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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARK CHRISTOPHER CREW,	)	No. S107856
	)	
Petitioner,	)	
	)	
On Habeas Corpus.	)	**CAPITAL CASE**
	)	
	)	

Santa Clara County Superior Court No. 101400
The Honorable Andrea Y. Bryan, Referee

PETITIONER'S OPPOSITION TO MOTION FOR CLARIFICATION OF THE REFERENCE QUESTIONS

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I.
INTRODUCTION

This Court appointed a referee to make findings of fact on seven questions related to petitioner's claim that his trial attorneys rendered ineffective assistance of counsel at the penalty phase of his capital trial. These reference questions were posed by the Court on October 12, 2005, when the hearing was originally ordered, and again, when the current referee was appointed almost a year ago, on September 13, 2006. The hearing is scheduled to begin on September 10, 2007. Now, less than two months before the hearing – after witness lists and exhibit lists have been exchanged, direct examination declarations of petitioner's experts have been served, subpoenas have been issued, and a joint statement of undisputed facts has been filed – respondent wants to change the questions. Remarkably, respondent seeks to maintain strict time parameters on petitioner's evidence – limiting the mitigating evidence that petitioner can present based on what would have been available at the time of trial – but requests that he be permitted to rebut this mitigation with "any and all

relevant evidence," whether or not it would have been obtained or available at that time.

The proposed modification of the reference questions in order to allow respondent – but not petitioner – to use "hindsight," as respondent puts it, would not only disrupt the current proceedings by changing the rules relied on by the parties and the referee, but would be completely at odds with well-established principles for litigating ineffective assistance of counsel claims. The motion should therefore be denied.

II.

BACKGROUND

Petitioner intends to prove the allegations raised in his habeas petition – that trial counsel did not begin to prepare for the penalty phase until mere weeks before that phase of the trial began, and did no investigation of petitioner's social history whatsoever. Petitioner will also show that had trial counsel conducted such an investigation, they would have uncovered evidence that petitioner was sexually abused by his mother, sexually exploited by his grandfather, and as a result of his sexual victimization and family history, he suffered from symptoms of depression, his self-esteem was destroyed, he became addicted to drugs and alcohol at an early age, and endured other mental health problems. Petitioner will present the testimony of two mental health experts at the hearing, each of whom has been directed by petitioner to rely on the resources and research that would have been available at the time of petitioner's trial in 1989. (See Habeas Petition, Exhibits 4 & 5.)

Respondent seeks to have his expert, Daniel Martell, Ph.D., conduct a full psychodiagnostic evaluation of petitioner, to assess petitioner's current mental state and to utilize psychological tests to determine the

nature and extent of any diagnosable disorders from which petitioner may be suffering. As respondent has conceded, however, Dr. Martell intends to rely on testing instruments that were not available at the time of trial. Indeed, it is undisputed that "[i]n 1989, personality tests and trauma symptom measures like those proposed by Dr. Martell were not available to reliably assess childhood sexual abuse suffered by adults and its psychological impact." (Petitioner's Opposition to Respondent's Motion, at p. 13, attached as Exhibit 2 to Respondent's Motion for Clarification.)

Not only were the psychological tests proposed by respondent not available at the time of petitioner's trial, but in Santa Clara County at that time – and subsequently – prosecutors relied on cross-examining defense experts or presenting their own expert in rebuttal without conducting their own independent mental health evaluations of capital defendants. As petitioner detailed in pleadings below, and respondent has now acknowledged – there are *no* Santa Clara County cases in which the prosecution obtained an evaluation of a capital defendant by its own expert and presented that expert in rebuttal at the penalty phase.[1]

Petitioner's trial is a case in point. As late as the opening statements at the penalty phase, petitioner's trial counsel was considering the presentation of mental health expert testimony. Counsel stated to the judge

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[1] Respondent's original motion to have Dr. Martell conduct an evaluation was denied on March 19, 2007. As respondent notes, the referee denied the motion without prejudice, and held it would permit a renewed motion if respondent could identify one Santa Clara County capital case in which the prosecution had sought to have its own expert evaluate the defendant. It is unclear why respondent waited until June 11, 2007, to renew its motion (with a hearing on the motion to be held on July 16, 2007) given that respondent acknowledged there were no such Santa Clara cases. The renewed motion was denied on July 16, 2007.

and prosecutor: "as to psychiatric evidence . . . I haven't decided yet. I quite frankly have two people that I may or may not call. I want to take a look at what happens at the end of the case." (RT 4706.) Despite this indication that mental health evidence could be put at issue – it ultimately was not – there was no suggestion that the prosecutor contemplated much less sought to have defendant examined by his own experts.

