

02/15/05

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

**MARK CHRISTOPHER CREW,**

On Habeas Corpus.

**CAPITAL CASE**

S107856

(Related Appeal No.

S034110)

Santa Clara County Superior Court No. 101400  
The Honorable John Schatz and Robert Ahern, Judges

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**RETURN TO ORDER TO SHOW CAUSE**

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*[Signature]*

DEATH PENALTY

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**COMES NOW** the Director of the Department of Corrections and states for a return to the order to show cause issued on February 2, 2005, as follows:

**I.**

In August 1982, Crew killed Nancy Andrade, a divorced mother of two, and took all her money and property. He married her to advance his plan to kill her on a cross-country trip so that her body would not be found. After embarking on the trip and stopping by the side of the road, he shot Nancy in the head and left her body in a ditch; he went back the next day with a friend and discovered that she had moved, so the friend strangled her and cut off her head. They buried the body and head in the friend's back yard, then dug them up when they began to smell. Nancy's head was put in a bucket and thrown off a bridge, and her body was put in a 55-gallon drum filled with cement; neither has been recovered. (See *People v. Crew* (2003) 31 Cal.4th 822, 828-831.)

**II.**

On July 26, 1989, a Santa Clara jury found Crew guilty of first degree murder and grand theft, and found true a financial gain special circumstance.

On July 22, 1993, Crew was sentenced to death. (*People v. Crew*, 3 Cal.4th at p. 828.)

### III.

Crew's first application for collateral relief in this Court, which was filed before the direct appeal commenced, was denied on December 21, 1999. (*In re Crew*, No. S084495).

### IV.

In 2003, this Court affirmed Crew's conviction and sentence. (*People v. Crew*, 3 Cal.4th at p. 860.) On April 19, 2004, the United States Supreme Court denied certiorari review. (*Crew v. California*, No. 03-8616.)

### V.

Crew was represented at trial by retained counsel Joseph O'Sullivan and appointed counsel Joseph Morehead. (Petition, Exhs. 1, 2.) Counsel were assisted by John Murphy, a license private investigator. (Petition, Exh. 3.)

### VI.

Counsel hired two mental health experts to evaluate Crew at the time of trial: Dr. David Smith, a physician and substance abuse expert, and Dr. Fredric Phillips, a psychiatrist. (Petition, Exhs. 5, 6.) Counsel made a tactical decision not to call these experts at the guilt phase to show that Crew's depression, sleep disorder, and drug and alcohol use negated specific intent, because their testimony would have been available only if Crew testified, and counsel made a tactical decision not to call Crew. (Petition, Exh. 1 at ¶ 15.) Counsel made a tactical decision not to call these experts at the penalty phase in order to avoid cross-examination on the facts of the crime. (Petition, Exh. 1 at ¶ 16.)

### VII.

Counsel called nine witnesses at the penalty phase who testified over four days: Crew's father, grandmother, former girlfriend, best friend from high school, and commanding officer from the Army, as well as three deputy sheriffs

and the former head of the California Department of Corrections. These witnesses portrayed Crew as a compassionate, generous, worthwhile person who would pose no future danger in prison.

### VIII.

Crew contends he received ineffective assistance at the penalty phase. Specifically, he alleges that counsel failed to adequately investigate and present mitigating evidence. He argues that counsel should have introduced evidence that his mother sexually molested him but was otherwise distant and depressed and that his father was an alcoholic who engaged in sexually inappropriate behavior with others, which caused him to numb the effects of these childhood experiences with alcohol, drugs, and compulsive sexual behavior. (Petition, Claim VI (B)).

### IX.

Counsels' penalty phase investigation was constitutionally adequate.

A. Morehead, who was primarily responsible for the penalty phase, was appointed almost five months before trial began, and investigator Murphy was hired two months before trial began. (Petition, Exh. 1 at ¶ 2, 4-6; Exh. 3 at ¶ 3.)

B. Counsel timely requested funding for the investigation, and received a total of \$27,000. In December 1988, four months before trial, counsel obtained funding for an investigator, a psychiatrist, and an "initial work up" of Crew's background for any penalty phase. (ACT 987.9 12, 170.) In March 1989, a month before trial, counsel obtained funding for a substance abuse expert and additional funding for the psychiatrist. (ACT 987.9 25.)

C. Although Morehead states he did not have enough time to gather additional unspecified evidence of Crew's depression, sleep disorders, and substance abuse (Petition, Exh. 1 at ¶ 10, 12), the record plainly shows that much of that evidence was introduced at trial. The jury was aware of Crew's

depression, insomnia, and excessive drinking from the testimony of witnesses Emily Bates, Beverly Ward, Lisa Moody, and Irene Watson. (RT 3947, 4151-4152, 4676-4679, 4771, 4796.)

