IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **In re MARK CHRISTOPHER CREW,** On Habeas Corpus.	**CAPITAL CASE** S107856

Trial: Santa Clara County Superior Court No. 101400
The Honorable John Schatz and Robert Ahern, Judges
Reference Hearing: Santa Clara County Superior Court No. 101400
The Honorable Andrea Y. Bryan, Judge

RESPONSE TO PETITIONER'S BRIEF ON THE MERITS

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BACKGROUND

On May 1, 2008, both parties simultaneously filed their exceptions to the referee's findings and briefs on the merits. As directed by this Court, the parties are to simultaneously file their response briefs 30 days later, on May 31, 2008.

ARGUMENT

I.

PETITIONER'S ARGUMENT REGARDING PREJUDICE ADOPTS A POSITION CONTRARY TO THE ONE HE MAINTAINED DURING THE REFERENCE HEARING

In his Brief on the Merits, petitioner argues that trial counsel's failure to investigate, develop and present the mitigation evidence presented at the reference hearing prejudiced him. According to petitioner, trial counsel's failure prevented the jury from having "the benefit of expert interpretation of the factors that affected [petitioner's] development and functioning." (Brief, p. 40.) Petitioner then cites *In re Lucas* (2004) 33 Cal.4th 682, 732, as support for this assertion, specifically quoting the following passage: "['Had the jurors been provided with such evidence [of childhood abandonment and abuse], they would not have been left to consider inexplicable acts of violence, but would have had some basis for understanding how it was that petitioner became the violent murderer he was shown to be at the guilt phase']." (*Id.* at pp. 40-41.) Respondent submits that this argument, including its supporting citation, does

not accurately represent petitioner's position stated at the reference hearing.

As respondent noted in its Exceptions to Referee's Findings of Fact and Brief on the Merits (hereafter "Respondent's Exceptions"), petitioner conceded that none of the alleged abuse evidence he offered was for the purpose of explaining why petitioner committed the cold-blooded, premeditated and deliberate murder of Nancy Andrade. (See Respondent's Exceptions, pp. 58-59; see also RT 421-422.) A review of the reference hearing record also shows that petitioner never offered any expert testimony that would have provided the jury with an understanding of how petitioner "became the violent murderer he was shown to be at the guilt phase" as a result of his family background and social history. This Court should not allow petitioner to recast the purpose for which he allegedly offered his new mitigating evidence at the reference hearing. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 ["Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding."]; accord *People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262 [The doctrine of judicial estoppel "is designed not to protect any party, but to protect the integrity of the judicial process. [Citation.]"]; *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 169 [judicial estoppel is "extraordinary remedy" invoked when party's inconsistent position is legal proceeding would result in miscarriage of justice].)

II.

THE FAILURE TO PRESENT THE PETITIONER'S SOCIAL HISTORY EVIDENCE WAS NOT PREJUDICIAL

According to petitioner, there was an "abundance" of "credible mitigating evidence" available to trial counsel of his "sexual victimization, addiction to drugs and alcohol, depression, and family history 'fraught with

incest, abuse, dysfunction, mental illness and substance abuse' [Citation]," such that at least one juror would not have voted for a death sentence. (Brief, p. 39.) In support of this assertion, petitioner cites to the following cases: *In re Lucas* (2004) 33 Cal.4th 682, *Penry v. Lynaugh* (1989) 492 U.S. 302, *Eddings v. Oklahoma* (1982) 455 U.S. 104, *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, and *In re Marquez* (1992) 1 Cal.4th 584. Aside from announcing the generally accepted proposition that a capital defendant's background may properly be used as evidence in mitigation, all of these cases are factually distinguishable from the case petitioner has presented.

Respondent has already discussed how *In re Lucas* is factually distinguishable from petitioner's situation. (See Respondent's Exceptions, pp. 77-78, 87-88.) Accordingly, respondent will not replicate that effort here.

At issue in both *Eddings* and *Penry* was the, now rather unremarkable principle announced in *Lockett v. Ohio* (1978) 438 U.S. 586, that a capital sentencer may not be precluded from considering and giving effect to mitigating evidence. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 110 & fn 5, 112; *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 315.) As the Court recognized in both cases, under the umbrella of mitigation is the principle that "punishment should be directly related to the personal culpability of the criminal defendant." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 319.) Accordingly, "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (*Ibid.*, quoting *California v. Brown* (1987) 479 U.S. 538, 545.) This Court, too, has long recognized the relevance of information about a capital defendant's background in the penalty decision. (See *People v. Rowland* (1992) 4 Cal.4th 238, 278.)

