IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S OPPOSITION TO RESPONDENT'S EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS

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I. THE REFEREE'S FINDING THAT CREW WAS SEXUALLY ABUSED IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Petitioner Is Not Required to "Prove" Sexual Abuse to Establish Ineffective Assistance of Counsel

At the evidentiary hearing, respondent challenged only petitioner's evidence of sexual abuse, leaving the remainder of the wealth of mitigating evidence unrebutted. The Referee found "no reason to doubt the veracity of any of the [mitigating] evidence that was presented and accepts the evidence as valid." (Findings of Fact, p. 16.) This included not only disputed evidence that Mr. Crew was molested by his mother, but also the uncontroverted evidence of a family history of sexual abuse, mental illness, alcoholism and depression, Mr. Crew's long-term substance abuse and other mental health symptoms, the sexual exploitation of him by his grandfather, and his exposure to the damaging influence of his father, brother and son of a family friend. Respondent continues to focus on the

evidence of sexual abuse, arguing that petitioner's entire case fails because he did not "prove" he had in fact been sexually abused by his mother and that the Referee's findings that the evidence of sexual abuse was credible should be rejected because the Referee placed unreasonable limitations on its rebuttal case.

As will be explained below, there was substantial evidence to support the Referee's finding that Mr. Crew was sexually abused and the court's rulings were uniformly proper. Preliminarily, however, petitioner disputes respondent's premise that he must prove that he was sexually abused by his mother in order to prevail on his ineffective assistance of counsel claim. (Respondent's Exceptions & Merits Brief, p. 52.) Respondent's assertion reveals a fundamental misconception of the nature and scope of mitigating evidence. Petitioner does not have to prove he was sexually abused, but only that the mitigating evidence he presented – of which sexual abuse was one aspect – "'might well have influenced the jury's appraisal' of [the defendant's] moral culpability." (*Wiggins v. Smith* (2003) 539 U.S. 510, 538, quoting *Williams v. Taylor* (2000) 529 U.S. 362, 398.)

Unlike the guilt determination, the jury's assessment of mitigating circumstances is inherently "'normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Bell* (2007) 40 Cal.4th 582, 620, quoting *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Put differently, "[b]ecause the determination of penalty is essentially moral and normative (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779), and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion." (*People v. Hayes* (1990) 52 Cal.3d 577, 643, citing *People v. Williams* (1988) 44 Cal.3d 883, 960.)

Thus, petitioner does not have to "prove" that he was abused by his mother for evidence of sexual abuse to be considered credible evidence that should have been presented at the penalty phase. As the cases below make clear, evidence far more equivocal than that provided here has been found to constitute compelling mitigating evidence.

As the United States Supreme Court has long held, the sentencer cannot be precluded from considering "'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." (*Tennard v. Dretke* (2004) 542 U.S. 274, 285 [citations omitted].) More recently, in *Abdul-Kabir v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1654, the Supreme Court reversed the death sentence because the jury was not provided a vehicle for expressing a reasoned moral response to mitigating evidence which included "*possible* neurological damage." (*Id.* at p. 1670, italics added.)

In *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, the Ninth Circuit granted relief on a claim of ineffective assistance of counsel after an evidentiary hearing at which the petitioner presented the testimony of experts "that, among other things, Silva . . . *may* suffer from organic brain disorders resulting from Fetal Alcohol Syndrome; that he *likely* suffers from Post-Traumatic Stress Disorder . . . and that at the time of the crime, he was *probably* suffering from amphetamine-induced organic mental disorders and withdrawal symptoms." (*Id.* at p. 847, fn. 17, italics added; see also *Frierson v. Woodford* (9th Cir. 2006) 463 F.3d 982, 993-994 [prejudice prong of penalty phase ineffective assistance established where jury was never presented with evidence that Frierson suffered multiple severe brain

injuries as a child that "may have resulted in organic brain dysfunction; that Frierson suffered from a learning disability, low intelligence, and may have been borderline mentally retarded"]; *Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482 [counsel ineffective because evidence would have shown Hamblin's unstable and deprived childhood and that he likely suffered from a mental disability or disorder].)

The mitigating evidence in these cases was not discounted because there was not absolute proof of brain damage or mental illness. Similarly, petitioner need not prove that he was molested by his mother, only that there was available and credible evidence of the likelihood of abuse. As explained below – and as the Referee found – the evidence presented by petitioner more than satisfied this threshold.

B. Dr. Morris's Expert Opinion That Crew Was Abused by His Mother Was Based on Substantial Evidence

Mr. Crew reported to Dr. Morris that from his earliest memories and continuing for many years, his mother brought him into her bed during the frequent times when Crew's father was absent. She placed his wrist between her legs or draped her body over him and straddled one of his legs, and then rubbed or pushed against him repeatedly. When she was finished, she hugged him and held him close to her. Crew recalled many nights waking with his hand asleep under his mother but not wanting to move it for fear of disturbing her. (Morris Declaration, p. 30.)

When Crew was a child, approximately 6 or 7 years old, his mother often got into the bathtub with him when he was taking a bath, holding him sideways so his hip bone was between her legs and holding him close. Crew also recalled that when he took a bath, his mother often sat on the toilet and after urinating had Crew take the toilet paper and wipe her with it.

(*Ibid.*)[1]

Dr. Morris, an expert in evaluating perpetrators and survivors of childhood trauma and sexual abuse, credibly explained why the sexual abuse Crew described was believable. (Morris Declaration, pp. 7-11.) Dr. Morris testified that the details of Crew's experiences, as well as his demeanor and affect, were consistent with those of victims who have suffered the type of abuse he described. In addition, while the details Crew provided of the abuse, and his feelings and reactions to it, were consistent with those of other male victims of sexual abuse, they contained many unique characteristics which were unlikely to have been fabricated. (*Id.* at p. 8.) Dr. Morris testified that Crew's "presentation to me was consistent with what I have seen personally as a clinician with individuals who have gone through mother-son incest cases." (RT 157.) In addition, the fact that Crew had not disclosed his sexual abuse history previously in no way cast doubt on the credibility of the evidence. Both Dr. Morris and respondent's expert agreed that men are typically very reluctant to disclose that they have been sexually abused. (RT 148, 151-152, 414, 416.)