III

THIS COURT'S REFERENCE QUESTIONS ARE BASED ON LONG-STANDING PRECEDENT WHICH DEFINES THE SCOPE OF THE EVIDENTIARY HEARING

In litigating claims of ineffective assistance, counsel's performance is measured against an "objective standard of reasonableness" and "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In judging counsel's performance, "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made. . . ." (*Id.* at p. 689.) Thus, the standard of reasonableness is "applied as if one stood in counsel's shoes." (*Rompilla v. Beard* (2005) 545 U.S. 374, 381.) As this Court has recognized, "[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." (*In re Andrews* (2002) 28 Cal.4th 1234, 1253.) For example, trial counsel cannot be faulted for failing to present evidence that was not obtainable. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1265-1270 [reasonable investigation by trial counsel would not have led to the discovery of the witnesses upon whom petitioner now relies]; see also *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1080 [ineffective assistance of counsel claim must be based on tests and

information that were available at the time of the trial].)

The prejudice inquiry necessarily looks at what the jury would have done if it had been presented with the evidence that counsel should have obtained. This is precisely how the United States Supreme Court analyzed prejudice in *Wiggins v. Smith* (2003) 539 U.S. 510: "We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." (*Id.* at p. 536.) The prejudice determination, thus requires the court to "'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" (*In re Lucas* (2004) 33 Cal.4th 682, 733, quoting *Wiggins v. Smith*, supra, 539 U.S. at p. 534.) The question is whether "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability." (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 538, quoting *Williams v. Taylor* (2000) 529 U.S. 362, 398.) Prejudice is found where "'at least one juror would have struck a different balance.'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 690, quoting *Wiggins v. Smith*, *supra*, 539 U.S. at p. 537.)

This Court, in its recent opinion in *In re Hardy*, reiterated that:

> [i]n a habeas corpus petition alleging trial counsel's investigation or presentation of evidence was incompetent, "the petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different." (*In re Fields* (1990) 51 Cal.3d 1063, 1071.) After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial (*In re Thomas*, supra, 37 Cal.4th at p. 1265), can we conclude petitioner

> has shown prejudice? That is, has he shown a probability of prejudice "sufficient to undermine confidence in the outcome"? (*Strickland*, supra, 466 U.S. at p. 694; *In re Thomas*, at p. 1256.)

(*In re Hardy* (July 26, 2007, S022153 & S093694) __ Cal.4th __ [p. 65].)

In challenging a claim of ineffective assistance, therefore, respondent cannot utilize evidence that the prosecution would not have obtained and the jury never would have considered. Limiting petitioner to presenting only evidence available at trial but allowing respondent to test the strength of this evidence with post-trial resources, tools and information would severely skew the lower court's findings and this Court's ultimate holding on trial counsel's effectiveness. An accurate assessment of prejudice can only be made by considering, as stated in *Hardy*, *supra*, what the trial would have been like if petitioner had been competently represented. This requires, here, that the evidence of petitioner's abusive upbringing and its impact be tested against evidence that the prosecution would have presented at the time of trial. This is reflected in the reference question which asks "was" – not "is" the available mitigating evidence credible, as well as the question which asks what evidence "would likely have been presented in rebuttal . . . ."[2]

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[2] The questions ordered in this case are similar to those in other reference hearings involving ineffective assistance of counsel, all of which imply an assessment based on available evidence at the time of trial. See, e.g., *In re Lucas*, S050142, Reference Order ["What Additional Information would an Adequate Investigation have Disclosed? . . . What Rebuttal Evidence Reasonably would have been Available to the Prosecution?"]; *In re Andrews*, S017657, Reference Order [What Mitigating Character & Background Evidence Could have Been, But Was Not, Presented by Petnr's Trial Attys At His Penalty Trial? . . . What Evidence Damaging to Petnr, But