Respondent certainly does not contest that information about a defendant's background and family history may be relevant mitigating evidence, as is obvious from the fact that respondent did not object to its admission at the reference hearing. The mere fact that such evidence may be relevant mitigation evidence, however, is not enough to automatically result in prejudice if it is not presented to the jury. Rather, the quantity and the quality of the evidence presented about a defendant's background and family history are significant factors assessed by the jurors in deciding how much weight to assign to that evidence when comparing it to the evidence that exists in aggravation. This point is clearly made when one examines *Boyde v. Brown*.

Like both the U. S. Supreme Court and this Court, the Ninth Circuit also recognizes that a defendant's background and family history are relevant matters a capital jury is entitled to consider and give effect to in determining an appropriate sentence. (*Boyde v. Brown*, *supra*, 404 F.3d at p. 1176.) "Because of the importance of background in convincing a jury to spare a defendant's life, the Supreme Court has recognized that it is ineffective for counsel to fail to present such evidence to the jury. [Citation.]" (*Ibid.*) In *Boyde*, the court was troubled by counsel's decision not to present evidence of the violent physical abuse Boyde suffered and "the family history of sexual abuse he had known about growing up," all of which counsel was aware, as it was by counsel's "failure to follow up on this evidence by investigating what other mitigating evidence might exist." (*Ibid.*)

Had counsel investigated further, he would have learned that:

> Boyde's mother beat him with an extension cord; when he didn't cry, she responded by promising that "she was going to keep beating him until he cried." The ensuing abuse was so severe that the other children began to cry and pled with their mother to quit beating Boyde, but she "just kept beating him" until, finally, "one tear trickled out and she stopped." On a different occasion, Boyde's mother hit him in the head with a vase with enough force that "it drew blood and he had to get stitches." Kendricks [Boyde's sister] recalled Boyde being "dazed by

> the blow to his head and . . . stumbling around afterwards." Bad as these beatings were, Boyde's stepfather was "much worse than [Boyde's] mother as far as beating the kids"; he would "beat [them] longer and would beat [them] all over the room."
>
> Kendricks also explained more about the stepfather's sexual abuse of the female siblings, which began for her when she was about 11 or 12 years old. None of the siblings was comfortable bringing up the sexual abuse with their mother; they worried that she would side with her husband, and that the consequences of mentioning it would be unpleasant. Boyde had participated in discussions among the siblings in which they gathered courage to approach their mother about it. Eventually, Betty Sauls, another of Boyde's sisters, informed her of the abuse. But, as feared, her mother did not believe her, pulled a gun on Sauls and threw her out of the house.
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> * * * * *
>
> Kendricks was not the only one of Boyde's siblings who could have testified about his childhood abuse. Sauls explained in an affidavit that their mother would beat the children with "anything she could get her hands on – straightening combs, water hoses, bricks, brushes, lamps." And Boyde's oldest sister, Beatrice Will, explained that their mother "would beat [Boyde] until he cried, using a switch or an extension cord. She would really whip [Boyde] – on his back, his butt, anywhere she could hit him. She mostly used an extension cord, but would beat you with the first thing she got her hands on." Both Sauls and Wills corroborated Kendrick's report of frequent sexual abuse.

(*Id.* at p. 1177.)

The Ninth Circuit stated that counsel's failure to investigate the physical and sexual abuse of which he was aware, prevented him from "discover[ing] the vast evidence that Boyde had been violently abused, and that he knew his sisters had been molested." (*Id.*) Counsel compounded this failure by calling Boyde's mother and stepfather, "the alleged abusers" to testify that Boyde had a "normal, non-violent childhood," something he was on notice was untrue. (*Id.* at p. 1178.) "The jury, left to wonder how Boyde learned to commit such violent acts, could not look to his childhood as an explanation – his parents'

testimony and counsel's deficiency took care of that – but must instead have concluded that he grew violent *despite* his childhood." (*Id.*, original emphasis.)