Also lending credence to Crew's reports of abuse was the consistency between Crew's sexual, emotional and behavioral patterns and problems, and those experienced by male victims of sexual abuse. According to Dr. Morris, "[t]hese included interpersonal relationship problems, compulsive sexual behavior and confusion about sexual matters, self-destructive thoughts and behavior, substance abuse, poor self-esteem, shame, depression, and sleep disturbances." (Morris Declaration, p. 9.)

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[1] While not conceding these incidents occurred, respondent's expert agreed that such incidents would constitute sexual abuse. (RT 432.)

While, contrary to respondent's characterization, Dr. Morris did not testify that these symptoms necessarily meant that Crew was sexually abused – by his mother or anyone else – he explained that such symptoms *often* arise in men who have been sexually abused. (*Id.* at pp. 6, 9, 40.)

Dr. Morris's conclusion that Crew was sexually abused was not based solely on self-reporting. As he testified:

> Mark Crew's family exhibited at least three major factors that are commonly found in families where mother-son incest has occurred, including: (a) marital difficulties, where the father was physically and emotionally absent, providing not only the opportunity for the mother to engage in such conduct but creating a vacuum for the mother's emotional and sexual needs; (b) a mother who was depressed and socially withdrawn; and (c) a family history of sexual and physical abuse, including a mother who was herself a victim of childhood sexual abuse.

(Morris Declaration, p. 9.)

Other evidence supporting Dr. Morris's conclusions include a noteworthy incident in which Crew's attorney, Joseph Morehead, observed Crew's mother sitting on Crew's lap while they visited together in a jury room during trial. (RT 215-216.) In addition, Crew's former girlfriend and his first wife both described the unusual relationship between Crew and his mother. Emily Vander Pauwert testified that Crew cried often when he talked about his mother. (RT 313.) When Vander Pauwert tried to get Crew to tell her what had happened between them, Crew replied that he "felt rejected" by her and admitted that they had an "abusive relationship," although he never specified whether it was physical, sexual or emotional abuse. (RT 326.) Vander Pauwert met Crew's mother one time, and

observed that she was very "distant and cold" toward her son, which Vander Pauwert thought was unusual because they had not seen each other for quite awhile. (RT 314.)

Patricia Silva, Crew's first wife, was married to Crew when he was in the Army. They lived in Georgia when Crew's mother and husband lived in South Carolina, and they had occasion to visit together. (RT 339.) Silva testified that Crew would get frustrated with his mother, and was agitated around her. Silva observed that Crew's mother "would go from treating him like a baby, you know, to smothering him, and babying him, to being very harsh towards him, and very critical. And that would frustrate him." (*Ibid.*)

At the hearing, respondent unsuccessfully attempted to rebut Dr. Morris's testimony based on the failure to perform any psychological testing on Crew and the fact that Dr. Morris did not render a psychiatric diagnosis. As Dr. Morris credibly explained, the psychological tests available at the time of Crew's trial were only used in sexual abuse cases for clinical purposes. (RT 124-128.) Dr. Morris pointed out that one problem with using such tests in criminal cases was that they were not standardized on a prison population. (RT 124.) Dr. Morris stated unequivocally that there were no psychological tests used at the time of Crew's trial in a forensic setting to assess whether or not a person had actually been sexually abused. (RT 151.) None of these points were rebutted by respondent.

Respondent questioned why Dr. Morris did not provide a diagnosis of Crew under the Diagnostic and Statistical Manual (DSM). (RT 128-131.) Dr. Morris testified that consistent with the stated purpose of the DSM, he only renders a DSM diagnosis in clinical cases, unless ordered to

do so. (RT 130.) Furthermore, as Dr. Morris explained, there is no diagnostic category in the DSM for child abuse victims, and abuse victims generally do not fit into any one specific DSM diagnosis. (RT 151.) Again, Dr. Morris's statements were unrebutted by respondent.

Respondent also suggested that an expert would not have inquired whether Crew was a victim of sexual abuse because, based on the literature available at the time of trial, mother-son incest was a rarely reported and researched phenomenon. (RT 413.) This contention was completely undermined by the fact that in 1989, Dr. Morris published *Males at Risk*, a compilation of the existing research on male victims of childhood sexual abuse, as well as therapeutic methods for treating male victims. (RT 119-121.) Tellingly, respondent's expert, Dr. Martell did not discuss Dr. Morris's book in his discussion of the existing literature.

Dr. Morris agreed that the reason for publishing this book was the "relative dearth" of information about male sexual abuse at the time, particularly with regard to abuse perpetrated by females. (RT 121.) He pointed out, however, that although it was published in 1989, the book was written over the preceding 18 months, and was based on existing research of male victims of sexual abuse. (RT 151.) Dr. Morris pointed to several pre-1989 studies which involved sexual abuse of males by females. (RT 132-136.) While respondent's expert, Dr. Martell, testified that there was little in the way of literature regarding mother-son incest, he did not render an opinion about the state of the literature of male victims of sexual abuse generally, or even of male victims of sexual abuse by female perpetrators, because he limited his review to mother-son incest literature. (RT 455.).

Thus, Dr. Martell's testimony in no way disputed Dr. Morris's assertion that:

> It was well established in 1989, that the initial effects on males who were sexually abused as children often include emotional and psychological distress (e.g., fear, anger, depression, guilt and shame, self-esteem problems, suicidality, sleep disturbances, dependency), behavior problems (including substance abuse) and sexualized behavior. For many male sexual abuse victims these initial effects persist and produce a number of long-term effects such as self-esteem problems, relationship problems, depression, addictions, concerns about sexuality, sexual dissatisfaction, and compulsive sexual activities.

(Morris Declaration, p. 6.)

Respondent finds it significant that when Dr. Morris was retained by habeas counsel it was intimated to him that petitioner had been sexually abused. (Respondent's Exceptions and Brief on Merits, p. 50, citing RT 117-118.) Dr. Morris was not "specifically told" that Crew had been sexually abused or provided any details of the abuse. (RT 118.) Of course, because Dr. Morris is an expert in sexual abuse he would not have been contacted unless there was some indication that the client had been abused. Respondent fails to explain how the intimation of sexual abuse impacted the validity of Dr. Morris's expert opinion.

