	204
V. PENALTY PHASE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL	206
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	208
1. Trial counsel's failure to object was not the result of a reasonable tactical decision.	208
2. The prosecutor's remarks were improper.	210
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.	216
C. Defense counsel failed to discover and produce substantial mitigating evidence at the penalty phase of the trial.	218
1. This claim was timely filed.	218
a. No delay is attributable to Mr. Merwin	218
b. No delay is attributable to Ms. Kelly	219
2. Trial counsel's failure to present substantial and credible mitigating evidence was not the result of a reasonable tactical decision.	231
VI. 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	241
A. This claim is timely and not otherwise procedurally barred.	241
B. Petitioner has presented a prima facie case for relief.	243

VII. DEFENSE COUNSEL’S CONFLICT OF INTEREST PREVENTED HIM FROM RENDERING EFFECTIVE ASSISTANCE OF COUNSEL	245
1. This claim is timely filed.	245
2. An actual conflict of interest is apparent.	247
VIII. 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	249
A. Ineffective Assistance of Trial Counsel	250
B. The Joinder of the Taylor Murder to Petitioner’s Case	250
1. This claim is not procedurally barred	251
C. The Bad Faith of the Prosecutor.	253
D. The unconstitutionality of Joinder and Resulting Prejudice.	253
1. The Taylor Rape/Murder	253
2. Cora Taylor’s Identification	254
3. Gang Graffiti and Other Gang Evidence	254
4. The Murder of Teheran Jefferson	257
5. Alleged Cumulative Effect	257
IX. CLAIMS OF PROSECUTORIAL MISCONDUCT	258
1. Petitioner’s claim is timely filed.	259
2. The prosecutor knowingly committed misconduct when he moved the superior court for an order permitting him to transport petitioner and Evan Mallet and then petitioner and Craig Ross in order to tape record their conversations.	260
a. Petitioner has established a prima facie case for relief.	261

3. The prosecutor committed prejudicial misconduct when he knowingly misrepresented the similarities between the Jefferson killing and the Taylor and Hassan crimes to the trial court.	265
a. Petitioner's claim is not procedurally barred.	265
b. Petitioner has made a prima facie case.	270
4. The prosecutor knowingly committed prejudicial misconduct when he represented to both defense counsel and the court that he had "no direct evidence Mr. Champion was inside the [Taylor] house" but proceeded to elicit an 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.	272
a. Petitioner's claim is supported by reasonably available documentary evidence.	272
b. Petitioner has made a prima facie case for relief.	272
X. THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL	278
XI. THE CUMULATIVE EFFECT OF THE ERRORS ON THE ISSUES OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY WARRANT REVERSAL	282
1. This claim is timely.	282
2. Petitioner has pled a prima facie case for relief.	282
XII. EXECUTION AFTER PROLONGED CONFINEMENT UNDER SENTENCE OF DEATH	286
XIII. EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT	288
XIV. PETITIONER'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW	291

TABLE OF AUTHORITIES

CASES

<i>Adamson v. Ricketts</i> (9th Cir. 1988) 865 F.2d 1011	211
<i>Berber v. United States</i> (1934) 295 U.S. 78	203, 210
<i>Coleman v. Brown</i> (10th Cir. 1986) 802 F.2d 1227	211, 212
<i>Fetterly v. Paskett</i> (9th Cir. 1993) 997 F.2d 1295	215
<i>Furman v. Georgia</i> (1972) 408 U.S. 238	281
<i>Gardner v. Florida</i> (1977) 430 U.S. 349	210, 211, 213
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153	281, 286
<i>Griffin v. California</i> (1965) 380 U.S. 609	215
<i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343	214, 215
<i>In re Clark</i> (1993) 5 Cal. 4th 750	2, 11, 14, 16, 18, 47, 119, 166, 167, 192, 218, 223, 280, 284, 294
<i>In re Dixon</i> (1953) 41 Cal.2d 756	274, 279
<i>In re Duvall</i> (1995) 9 Cal.4th 464	95, 123, 216, 223, 281, 291
<i>In re Fields</i> (1990) 51 Cal.3d 1063	266, 269
<i>In re Gallega</i> (1998) 18 Cal.4th 825	2, 11, 87, 127, 165, 222, 223, 227, 228
<i>In re Harris</i> (1993) 5 Cal.4th 813	262, 266
<i>In re Jackson</i> (1992) 3 Cal.4th 578	169, 232, 236