And, whatever sympathy counsel hoped to generate by arguing that Boyde's violence was rooted in the systemic failure of the state's youth and adult corrections system, "was quickly extinguished" by invoking Charles Manson as a poster boy for what that system produced. (*Id.*) As the court stated, "It is difficult to conceive of any possible justification for referring to a notorious mass murderer in trying to persuade the jury to spare Boyde's life, and certainly not one that warrants comparing Boyde to that murderer." (*Id.*)

As with the cases petitioner has previously relied on to support his claim of ineffective assistance, *Boyde* is readily distinguishable factually from petitioner's situation. First, contrary to petitioner's assertion and the referee's finding, the evidence presented at the reference hearing (Dr. Morris's testimony) does not credibly establish petitioner was sexually molested by his mother. (See Respondent's Exceptions, pp. 69-74.) Furthermore, even if one were to assume petitioner was sexually abused as he claims, he openly conceded at the reference hearing that he was not offering the evidence of his sexual abuse by his mother as an explanation for his criminal conduct. Rather, it was being offered only for sympathy under Penal Code, section 190.3(k). (See RT 422.) Second, as with the evidence of his alleged sexual abuse by his mother, petitioner made no attempt to demonstrate how his "social history" mitigation explains his violent criminal conduct. Furthermore, there is no proof showing that petitioner, as compared to Boyde, was ever exposed to many of the matters contained in his social history, i.e., that his grandfather physically abused others and committed acts of sexual molestation; reports of mental illness of distant family members; the molestation of his cousins by Eddie Richardson. Third, there is absolutely no evidence that petitioner ever was subjected to the repeated, violent physical abuse such as that experienced by

Boyde. In fact the record is devoid of any evidence of physical abuse, in the same way that it is devoid of any evidence showing that petitioner wanted for anything in a material sense, such a food, clothing or shelter.

When compared to the mitigation evidence that counsel was on notice existed and that could have been developed in Boyde's case, petitioner's reference hearing mitigation evidence does not come remotely close to Boyde's in terms of quality and the weight the jury would have accorded it in reaching a penalty decision.

Finally, *In re Marquez*, *supra*, is immediately distinguishable from petitioner's case, in that Marquez's trial counsel failed to present any evidence at the penalty phase. (*In re Marquez*, *supra*, 1 Cal.4th at p. 594.) Accordingly, counsel's penalty phase argument was "brief." (*Ibid.*)

> The defense argument by Fred de la Pena began by stating: "Purposely we elected not to present evidence having to do with his family because we presented that at the guilt phase.[1/] There is nothing more that I could add." Defense counsel then reviewed the statutory factors, but he did not argue for viewing them in petitioner's favor. He viewed the absence of evidence of victim participation as aggravating, contrary to our decision in *People v. Davenport* (1985) 41 Cal.3d 247, 288-290 [221 Cal.Rptr. 794, 710 P.2d 861], which was not filed until after this case was tried. Counsel argued for life without possibility of parole, but his argument was not particularly forceful.

(*Ibid.*)

At Marquez's habeas reference hearing, the referee found that only one investigative trip was made in preparation for both phases of the trial.

> This trip was made by [counsel] de la Pena and investigator Mendoza and consumed eight days and seven nights. Five of those seven nights were spent in the El Presidente Chapultepec Hotel in a scenic suburb of Mexico City, one in the resort town of Patzcuaro between Mexico City and El Pilon [Marquez's hometown], and one in the vicinity of El Pilon.

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1. The family evidence consisted of alibi testimonies provided by Marquez's girlfriend, sister, and family physician from near his hometown in Mexico. (*Id.* at p. 600.)

> Only two days were spent in the El Pilon area investigating birth records and interviewing petitioner's family and doctor. They spent a total of 20 to 25 minutes at petitioner's home in El Pilon and interviewed petitioner's parents at a nearby hotel for an hour or two. De le Pena arranged for follow-up contacts with the parents by having Ana Maria Llamas, petitioner's sister in Los Angeles, call Elena, the sister in Los Reyes, who in turn would relay a message to the parents.