Here, as at the hearing, respondent fails to establish that the evidence that Crew was abused by his mother was anything less than substantial.

C. Respondent Was Not Entitled to Conduct an Independent Psychological Evaluation of Petitioner Using Instruments That Were Not Available At the Time of Trial

The Referee denied respondent's motion to have its expert conduct a psychodiagnostic evaluation of Crew because respondent's expert intended to rely on testing instruments that were not available at the time of trial and

because respondent was unable to demonstrate that Santa Clara County prosecutors had ever sought an independent mental health evaluation of a capital defendant. The Referee's ruling was proper.

Respondent does not dispute Dr. Morris's testimony that at the time of Crew's trial there were no psychological tests in use in a forensic setting to assess whether or not a person had been sexually abused. (RT 151.) Nor does respondent attempt to argue that the psychological tests it sought to use were available at the time of petitioner's trial. Nevertheless, respondent insists that it be permitted to use currently available testing instruments in order to establish whether or not petitioner had actually been sexually abused. This position reflects a misunderstanding of the relevant factual question, which is whether credible evidence of abuse could have been presented at the time of trial, and not whether it can be determined that Crew was in fact abused based on current testing instruments.

In addition, as respondent concedes, there were *no* Santa Clara County cases in which the prosecution obtained an evaluation of a capital defendant by its own expert and presented the testimony of that expert in rebuttal at the penalty phase. (Respondent's Exceptions and Brief on Merits, p. 49.) Petitioner's trial is a case in point. As late as the opening statements at the penalty phase, petitioner's trial counsel stated that they were considering the presentation of mental health expert testimony. Counsel stated to the judge 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." (Trial 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 petitioner examined by his own

experts.

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.)

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* (2007) 41 Cal.4th 977, 1025.)

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 the time of trial but allowing respondent to test the strength of this evidence with post-trial resources and tools would have severely skewed the Referee'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 . . . ."

Respondent acknowledged this fundamental flaw in its argument when it filed a motion with this Court to *change* the relevant reference question to "is" the mitigating evidence credible in order to permit Dr. Martell to conduct an evaluation of petitioner using tests that were not available at the time of trial. (Motion for the Clarification of Reference Questions, filed July 24, 2007.) The motion – which respondent does not mention in its Exceptions and Brief on the Merits – was denied by this Court on August 29, 2007.[2]

The Referee's denial of respondent's request to have their expert conduct an evaluation of petitioner using testing instruments that were not available at the time of trial was consistent with this Court's refusal to modify the reference question and therefore proper.

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[2] Respondent now states that the Referee should have at least permitted Dr. Martell to evaluate petitioner using only those resources available at the time of trial. (Respondent's Exceptions and Brief on Merits, p. 54, fn. 23.) Respondent never previously requested that it be permitted to conduct such an evaluation, and Dr. Martell specifically stated that he could only render an expert opinion "concerning the mental health issues" raised in this case by conducting a full psychodiagnostic evaluation utilizing currently available testing instruments. (Respondent's Renewed Motion For Permission to Conduct Psychodiagnositc Evaluation of Petitioner, Exhibit B.)

D. The Referee Did Not Abuse Her Discretion in Denying Respondent's Request to Call Petitioner As A Witness

Respondent contends that the Referee erred in rejecting its request to call petitioner as a witness at the evidentiary hearing, arguing that petitioner's testimony was necessary in order for the Referee to determine whether or not petitioner had in fact been molested by his mother. (Respondent's Opposition to Petitioner's Motion to Preclude Petitioner from Testifying as a Witness, pp. 1-2.) Again, respondent misconstrues the nature of the proceedings in this case, which were restricted to what mitigating evidence would have been available to trial counsel. Petitioner's testimony was simply not relevant to this question.

Petitioner would not have been called as a witness at trial to either support or rebut petitioner's mitigation case. At no time has petitioner ever asserted that trial counsel should have called him as a witness. Nor is there any question that the prosecution could have called him as a witness at the penalty phase since he had the right to rely on his Fifth Amendment privilege at the penalty phase just as he did at the guilt phase. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1424-1425; *Estelle v. Smith* (1981) 451 U.S. 454, 462-463.) Respondent, therefore, was not entitled to call petitioner at the evidentiary hearing to test the strength of the mitigation case that would have been presented at trial. (*In re Andrews, supra,* 28 Cal.4th at p. 1253; *In re Thomas, supra,* 37 Cal.4th at pp. 1265-1270; *In re Fields* (1990) 51 Cal.3d 1063, 1071.)

Respondent argues that petitioner was required to testify to reveal to whom he first disclosed that he had been sexually abused as a child. According to respondent, evidence of the disclosure was of "extreme importance" in evaluating the veracity of his claim. (Respondent's

Exceptions and Merits Brief, p. 56.) The importance of this point is belied by the fact that the subject was explored on cross-examination with Dr. Morris with no discernible impact on his opinions, or on the credibility of petitioner's allegation. (RT 118.) Indeed, respondent's own expert, Dr. Martell, offered no opinion on the importance of this fact in assessing an expert's opinion on the existence of sexual abuse.

Since petitioner conceded that he did not inform trial counsel, trial counsel's investigator or the mental health expert who interviewed him that his mother sexually molested him or that he was subject to any sexual abuse, there was no need to question him on this point. (Joint Statement of Undisputed Facts, p. 10.) Respondent nevertheless asserts that it would have been important to question petitioner as to why he did not disclose the abuse prior to trial. This question was fully answered by the testimony of the trial team: Crew was not asked about whether he was abused and was not informed that such information was even significant to his defense at the penalty phase.

Crew's attorney, Joseph O'Sullivan's explanation to him of the scope of mitigating evidence consisted of reading to Crew the "applicable code sections." O'Sullivan did not specifically ask Crew whether he was mistreated as a child. (RT 268.) Attorney Morehead's discussions with Crew related to the penalty phase focused on positive aspects of his life, particularly his adult life, "to the exclusion" of potentially negative aspects of his childhood. (RT 228-229.) John Murphy, the investigator, did not interview Crew regarding his family life and childhood. (RT 257.)