<i>In re Marquez</i> (1992) 1 Cal.4th 584	35, 193
<i>In re Robbins</i> (1998) 18 Cal.4th 770	2, 11, 13, 14, 46, 69, 70, 88, 119, 165-167, 223, 224, 230, 252, 280, 294
<i>In re Waltreus</i> (1965) 62 Cal.2d 218	195, 199, 280
<i>Izazaga v. Superior Court</i> (1991) 54 Cal.3d 356	270, 274
<i>Lockett v. Ohio</i> (1978) 438 U.S. 586	212
<i>Magill v. Dugger</i> (11th Cir. 1987) 824 F.2d 879	35, 36, 193
<i>People v. Bolton</i> (1979) 23 Cal.3d 208	210
<i>People v. Champion</i> (1995) 9 Cal.4th 879	41, 90, 162, 170, 199, 207, 216, 237, 243, 281, 288, 292
<i>People v. Crandell</i> (1988) 46 Cal.3d 833,	212
<i>People v. Davenport</i> (1985) 41 Cal.3d 247	215, 216
<i>People v. Durham</i> (1969) 70 Cal.2d 171	199, 203
<i>People v. Ewoldt</i> (1994) 7 Cal.4th 380	103, 187
<i>People v. Gamez</i> (1991) 235 Cal.App.3d 957	102, 103
<i>People v. Hamilton</i> (1989) 48 Cal.3d 1142	242
<i>People v. Haskett</i> (1982) 30 Cal.3d 841	211, 212
<i>People v. Hogan</i> (1982) 31 Cal.3d 815	36, 101, 102
<i>People v. Hogan</i> , (1982) 31 Cal.3d 815	102

<i>People v. Holt</i> (1997) 15 Cal.4th 619	280
<i>People v. Jones</i> (1954) 42 Cal.2d 219	214
<i>People v. Ledesma</i> (1987) 43 Cal.3d 171	35
<i>People v. Love</i> (1961) 56 Cal.2d 720	212, 213
<i>People v. Ortiz</i> (1978) 22 Cal.3d 38.	243, 262
<i>People v. Pope</i> (1979) 23 Cal.3d 412	2, 35
<i>People v. Price</i> (1990) 223 Cal.App.3d 606	242, 243
<i>People v. Scott</i> (1978) 21 Cal.3d 284	269, 270
<i>People v. Scott</i> (1997) 15 Cal.4th 1188	279, 280
<i>People v. Sergill</i> (1985) 138 Cal.App.3d 34.	102
<i>People v. Stanley</i> (1995) 10 Cal.4th 764	280
<i>People v. Taylor</i> (1990) 52 Cal. 3d 719	214
<i>Siripongs v. Calderon</i> (9 th Cir. 1998) 35 F.3d 1308	236
<i>United States v. Tucker</i> (9th Cir. 1983) 716 F.2d 576	36
<i>Von Moltke v. Gillies</i> (1948) 332 U.S. 708	35
<i>Wade v. Calderon</i> , (9th Cir. 1994) 29 F.3d 1312	280, 281
<i>Walker v. United States</i> (8th Cir. 1974) 490 F.2d 683	36

CODES

Evidence Code section 352	194, 195
Evidence Code section 720, subdivision (a)	101, 102
Evidence Code section 780.	213, 214
Evidence Code section 801, subdivision (a)	103
Evidence Code section 1101 subdivision (b)	187, 194
Penal Code section 987	223, 232

CONSTITUTIONAL PROVISIONS

CALIFORNIA

Article I, section 1	20, 112, 177, 206, 241, 245, 249, 258
Article I, section 7	20, 112, 177, 206, 241, 245, 249, 258
Article I, section 15	20, 112, 177, 206, 241, 245, 249, 258
Article I, section 17	20, 112, 177, 206, 241, 245, 249, 258
Article I, section 24	20, 112, 177, 206, 241, 245, 249, 258
Article VI, section 10	20, 112, 177, 206, 241, 245, 249, 258