(*Id.* at pp. 595-596.) No other mitigation investigation was undertaken. (*Id.* at p. 596.) Additionally, de la Pena claimed that he failed to investigate mitigation evidence because "of his fear that an investigation might turn up aggravating evidence." (*Id.*)

At the reference hearing, Marquez presented mitigation evidence about his background and character through the testimonies of his parents and four siblings. (*Id.* at p. 601.) The referee found, and this Court concurred, that these witnesses were "credible" and their testimonies were "compelling." (*Id.* at p. 602.) Their testimonies focused on Marquez's "generosity, his consideration of others, and his capacity for hard work," "which could have provided the nucleus of a very strong case in mitigation of penalty." (*Id.*)

The above facts led this Court to conclude that counsel's performance was deficient, because he "had no knowledge of the available mitigating evidence." (*Id.* at p. 606.) And, though counsel attempted to justify his inadequate investigation because "he had encountered ominous signs, he was in no position to assess the admissibility or strength of any aggravating evidence." (*Id.*) Consequently, counsel's decision not to investigate what mitigating evidence might exist and to "offer nothing in mitigation" could not be justified as an informed tactical choice. (*Id.*) Unlike Marquez's counsel, petitioner's trial counsel did investigate and present mitigating evidence.[2/]

With regard to prejudice resulting from Marquez's counsel's deficient

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2. Nor did counsel treat their mitigation phase investigation as an opportunity for a personal vacation at a foreign resort at public expense.

performance, this Court noted that it had considered a similar situation in *People v. Durham* (1969) 70 Cal.2d 171, 191-192, where it "rejected a claim that the failure to present mitigating evidence conclusively proved inadequate representation" because Durham "failed to point to any specific mitigating evidence that counsel could have presented," and "counsel cross-examined the People's penalty phase witnesses and presented a well-reasoned argument to the jury based upon the evidence presented at the guilt phase." (*In re Marquez*, *supra*, 1 Cal.4th at p. 606.) However, in Marquez's case, this Court found prejudice because the mitigating evidence presented on habeas corpus "was substantial, and not cumulative to any evidence offered at trial." (*Id.* at p. 609.) It would have given the jury, "for the first time, a description of [Marquez's] childhood and adolescence growing up in the village of El Pilon, and put before the jury the positive aspects of his character." (*Id.*) It also would have shown "that his family, relatives and neighbors believe in him and are willing to travel from Mexico to testify on his behalf." (*Id.*) When weighed against the "relatively spare [sic] aggravating evidence" this Court thought it reasonably probable that the jury would have returned with a verdict of LWOP. (*Id.*) "We cannot put confidence in the verdict of a jury that decided the case without hearing the substantial mitigating evidence that competent counsel could and should have presented." (*Id.*)

Curiously, the type of mitigating evidence this Court found to be compelling in *Marquez* is similar to that presented by petitioner's counsel, and which he now complains counsel was ineffective for presenting. (See *People v. Crew* (2003) 31 Cal.4th 822, 832-834 [petitioner's lack of prior felony convictions, the absence of any physical abuse suffered by him, the negative emotional impact his parents' divorce had on him, his outstanding military service, his care and concern for friends who suffered from alcohol and substance abuse problems, his positive relationship with Emily Bates,

petitioner's provision of financial support for Kathy Harper when she was destitute, petitioner's potential for positive adjustment to prison, and the fact that petitioner cared for his grandmother for several months while she was in ill health]; see also Trial RT 5176-5177 [". . . I was certainly impressed by the defense's presentation in the penalty phase. . . I was impressed by the evidence aduced [*sic*] by the defense in connection with determining the penalty to be imposed."].) It is only now, after counsel's approach ultimately proved unsuccessful, that petitioner complains that counsel should have adopted a different mitigation theory, one offering a much less favorable spin on his background. This is just the type of "Monday morning quarterbacking" that *Strickland v. Washington* (1984) 466 U.S. 668, cautions against. (*Id.* at p 689 ["A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."].)

Accordingly, petitioner was not prejudiced by trial counsel's failure to present the mitigation case he now claims they should have presented.

III.

PETITIONER HAS FAILED TO DEMONSTRATE AN ENTITLEMENT TO DISCLOSURE OF THE REMARKS MADE TO JUDGE WALSH WHICH CAUSED HIM TO RECUSE HIMSELF AS REFEREE

On March 22, 2006, Judge Brian C. Walsh recused himself from serving as referee because he had received "an inadvertent disclosure concerning this case." (Petition for Review, Supreme Court No. S143693, Attachment A.) This disclosure was made by a fellow judge who, as a former Santa Clara County Deputy District Attorney, had some involvement in petitioner's case. (*Ibid.*) Accordingly, Judge Walsh decided his recusal was required "in the

interest of justice." (*Ibid.*)