Dr. Phillips, the only mental health expert to evaluate Crew before trial, conducted a 20-minute "preliminary interview" while Crew was shackled, with a guard within earshot. (RT 168-169, 175-178.) Dr. Phillips

asked "general questions" about Crew's childhood, but did not ask him whether he had been physically or sexually abused. (RT 169, 176-177.) Such an interview was not likely to elicit any significant information about Crew's childhood, as even respondent's expert conceded. (RT 449-450.)

Testimony from Crew about the fact that he did not discuss the difficult and traumatic aspects of his childhood with his trial attorneys, investigator or expert would add nothing of consequence given the consensus that they did not seek to elicit this information from him.

Given the lack of relevance to petitioner's testimony to any of the reference questions, the Referee did not abuse her discretion in granting petitioner's motion to preclude him from being called as a witness by respondent.

II. THE REFEREE'S EVIDENTIARY RULINGS WERE PROPER

A. The Referee Did Not Abuse Her Discretion in Sustaining Objections to Questions of a Lay Witness

Emily Vander Pauwert, one of Crew's former girlfriends, testified about Crew's drinking habits (RT 303-304, 310), his father's encouragement of Crew's excessive drinking (RT 304-307, 309), his father's sexual advance to her (RT 308), his sleep patterns (RT 311-312), his relationship with his mother (RT 313-315), his relationships with other women (RT 315-317), and Ms. Vander Pauwert's own contacts with trial counsel. (RT 319-321.)[3]

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[3] Respondent asserts that Ms. Vander Pauwert was obviously biased and evasive. (Respondent's Exceptions and Brief on Merits, p. 51, fn. 21.) Ms. Vander Pauwert's testimony, however, was consistent with the other lay witnesses and was found to be credible by the Referee. (Findings of Fact, pp. 7-8, 16, 19.)

Respondent complains that it was precluded from impeaching petitioner's credibility during Vander Pauwert's cross-examination. Respondent asked Vander Pauwert whether, when she visited Crew at the jail prior to trial, he gave two different versions of how his wife died. (RT 324.) Petitioner's counsel objected that this was beyond the scope of the hearing. (*Ibid.*) Respondent's counsel responded as follows:

> My understanding is that Miss Vander Pauwert would have been called as a witness at the penalty phase and asked all the questions that were put to her today. I believe that it is relevant that the prosecution could discuss with her any facts about petitioner's character. Because the whole purpose of the penalty phase hearing is to assess the petitioner's moral culpability and whether or not he deserves the death penalty.

(*Ibid.*)

Respondent also contended that Crew's alleged statements to a former girlfriend about the crime prior to his trial – approximately 20 years ago – was relevant to his current veracity and Dr. Morris's expert opinion which was based, in part, on Crew's veracity. (RT 325.)

The Referee appropriately sustained the objection.

Ms. Vander Pauwert did not testify on direct examination at the hearing regarding Mr. Crew's truthfulness, generally, or about any statements Crew made about the crime. Questions by respondent directed to these areas were beyond the permissible scope of direct examination and were properly excluded. (Cf. *Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93 [where officer did not testify on direct examination concerning any conversations with petitioner nor any statements petitioner may have made, petitioner's inquiry to the officer about his statements was

not proper cross-examination, but an attempt to offer affirmative evidence of his own].) "Cross-examination is limited to matters within the scope of the direct examination. (Evid. Code §§ 761, 773(a).) While wide latitude may be permitted, the above statutes still govern the scope of cross-examination in California." (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 421.)

Respondent's questions were also irrelevant to assessing the credibility of mitigating evidence that would have been presented at trial. As petitioner's counsel pointed out, Ms. Vander Pauwert was called as a defense witness both at the guilt and penalty phases of petitioner's trial, and was never asked by the prosecutor the questions posed to Ms. Vander Pauwert by respondent's counsel at the evidentiary hearing. (RT 325.) In fact, when defense counsel sought to introduce Crew's pre-trial statements to Vander Pauwert, the prosecutor's objections were sustained. (Trial RT 4495-4498.)

Even assuming the Referee erred and Vander Pauwert had testified that petitioner lied to her about his involvement in the murder, it is hard to imagine how this would be relevant to an expert's assessment of petitioner. Dr. Morris was fully aware that petitioner "often made up stories and lied about his life, his background and his experiences." (Morris Declaration, p. 11.) As Dr. Morris explained:

> This is also consistent with someone who suffered childhood sexual abuse. A child learns to lie in order to hide the shame of the abuse itself, and from an early age Mr. Crew was conditioned to cover up his true feelings and experiences, knowing on some level that what his mother was doing to him was wrong and that he could not tell anyone about it. The

> feeling by sex abuse victims that they will be found out by others is a very common phenomenon. In addition, sexual abuse often results in profound feelings of inferiority, which frequently lead to behaviors such as compulsive lying and making up stories to make one appear more worthwhile or at least, different, than they are.

(*Ibid.*)

Thus, even assuming Dr. Morris had been made aware of any additional instances of lying, they would have had no discernable impact on his findings.

B. The Referee Did Not Abuse Her Discretion in Sustaining an Objection to Respondent's Expert Testimony Regarding the Lack of a Nexus Between Petitioner's Sexual Abuse History and the Capital Crime

It is undisputed that petitioner did not seek to connect the mitigating evidence presented at the evidentiary hearing regarding his family history, his traumatic childhood and his mental health problems with the crime. As petitioner's habeas counsel stated on the record at the hearing: "There has been no evidence offered by petitioner regarding the assertion that the abuse evidence that has been presented is connected to the commission of the offense." (RT 421.) Nevertheless, respondent sought to have its expert, Dr. Martell, opine whether males who have been sexually abused were "at a statistically significant higher risk than someone who had not been so sexually assaulted to commit a premeditated and deliberate murder." (*Ibid.*) Petitioner's objection to this question was sustained.