The sole authority for respondent's radical view that these questions should be changed so that he can use "any and all relevant evidence, whether or not it was in existence in 1989" (Motion, at p. 8) is a strained analogy to the United States Supreme Court case of *Lockhart v. Fretwell* (1993) 506 U.S. 364. However, as the Supreme Court itself has made clear, *Fretwell* did not modify or supplant *Strickland.* (See *Williams v. Taylor* (2000) 529 U.S. 362, 392.) In *Williams,* the Court held that the Virginia Supreme Court unreasonably applied *Fretwell* in the precise way that respondent argues it should be applied here – as a basis for rejecting the outcome-determinative finding that there was a reasonable probability that but for counsel's failure to discover and present mitigating evidence the result of the defendant's penalty phase would have been different. (*Id.* at pp. 371, 392, 395.) If this were not clear enough, Justice O'Connor's concurring opinion in *Fretwell,* stressed that the case was unusual and that the decision "will, in the vast majority of cases" have no effect on the *Strickland* inquiry. (*Lockhart v. Fretwell, supra*, 506 U.S. at p. 373, O'Connor, J., concurring.) As Justice O'Connor explained, *Fretwell* was a "narrow holding" that "the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." (*Id.)* Endorsing Justice O'Connor's view, the Supreme Court in *Williams* held that *Fretwell* does

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not Presented by the Prosecution At the Guilt or Penalty Trials, would Likely have been Presented"]; *In re Thomas*, S063274, Reference Order ["If [counsel] could have contacted these potential witnesses, what information would they have provided? Would they have testified at petitioner's trial and, if so, to what effect?"]. (These orders can be found on the docket sheets of the respective cases at: http://appellatecases.courtinfo.ca.gov.)

"not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him. [footnote omitted]." (*Williams v. Taylor*, *supra*, 529 U.S. at p. 393.) And in *Williams*, as in petitioner's case, "it is undisputed that [the defendant] had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." (*Id.*)

Petitioner is not aware of any case, and respondent cites none, in which *Fretwell* has been applied to allow the State to rely on procedures and information that would not have been relied on at trial to rebut the credibility of mitigating evidence that could have been presented at that time. And as explained above, *Williams* forecloses such an application.

IV.

A CHANGE IN THE REFERENCE QUESTIONS WOULD DISRUPT THE PROCEEDINGS

Petitioner's counsel has reasonably relied on this Court's reference questions – in the context of well-established precedent – in preparing for the evidentiary hearing which is scheduled to begin on September 10, 2007. Petitioner intends to present substantial evidence that was available at the time of trial to prove his allegations, and has disregarded additional information and research which post-date the trial that would have further substantiated his claims.

If respondent is now permitted to use any and all evidence to challenge petitioner's claim, it would likely require another postponement

of the hearing.[3] Even assuming Dr. Martell is able to conduct an evaluation in an expeditious manner, petitioner would need time to evaluate the testing done by Martell - - perhaps do his own testing and utilize more current resources which support petitioner's allegations in order to rebut Martell's findings. Respondent should not be permitted to disrupt the proceedings at this late stage[4] by obtaining a change in the very questions upon which petitioner has reasonably relied in developing his case.

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[3] As this Court is aware, a September 2006 hearing date in this case was abruptly vacated after the first court-appointed referee recused himself because a former prosecutor – and now Superior Court Judge – discussed the case with him.

[4] Nowhere in respondent's return to the order to show cause is there any allegation or contention that petitioner's proffered mental health testimony is not credible. Respondent instead argued that such evidence – even if true – would have been viewed unfavorably by the jury and would not have made a difference in the outcome of the trial. (Return, at pp. 6-8.)

V.

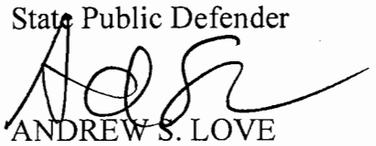
CONCLUSION

Based on the foregoing, respondent's motion to modify the reference questions so that his expert may conduct an evaluation of petitioner using tests that were not available at the time of trial should be denied.

Dated: July 30, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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DECLARATION OF SERVICE

Re: In re Mark Christopher Crew, S107856

I, Glenice Fuller, am a citizen of the United States. My business address is: 221 Main Street, San Francisco, CA 94105. I am employed in the City and County of San Francisco where this mailing occurs; I am over the age of 18 years and not a party to the within cause. I served the within document:

PETITIONER'S OPPOSITION TO MOTION FOR CLARIFICATION OF THE REFERENCE QUESTIONS

on the following named person(s) by placing a true copy thereof enclosed in an envelope addressed as follows:

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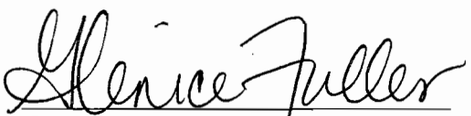
and causing said envelope to be sealed and deposited in the United States mail, with postage thereon fully prepaid, at San Francisco.

I declare under penalty of perjury that service was effected on July 30, 2007, at San Francisco, California and that this declaration was executed on July 30, 2007, at San Francisco, California.



GLENICE FULLER