UNITED STATES

First Amendment20

Fifth Amendment20, 112, 177, 206, 241,
245, 249, 258

Sixth Amendment 20, 112, 177, 206, 241,
245, 249, 258

Eighth Amendment20, 112, 177, 206, 241, 245,
249, 258

Fourteenth Amendment 20, 112, 177, 206, 241,
245, 249, 258

TABLE OF EXHIBITS ¹

- 1 (1A) DECLARATION OF JAMES MERWIN
- 2 (2A) *In re Ayala* ORDER
- 3 (3A) DECLARATION OF THOMAS LAMBRECHT
- 4 (4A) SUPPLEMENTAL DECLARATION OF ROUSELLE SHEPARD
- 5 (5A) LETTER FROM DR. SEYMOUR POLLACK M.D.

¹ Exhibits 1-5 attached to this Informal Reply are referred to in the text of the Informal Reply as Exhibits 1A-5A. This is to distinguish Exhibits 1-5 attached to the Informal Reply from Exhibits 1-5 attached to the Petition.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE STEVE ALLEN CHAMPION)	No.S065575
PETITIONER,)	(Related Appeal:
)	<i>People v. Champion,</i>
)	Crim. No. 22955.)
ON HABEAS CORPUS.)	
_____)		

INFORMAL REPLY

I.

THE PETITION HAS BEEN TIMELY FILED

Respondent asserts that petitioner's claims should be denied as untimely.

(Informal Response at p. 16.) Specifically, respondent asserts that petitioner has failed to establish the absence of substantial delay, has not established good cause for delay, and finally, has not demonstrated the applicability of any of the miscarriage of justice exceptions to the timeliness bar. (Informal Response at pp. 17-27.)

Respondent is wrong. The Court should address the merits of each of petitioner's claims.

A. General Reply to Respondent's General Assertion of Untimeliness

Respondent misstates the basic standard governing the obligation to present habeas claims. Respondent asserts that “counsel’s duty to present claims in a habeas petition arises when counsel becomes ‘aware’ of ‘triggering information’ that would lead a reasonable attorney to initiate an investigation.” (Informal Response at p. 19.) This statement is not quite correct. The “trigger” respondent describes is that which triggers defense counsel’s *duty to investigate*, but not her duty to present the claims. Counsel’s *duty to present claims* arises once counsel has (or should have had) information sufficient to support a prima facie case for relief. (*In re Robbins* (1998) 18 Cal.4th 770, 806 fn. 28 and 29 (majority), 820 (Justice Kennard concurring and dissenting); *In re Gallega* (1998) 18 Cal.4th 825, 834; *In re Clark* (1993) 5 Cal. 4th 750, 781.)

Although respondent may be correct in noting that “triggering facts” for some claims were contained in materials available to appellate counsel, R. Charles Johnson, to previous habeas counsel, Jim Merwin, and then to present habeas counsel, Karen Kelly (i.e., many of these “triggering facts” were in police reports and/or the appellate record) (Informal Response p. 20 and fn. 9), it does not follow that there was undue or unjustified delay in developing and presenting the claims and supporting facts.

1. No Substantial, Unjustifiable Delay is Attributable to Mr. Johnson

Respondent erroneously asserts that appellate counsel R. Charles Johnson (1) was qualified to conduct a habeas investigation, (2) agreed to undertake such responsibility and (3) was under an obligation to do so. (Informal Response at pp. 21-22.) Respondent grossly misstates the record in asserting that Attorney Johnson accepted the duty to investigate habeas claims. (Informal Response at p. 21.) Clearly he did not.

Mr. Johnson was appointed as petitioner's appellate counsel on May 23, 1983. (Exhibit 1, Guilt Phase Exhibits Vol. 1.) The new Standards regarding the preparation and filing of habeas petitions were issued over *six years later* in June of 1989.¹ In September of 1989, Mr. Johnson requested second counsel be appointed to petitioner's case. Mr. Johnson *explained that he was not qualified* to undertake habeas responsibilities. (Exhibits 2, 3, Guilt Phase Exhibits Vol. 1.) In his declaration to this Court, Mr. Johnson noted that he had never acted as the attorney of record in a habeas corpus hearing, had no knowledge as to how such a hearing should be conducted and that he did not feel competent to undertake the

¹ See Supreme 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 "Standards"), originally adopted effective June 6, 1989.

investigation and preparation necessary to a habeas proceeding. (Exhibit 3, Guilt Phase Exhibits Vol. 1.)²

Respondent concedes that this Court tentatively granted Mr. Johnson's request for second counsel in March of 1990, approximately six months after the request was made. (Exhibit 4, Guilt Phase Exhibits Vol. 1.) Mr. Merwin was finally appointed on September 22, 1992, approximately four years after Mr. Johnson made his request for second counsel and approximately three and one-half years after this Court tentatively granted Mr. Johnson's request.