Respondent now argues that testimony from its expert that petitioner's sexual abuse history did not make him any more likely to have committed the murder would have been rebuttal evidence to the defense

case in mitigation. However, such testimony would not have rebutted any part of the defense since, as previously noted, petitioner did not seek to create any nexus between the mitigation and the crime itself. Respondent's expert is not entitled to testify to a fact that simply reinforced what was already conceded by petitioner. The Referee's ruling was correct.

C. The Referee Correctly Sustained Objections to Questions on Cross-Examination of Dr. Morris About Petitioner's Motivation for the Crime

Petitioner did not present evidence specifically to mitigate the circumstances of the crime and Dr. Morris did not offer an opinion regarding Mr. Crew's mental state at the time of the crime. Nevertheless, on cross-examination, respondent asked whether Dr. Morris believed that in committing the murder Crew was motivated by greed and whether he killed for the thrill of it. The Referee sustained petitioner's objections to these questions. (RT 114-115.)

Respondent argues that these questions were designed to test Dr. Morris's credibility, but fails to explain how Dr. Morris's opinion about Crew's motivation for the murder would impact his opinion about Crew's social history, abusive upbringing and mental health symptoms.

As this Court reiterated in *In re Lucas*, "[t]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*In re Lucas, supra*, 33 Cal.4th 682, 733, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.) Thus, "[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct." (*Id.*, citing *In re Jackson* (1992) 3 Cal.4th 578, 613-614; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1191-1193.) .

Respondent's cross-examination questions were beyond the scope of Dr. Morris's direct testimony, did not seek evidence relevant to either his credibility or the credibility of the available mitigating evidence, and was not proper rebuttal. The Referee did not abuse her discretion in sustaining the objections.

III. RESPONDENT FAILED TO DISPUTE THE CREDIBILITY OR AVAILABILITY OF THE REMAINDER OF PETITIONER'S MITIGATING EVIDENCE

Respondent fails to recognize that to establish the existence of credible and compelling mitigating evidence, it is not necessary for petitioner to pinpoint whether Crew's development and functioning were undermined by sexual molestation by his mother, by other abusive and neglectful experiences, such as those detailed by Dr. Morris and other witnesses, or a combination of these traumas. As a result, respondent challenged the evidence that Crew was sexually molested by his mother, but failed to call into question the credibility of the remainder of the abundant mitigating evidence of Crew's history and upbringing and its impact on Crew's mental health. This undisputed evidence demonstrates that Crew's "symptoms and history . . . [are] consistent with someone who's been sexually abused or has [had] some childhood trauma." (RT 111; see also RT 155.) As Dr. Morris put it, there were certainly a "cluster of activities that were going on in Mr. Crew's background" that had a damaging effect on his mental health. (RT 155.)

Petitioner presented the following uncontested mitigating evidence that was not obtained by trial counsel but was found to be readily available and credible by the Referee:

Mark Crew was raised by two very damaged parents. His mother, having grown up in an extremely violent home where she was beaten and

sexually molested by her father, was profoundly depressed, emotionally withdrawn, and socially isolated. (Proposed Findings, pp. 21-23, 28-30; Findings of Fact, p. 14, 15.) Crew's father had been abandoned by his parents and raised by his grandparents. Consistent with his family history, he was a hard-drinking womanizer who was rarely home when Crew was growing up. (Proposed Findings, pp. 25-27, 30-31; Findings of Fact, p. 14, 15.)

Crew was subjected to neglect and an extraordinary lack of supervision due to his mother's emotional withdrawal and father's absence. (Proposed Findings, at p. 30.) As Dr. Morris testified:

> When children are left to essentially raise themselves, they neither have the resources to do that job adequately nor do they receive the feedback from nurturing adults to help form appropriate emotional responses and a positive self-image. The result is often an anxious and depressed adult with lots of cognitive distortions about themselves and others. And lack of boundaries as a child exposes the child to risks of abuse by others and early experimentation with potentially addictive substances. This is what occurred to Mr. Crew.

(Morris Declaration, at pp. 26-27.)

Crew's maternal grandfather, Jack Richardson, came to live with the Crew family when Crew was a young boy. Richardson, who had molested Crew's mother and other girls in earlier years, was notorious among Crew's and his brother's friends as a "dirty old man." He exposed Crew to an extraordinarily oversexualized environment and encouraged Crew to participate in highly inappropriate sexual activities for the grandfather's pleasure. (Proposed Findings, pp. 35-37; Findings of Fact, p. 15.) This

"abuse of sexuality," in and of itself, was psychologically damaging to Crew. (RT 155-156.)

Other males in Crew's life, including his father, brother and son of a family friend, provided destructive role models for Crew by exposing him to sexual experiences, drugs and alcohol at an inappropriately young age. (Proposed Findings, pp. 30-31, 37-38, 40-41; Findings of Fact, pp. 15-16.)

It was widely and consistently reported that Crew suffered from symptoms of depression, anxiety, low self-esteem and sleep disorders. (Proposed Findings of Fact, pp. 41-43; Findings of Fact, p. 15.)

Crew began abusing drugs and alcohol by the time he was 13 or 14 years old, and drank and used drugs daily, beginning when he was in high school. His alcohol and drug use escalated in later years. (Proposed Findings of Fact, p. 16; Findings of Fact, p. 14.) Dr. David Smith, an expert in addiction medicine and clinical toxicology, testified without contradiction that "Mr. Crew suffered from chronic alcohol and drug dependence stemming from his traumatic upbringing and family history, which had a long term deleterious effect on his mental health and functioning." (Smith Declaration, p. 13; Proposed Findings of Fact, 44-47; Findings of Fact, p. 16.)

It was undisputed that the mitigating evidence outlined above, and described in more detail in petitioner's Proposed Findings of Fact, was readily available at the time of trial but not obtained by trial counsel. The credibility of this evidence was not disputed by respondent and all of it was found credible by the Referee. This evidence, in addition to the evidence of sexual abuse, constituted ample evidence of Crew's troubled family history, traumatizing background and resulting mental health symptoms, which would have provided a compelling and humanizing portrayal of Crew at the

penalty phase of his trial.