In a letter dated March 27, 2006, petitioner's counsel asked Judge Walsh to set a hearing at which he would "disclose the basis for the disqualification and provide the parties an opportunity to waive the disqualification, as provided by the applicable statutes." (Response to Motion for Discovery of Information Provided by Ex-Prosecutor that Resulted in Referee's Recusal; Memorandum of Points and Authorities (hereafter Response to Motion for Discovery), Exh. 1.) Petitioner's counsel concomitantly wrote a letter to Judge James Emerson asking that, "before the case is reassigned to another judge," Judge Walsh be given the opportunity to rule on the request made of him in counsel's March 27, 2006. (Response to Motion for Discovery, Exh. 2.)

Judge Walsh denied petitioner's March 27, 2006 request in a letter dated April 26, 2006. (Petition for Review, Attachment B.)

On May 2, 2006, petitioner filed a motion for disclosure of the basis of Judge Walsh's recusal in the superior court.

On May 8, 2006, petitioner filed a petition for writ of mandate in the Court of Appeal, Sixth Appellate District, asking that Judge Walsh's disqualification order be vacated. The petition was denied on May 19, 2006. Petitioner then petitioned for review of that denial in this Court on May 24, 2006. His petition for review was denied on June 14, 2006.

On May 31, 2006, Judge Emerson heard petitioner's motion for disclosure and denied it, stating: ". . . as reasons for the denial of that motion I will cite the denial of the writ by the Sixth District on May 19th, and also the fact that you sought review by the Supreme Court and I believe that they would be the appropriate court to order this case [sic] to engage further inquiry as to Judge Walsh's reasons."

On September 13, 2006, this Court vacated Judge Walsh's appointment and appointed Judge Andrea Y. Bryan as referee.

Petitioner next filed a Motion for Discovery of Information Provided by Ex-Prosecutor that Resulted in Referee's Recusal, which was argued on March 19, 2007, and taken under submission. On March 26, 2007, Judge Bryan entered an order denying petitioner's motion stating, "If the disclosure (which was of such significance that it caused Judge Walsh to recuse himself) was in substance favorable to the accused, then it probably also rises to the level of *Brady* material and should be disclosed to Petitioner." (Order, March 27, 2007, at p. 2; see also *Brady v. Maryland* (1963) 373 U.S. 83.) However, because *Brady's* due process requirements are "self-executing" and neither Judge Walsh nor the judge who made the inadvertent disclosure to him voluntarily disclosed the information that led to Judge Walsh's recusal, "we must conclude that the information was not *Brady* material." (Order, March 27, 2007, at p. 2.)

Petitioner claims he is entitled to know the specific details of the conversation between Judge Walsh and the still undisclosed judge, citing as authority for this sweeping proposition *Brady v. Maryland*, *ante*, and its progeny, which require the prosecution, as a matter or due process, to disclose material evidence in its possession that is favorable to an accused on the issues of either guilt or punishment, even if not specifically requested by the defense. (See *Brady v. Maryland*, *supra*, at p. 87; accord *Kyles v. Whitley* (1995) 514 U.S. 419, 432.) How petitioner makes the quantum leap from Judge Walsh's on-the-record reason for recusing himself to the explicit assertion that the conversation with his fellow judge must have involved *Brady*-type information is both unexplained and unwarranted. Information that was adverse to petitioner would also be material to a recusal decision and provides an equally plausible explanation for Judge Walsh's action. Absent articulation of a rational basis for what can only be described as a gross and unsupported assumption that the judges' conversation involved *Brady* material, petitioner's request lacks both foundation and precedential authority. (See generally Civ.

Proc. Code, § 170.1, subd. (a)(6).)

This Court should not entertain petitioner's invitation to indulge in such gross speculation that a sitting judge is unaware of the obligations *Brady* imposes and would fail to fulfill those obligations.

CONCLUSION

Based on the foregoing, as well as for all the reasons set forth in Respondent's Exceptions to Referee's Findings of Fact and Brief on the Merits, the petition for writ of habeas corpus and petitioner's request for remand for disclosure of the contents of the communication resulting in Judge Walsh's recusal should be denied.

Dated: May 29, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Mark Christopher Crew** No.: **S107856**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **May 30, 2008**, I served the attached **RESPONSE TO PETITIONER'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 30, 2008**, at San Francisco, California.

Gloria J. Milina
Declarant

Signature

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