Respondent asks this Court to attribute the delay in the appointment of habeas counsel to petitioner's appellate counsel and then (apparently) to petitioner.

Respondent is wrong in assuming that anyone was at fault or that the Court on its own was simply ignoring the need for habeas counsel. The truth is, as respondent should be aware, it is not easy to find counsel to accept appointment in these cases -- particularly where the appointment is just for purposes of representing petitioner

² More than a year earlier, in June of 1988, Mr. Johnson had previously responded to a court-directed California Appellate Project poll that he did not feel capable of representing petitioner in habeas corpus proceedings. (Exhibit 3, Guilt Phase Exhibits Vol. 1.) In September of 1986, Mr. Johnson filed a single-issue petition calculated only to permit the assertion of what was essentially an appellate claim and requiring no extra record investigation. (See Petition, pp. 2 and 5.)

in habeas and clemency proceedings.³

2. *No Substantial, Unjustifiable Delay is Attributable to Mr. Merwin*

As discussed in the petition, Mr. Merwin was associate counsel from September 22, 1992 through June 28, 1995. (Exhibit 8, Guilt Phase Exhibits Vol. 1.)⁴ Between September 22, 1992 and February 23, 1993, Mr. Merwin reviewed approximately 1400 pages of training materials regarding "Representation in Capital Cases" and "Habeas Corpus Workshop Materials" which were furnished to Mr. Merwin by the California Appellate Project. (Exhibit 1A, Declaration of James Merwin.) After receiving a copy of the record on appeal, Mr. Merwin reviewed most of the greater than 5,000 page record, discussed the case and potential issues with Mr. Johnson and with CAP Attorney Steven Parnes. Mr. Merwin secured release forms from Mr. Champion and *attempted to visit him*. (Exhibit 1A.)

As discussed in the petition, during his tenure as habeas counsel, Mr. Merwin experienced difficulty in investigation caused by San Quentin's unwillingness to permit him to visit with petitioner in a confidential setting. (Petition, pp. 6-7.)

³ As this Court is aware there is currently a four year delay in the appointment of appellate counsel and even greater difficulty and delay in finding habeas counsel. The recent creation of the California Habeas Resource Center (Govt. Code § 68650-68656) will hopefully alleviate the latter problem.

⁴ Mr. Merwin moved to withdraw from petitioner's case in March of 1995. (Exhibit 6, Guilt Phase Exhibits Vol. 1.)

Counsel could not form any final plan of investigation, let alone file a petition, without an opportunity to confer with his client about a variety of sensitive information. Indeed the Standards themselves now explicitly recognize that habeas counsel must make "reasonable efforts to discuss the case with the defendant." (Standard 1-1, par. 2.) Surely this duty includes efforts to obtain an opportunity to confer in a confidential setting --- particularly where the client is fearful of institutional eavesdropping.

By June of 1993, in addition to the previously discussed tasks, Mr. Merwin obtained and reviewed Mr. Champion's central file at San Quentin State Prison and visited petitioner in a non-confidential setting. Mr. Merwin also located and interviewed trial counsel Ronald Skyers, reviewed and copied petitioner's trial file and began an evaluation of trial counsel's investigation and preparation for trial. Notably, between February 23, 1993 and June 1993, Mr. Merwin researched, prepared and filed with this Court, a motion ancillary to his habeas corpus petition for prior authorization for funds to prepare and litigate a petition for a writ of habeas corpus in Marin County Superior Court addressing petitioner's housing status and the unavailability of confidential visits with counsel. (Exhibit 1A.)

On August 25, 1993, this Court denied Mr. Merwin's motion for funds for the Marin County writ. The motion was *denied without prejudice to his seeking such a*