IV. PETITIONER DID NOTHING TO HINDER OR PREVENT THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE

Respondent contends that petitioner hampered his trial counsel's penalty phase investigation by failing to disclose that he was sexually abused by his mother or reveal other negative information about his family history. It is undisputed, however, that the investigation of mitigating evidence was not undertaken until weeks before the penalty phase was scheduled to begin. There was, therefore, no investigation for Crew to hinder or prevent.

While Crew did not volunteer information that he had suffered from a traumatic and abusive upbringing, this Court has made clear that a petitioner's "failure to inform defense counsel that he, petitioner, had been abused as a child" does not "constitute[] a lack of cooperation excusing defense counsel's perfunctory investigation." (*In re Lucas*, *supra*, 33 Cal.4th at p. 729.) Rather, "it was counsel's obligation to initiate investigation into petitioner's background." (*Ibid.*) Moreover, "the accused would not necessarily understand the significance of the information that would be uncovered by such an investigation." (*Ibid.*)

It was petitioner's counsel who failed to conduct an adequate social history investigation which would have included asking Crew about his background and whether there were traumatic events in his life, and explaining to him the significance of such information to his defense at the penalty phase. As discussed above, both trial counsel and the trial investigator agreed that Crew was a cooperative client who did not impede counsel's investigation or presentation of evidence. The Referee concurred. (Findings of Fact, p. 18.)

V. TRIAL COUNSEL'S FAILURE TO CONDUCT A SOCIAL HISTORY INVESTIGATION OR TO CONDUCT ANY INVESTIGATION OF MITIGATING EVIDENCE UNTIL WEEKS BEFORE THE PENALTY PHASE CONSTITUTED CONSTITUTIONALLY DEFICIENT PERFORMANCE

Respondent concedes that counsel had limited time and resources for developing mitigating evidence. As respondent acknowledges, this was partly due to counsel's belief that the case would never proceed to a penalty phase because the special circumstance was likely to be stricken. (Respondent's Exceptions and Brief on Merits, pp. 78-79.) What respondent fails to even mention, however, is that the primary reason for counsel's time constraints was lead counsel's debilitating drinking problem which prevented him from conducting any pre-trial penalty phase investigation and necessitated the belated appointment of second counsel who first had to devote his limited time to assisting with preparation for the guilt phase.

Counsel did retain a psychiatrist, Dr. Frederick Phillips, and it is true, as respondent notes, that Dr. Phillips learned nothing helpful to support a mitigation case. (Respondent's Exceptions and Brief on Merits, p. 79.) It is also undisputed, however, that Dr. Phillips was not even aware that this was a capital case or that he was expected to evaluate Crew for any other purpose beyond Crew's then-current mental state and his mental state at the time of the crime. (RT 167.) Moreover, as discussed above, Dr. Phillips' 20-minute visit with Crew while Crew was shackled and a guard was within earshot was far from an adequate environment in which to elicit potential mitigating evidence of Crew's background and history.

Respondent also mentions that trial counsel consulted with Dr. Smith regarding Crew's substance abuse problems. As with Dr. Phillips, however,

counsel's consultation with Dr. Smith was limited to the subjects of Crew's mental state at the time of the crime, and specifically whether Crew's use of drugs may have impaired his conduct on the day in question. Dr. Smith was not asked to consider Crew's substance abuse as a potential mitigating factor. (RT 209, 221-222.)

It cannot be reasonably argued that an investigation that did not begin until mere weeks before the penalty phase and that did not include any meaningful exploration of the client's family background is consistent with prevailing professional norms. Respondent's claim that counsel's penalty phase strategy appropriately focused on positive aspects of petitioner's life ignores the fact that the strategy was arrived at without the benefit of any investigation. (Respondent's Exceptions and Brief on Merits, pp. 83-84.)

Respondent contends that counsel had no obligation to perform any investigation of Crew's background because Crew failed to tell them about his troubled childhood, and Crew's father and grandmother agreed that his childhood was normal. (*Id.* at p. 88.) Respondent further relies on the lack of any relevant finding of Dr. Phillips and Dr. Smith, although neither of them were consulted for the penalty phase, and Dr. Smith never saw Crew. (*Ibid.*) As discussed in the Brief on the Merits, there was other information in trial counsel's possession that should have alerted counsel that Crew's background was troubled and warranted investigation. (Petitioner's Brief on Merits, at pp. 20-22.) Especially when, as here, counsel was on notice that Crew suffered from depression and had a serious substance abuse problem, they were obligated to undertake an adequate and timely investigation.

Counsel's failure to conduct any investigation until well after the

trial began cannot be blamed on petitioner. It was lead counsel's incapacity due to a serious drinking problem that resulted in the lack of investigation. This was followed by the belated appointment of second counsel who, without adequate time to perform a competent investigation of mitigating evidence, unreasonably clung to the hope that the trial court would strike the special circumstance and eliminate the need for a penalty phase. By the time the trial court denied the motion to strike the special circumstance after the prosecution rested at the guilt phase it was simply too late.[4]

VI. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF PETITIONER'S LIFE HISTORY WAS PREJUDICIAL

A. Evidence of Petitioner's Abusive Upbringing Was Credible

Respondent's primary argument in favor of a finding of no prejudice is that Dr. Morris's expert opinion that Crew was sexually abused would not have been believed by any reasonable juror. The problem with this argument, of course, is that the Referee found Dr. Morris to be credible. Indeed, the Referee found "no reason to doubt the veracity of any of the evidence that was presented and accepts the evidence as valid." (Findings of Fact, p. 16.)

Respondent persists in asserting that Dr. Morris's opinion should not

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[4] Respondent argues that petitioner's counsel's performance in this case was well within the range of reasonable professional judgments comparable to counsel's performance in *Strickland v. Washington, supra*, 466 U.S. 668. (Respondent's Exceptions and Brief on Merits, p. 84.) Even assuming that counsel acted consistent with professional norms prevailing in 1976, the time of Strickland's Florida sentencing hearing (see *Washington v. Strickland* (Former 5th Cir. 1982) 673 F.3d 879, 883), this has no relevance to the norms prevailing in 1989.

be credited, relying on the testimony of its expert, Dr. Martell, that no reasonably competent mental health professional would have inquired into Crew's history of sexual abuse. Respondent's argument seems to be that petitioner suffered no prejudice from counsel's failure to present evidence of sexual abuse because such evidence would not have been discovered by a competent expert or by competent counsel at the time of trial. Again, the Referee's finding to the contrary is that petitioner "established that the mitigating evidence he presented at the evidentiary hearing was credible and would have been available at the time of trial." (Findings of Fact, p. 16.) The Referee found that "[e]ither Dr. Morris, or an expert with comparable experience, would have been able to provide testimony regarding Crew's sexual abuse history at the time of trial." (*Id.* at p. 17.)

Dr. Martell testified that a reasonably competent mental health professional would not have inquired as to whether or not Crew had been sexually abused – even if he or she were aware of the nature and extent of Crew's mental health symptoms and a family history that included the history of sexual abuse presented by petitioner. (RT 411.) Dr. Martell's opinion is untenable and completely unsupported. Given his relative lack of experience in the field of child sexual abuse, particularly when compared with Dr. Morris,[5] and his *complete* lack of experience in consulting with defense counsel in preparing mitigating evidence in a death penalty case (RT 451-453), Dr. Martell's opinion was appropriately given little weight.

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[5] Dr. Martell's expertise is in the area of neuropsychology and forensics. (RT 386, 388, 393.) Although he qualified as an expert on sexual abuse over petitioner's objection (RT 405-408), his forensic and clinical experience with regard to male victims of sexual abuse is minimal, particularly in contrast to that of Dr. Morris. (Compare RT 106-114, 153, Exh. 1 with RT 385-408, Exh. 153.)

Dr. Martell provided three reasons to support his view that Crew's sexual abuse would not have been discovered in the absence of disclosure by Crew himself. First, he contended that Crew's symptoms of depression, womanizing and substance abuse would have led a forensic psychologist or psychiatrist initially to consider that the defendant had anti-social personality disorder ("ASPD"). (RT 412.) According to Dr. Martell, having found symptoms consistent with ASPD, a competent expert would go no further. (RT 450-451.) It is ludicrous, however, to suggest that an expert consulted by the defense for purposes of developing mitigating evidence would simply stop investigating a defendant's mental health history after concluding that the symptoms are consistent with – although not exclusive to – ASPD.[6] This would be particularly ill-advised given that, as Dr. Martell testified, a "substantial majority" of the prison population exhibit these symptoms. (RT 417-418.)

It may be Dr. Martell's practice, as the State's expert rebutting defense evidence, to narrow the scope of his assessment in order to find ASPD. However, as Dr. Martell conceded, he has never been retained by the defense in a capital case where child sexual abuse was a potential mitigating circumstance. (RT 430.) In fact, he has no experience at all in developing mitigating evidence for the defense in a death penalty trial. (RT 451-453.)

Second, Dr. Martell testified that an expert would not have inquired

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[6] Dr. Morris agreed that these mental health symptoms would be consistent with someone with ASPD. (RT 138.) Crew, however, would not have been diagnosed with ASPD because he does not meet the DSM criteria, specifically the presence of a conduct disorder before the age of 15. (RT 152.)

whether Crew was the victim of sexual abuse because, based on the literature available at the time of trial, mother-son incest was a rarely reported and researched phenomenon. (RT 413.) This contention is completely undermined by the fact that in 1989, as discussed above, Dr. Morris published *Males at Risk*, a compilation of the existing research on male victims of childhood sexual abuse, as well as therapeutic methods for treating male victims. (RT 119-121.)

Dr. Martell's final contention was that in the absence of disclosure from Crew himself, the pervasive history of sexual abuse on both sides of Crew's family, including Crew's mother's own victimization by her father, together with Crew's mental health symptoms, "would not have raised a concern" that Crew, himself, was a victim of sexual abuse, because all the victims in the family were women and the perpetrators were men. (RT 416-417, 448.)[7] Dr. Martell concluded that, "[i]t's just not a logical endpoint to get to based on that set of facts, even with the totality of the circumstances of depression, substance abuse, womanizing, and coming from a chaotic and sexually abused family, that would lead a reasonably competent doctor to reach that conclusion that, oh, he must be a victim of sexual abuse as well." (RT 417.) Dr. Martell claimed that it is "highly unlikely" that an attorney or an expert, who, unlike Dr. Morris, was not an expert in sexual

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[7] In Dr. Martell's opinion, nothing in Crew's history raised a red flag to warrant investigation into whether he may have been sexually abused including "the history of a grandfather who molested his daughter, Mr. Crew's mother, the grandfather also molested granddaughters, and engaged in inappropriate sexual behavior or inappropriate sexual situations with Mr. Crew and his brother, an uncle, a maternal uncle who molested his children and grandchildren, a father who molested his stepdaughter . . . ." (RT 439-440.)

abuse, "would have been reasonably led to consider Mr. Crew was the victim of sexual abuse." (RT 442; see RT 441 [Dr. Martell concedes that Dr. Morris or someone with comparable experience would have considered such a possibility].)

While Crew's family history and mental health symptoms may not necessarily have directed an expert to suspect that Crew was molested by his mother, it is hard to fathom that a competent expert would not have suspected some degree of trauma in Crew's life warranting further investigation, particularly in the area of sexual abuse. Indeed, this history would have included – after competent investigation – the abuse of sexuality experiences involving Crew's grandfather, which as Dr. Morris testified, were themselves psychologically destructive. Even Dr. Phillips, the expert consulted by trial counsel, agreed that Crew's sexual abuse would be a conclusion he would have considered if presented with Crew's symptoms and family history. (RT 180-181.) And certainly, counsel who had undertaken an appropriate investigation, and then observed, as trial counsel did here, Crew's mother sitting on her son's lap while visiting him in the jury room (RT 215-216), would have strongly suspected sexual abuse.

Dr. Martell's willingness to testify beyond his area of expertise is clear from his statement that not even a "specialized capital attorney" would have considered the possibility that Crew had been sexually abused. As noted above, Dr. Martell conceded that he has never assisted defense counsel in developing mitigating evidence in a death penalty case. (RT 451-453.) Nor had Dr. Martell ever heard of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (RT 445-446.)

Dr. Martell's testimony sheds no light on the availability of mitigating evidence in this case. The Referee's findings on the credibility and availability of Dr. Morris's testimony implicitly reject the position of respondent's expert that such evidence would not have been discovered by a competent expert. Respondent presented no credible evidence to dispute the findings that had trial counsel followed prevailing professional norms and conducted a timely and reasonably thorough investigation of Crew's social history and upbringing, they would have obtained the evidence presented at the evidentiary hearing.

B. Petitioner Need Not Establish A Nexus Between The Mitigating Evidence and the Crime to Prove Prejudice

Respondent's argument that it is not reasonably likely that any juror would have voted to spare petitioner's life because the evidence of petitioner's social history, traumatic upbringing and mental health problems were not offered to mitigate the circumstances of the crime reveals another fundamental misconception of the nature and scope of mitigating evidence.

In *In re Lucas* (2004) 33 Cal.4th 682, this Court found counsel's failure to present mitigating evidence of the defendant's abusive upbringing prejudicial, not because it provided a nexus to the capital crime, but because it would have provided a poignant portrayal of the defendant's traumatic life that would have humanized him for the jury. The Court found "genuine pathos" in the abusive and neglectful upbringing that Lucas suffered regardless of its connection to the crime. As the Court held, "[s]uch evidence naturally would have given rise to greater understanding, if not also to sympathy. (*Id.* at p. 732.)

In *In re Marquez* (1992) 1 Cal.4th 584, prejudice was found based on trial counsel's failure to obtain and present background evidence that

was not connected to the crime. This Court found that such evidence would have provided the jury with "a description of petitioner's childhood and adolescence growing up in the village of El Pilon, and put before the jury the positive aspects of his character. It would show, also, that his family, relatives, and neighbors believe in him and are willing to travel from Mexico to testify on his behalf. It would, in short, permit the jury to make an 'individualized' decision, one based not only on the facts of the crime, but on the whole life of the defendant." (*Id.* at p. 609.)

As the United States Supreme Court held in *Williams v. Taylor* (2000) 529 U.S. 362, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." (*Id.* at p. 368.) And as the Court recently reaffirmed, a defendant's abusive and neglectful upbringing is relevant to a defendant's moral culpability whether or not it is connected to the defendant's deliberateness in committing the crime. (*Kabir-Abdul v. Quarterman, supra,* __ U.S. __, 127 S.Ct. at p. 1672.)

In *Atkins v. Virginia* (2002) 536 U.S. 304, the Supreme Court held that impaired intellectual functioning is inherently mitigating. As the Court later explained in *Tennard*, nothing in the *Atkins* opinion "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered." (*Tennard v. Dretke, supra,* 542 U.S. at p. 287.) Similarly, the Court rejected the suggestion that mitigating evidence was not relevant "unless the defendant also establishes a nexus to the crime." (*Ibid.*) Thus, in *Tennard*, the Court found that evidence of defendant's low IQ and impaired intellectual functioning had "mitigating dimension beyond the impact it has on the individual's ability to act deliberately." (*Id.* at p.

289; see also *Smith v. Texas* (2004) 543 U.S. 37, 45 [Court noted that it had "rejected the . . . 'nexus' requirement in *Tennard*," and stated under its prior decisions it was plain that evidence regarding petitioner's troubled childhood and limited mental abilities was relevant for mitigation purposes].)

The precise argument proffered by respondent here was rejected in *Lambright v. Schriro* (9th Cir. 2007) 490 F.3d 1103. In that case the district court found no prejudice from trial counsel's failure to discover and present evidence of petitioner's prolonged drug abuse, mental health problems and abusive childhood in the absence of any explanatory nexus to the crime. (*Id.* at p. 1112.) The Ninth Circuit reversed, finding the district court's reliance on such a nexus requirement to be erroneous. (*Id.* at p. 1114, citing *Tennard v. Dretke*, *supra,* 542 U.S. 527.) The Court explained:

> If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant. This is simply unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required.

(*Id.* at p. 1115, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605; see also

Marshall v. Hendricks (3rd Cir. 2002) 307 F.3d 36, 99, 103 ["The penalty phase focuses 'on the production of evidence to make a case for life' humanizing the defendant by showing 'the meaning and value of the defendant's life' and 'worthiness to live'"].)

As argued in petitioner's Brief on the Merits, this was a close case on penalty. There was no aggravating evidence presented by the prosecution. The trial court's grant of the 190.4(e) motion, finding that the aggravating evidence did not outweigh mitigating evidence, although reversed, illustrated the closeness of the case. In addition, juror declarations filed in support of the habeas petition and incorporated into petitioner's reply to the return include undisputed evidence that the initial vote during penalty deliberations was close to an even split between death and life without possibility of parole (Petition Exh. 40, at p. 273; Exh. 41, at p. 274), and that only after many votes and intense deliberations did the jury ultimately vote for death. (Petition Exh. 40, at p. 273; Exh. 41, at p. 274; Exh. 43, at p. 276; Exh. 44, at p. 277.)

The mitigating evidence petitioner contends should have been presented would have undermined the central theme of the prosecution's case. As the Referee concluded, trial counsel's presentation of evidence limited to positive aspects of petitioner's life "permitted the prosecution to argue that petitioner was a selfish man who squandered the advantages of a good upbringing and normal life. On the contrary, there was abundant evidence available to petitioner's trial counsel that could have established that petitioner's upbringing was anything but idyllic. The evidence presented here demonstrated that petitioner had a family history fraught with incest, abuse, dysfunction, mental illness and substance abuse." (Findings of Fact, p. 19.)

As discussed in more detail in petitioner's Brief on the Merits, trial counsel's failure to obtain and present this evidence to petitioner's jury was prejudicial.

CONCLUSION

For the reasons stated in Petitioner's Brief on the Merits and based on the foregoing, petitioner is entitled to relief.

Dated: June 2, 2008

Respectfully submitted,

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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 RESPONDENT'S EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS

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

Glenn R. Pruden
Supervising Deputy Attorney General
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Mark Christopher Crew
P.O. Box E-48050
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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 June 2, 2008, at San Francisco, California and that this declaration was executed on June 2, 2008, at San Francisco, California.

Glenice Fuller

GLENICE FULLER