D. Morehead states that he did not have enough time to obtain various family records and interview distant relatives. (Petition, Exh. 1 at ¶ 8-11.) However, there was no reasonable probability that such information would have affected the outcome. Counsel did obtain Crew's military and jail records (Petition, Exh. 1 at ¶ 8), and the other documents had little or no relevance. Counsel interviewed Crew's father and mother, and met with his grandmother before she testified; most of the other living relatives resided in other states and had little actual knowledge of Crew's family life.

E. Morehead had a "good relationship" with Crew (Petition, Exh. 1 at ¶ 18), and the investigator spoke to Crew either in person or on the phone at least 27 times before and during trial. (ACT 987.9 178, 179, 183, 184, 185, 190, 191, 192, 205, 206, 207, 208, 209.) Although counsel and the investigator notably do not acknowledge it in their declarations, Crew apparently never told them that his mother had sexually molested him, or that his father's depiction of their family life was inaccurate. Counsel cannot be faulted for failing to discover what Crew neglected to disclose.

F. Morehead states that he believes there was not enough time to adequately investigate the penalty phase, and that he chose the "easier and much less time-consuming" path of presenting Crew as a "caring, generous, loving person." (Petition, Exh. 1 at ¶ 8, 13.) For obvious reasons, an attorney's own evaluation of his performance in hindsight is not dispositive, as it runs afoul of the rule requiring contemporary assessment of counsel's performance based on what he knew at the time of trial. In addition, even if counsel should have conducted a more extensive investigation, it was not ineffective to present Crew to the jury as a worthwhile human being rather than a traumatized victim.

## X.

Counsel were not ineffective for failing to present the retained mental health experts at the penalty phase.

A. Morehead retained “appropriate” mental health experts — a substance abuse expert and a psychiatrist — who were both well-qualified to make a forensic evaluation of Crew’s mental state. Morehead had no duty to seek out additional experts. Morehead was aware of Crew’s depression, substance abuse, and insomnia (Petition, Exh. 1 at ¶ 10), but he had no duty to independently recognize that those traits could mean Crew had been sexually molested, and therefore no duty to retain an expert who specialized in male childhood sexual abuse.

B. Morehead orally provided Dr. Smith and Dr. Phillips with information about the crime. Morehead had no duty to provide the experts with additional information unless they requested it. Neither expert states in his declaration that he requested any additional information in this case (see Petition, Exh. 5 at ¶ 8-9 (Dr. Smith’s practice is to “recommend” a complete investigation of a defendant’s background, but he had no recollection of his contacts with counsel in this case); Exh. 6 at ¶ 4 (Dr. Phillips made no mention of any requests for information)), a circumstance that supports the inference that neither expert ever made such a request.

C. Dr. Phillips and Dr. Smith do not indicate what opinions they reached about Crew’s mental health in 1989, and Morehead does not indicate what findings they communicated to him at that time. Dr. Phillips interviewed Crew on January 5, 1989, but does not state in his declaration that Crew said he had been sexually molested by his mother, Jean. Jean was alive at the time of that interview; by the time Crew first told anyone that his mother had sexually molested him (in a February 2002 interview with Dr. Morris), she had died. According to Crew’s account, no one else witnessed or would have known

about the molestation except him and his mother. Counsel cannot be faulted for failing to call Dr. Phillips to establish Crew's sexual abuse by his mother when Crew neglected to tell Dr. Phillips about its supposed occurrence.

D. Morehead made a reasonable tactical decision not to call Dr. Smith and Dr. Phillips at the penalty phase. He decided not to present their testimony because he "did not want to open the door to cross-examination on the facts of the crime." (Petition, Exh. 1 at ¶ 16.) Morehead now believes "there would have been an effective way to present this evidence without delving back into the crime" (Petition, Exh. 1 at ¶ 21), but he fails to explain how the expert testimony could have been so limited. An expert may be "fully cross-examined" about the subject to which his testimony relates and the bases for his opinion. (Evid. Code, § 721, subd. (a)). The prosecutor would have been entitled to ask any mental health expert how the facts of the murder affected his opinion. Morehead's decision not to call the experts in order to avoid emphasizing highly unfavorable facts is the kind of tactical decision that is virtually unchallengeable, and certainly does not establish ineffective assistance under the circumstances presented here.

## **XI.**

Counsel were not ineffective for failing to present a male childhood sexual abuse expert.

A. The jury would not likely have accepted the theory that Crew's adult behavior, culminating in the murder of Nancy Andrade, stemmed from being sexually molested by his mother and having an alcoholic father. If counsel had presented the kind of testimony outlined by Dr. Morris, i.e., that Crew's alleged childhood trauma manifested in the form of depression, sleep disorders, lying, substance abuse, and compulsive sexual behavior, the prosecutor could have countered with evidence and argument to the effect that Crew's depression and insomnia around the time of the crime were the result of his concern that the



victim's decaying corpse might lead to the discovery of his crime, not the result of genetic predisposition and sexual molestation; that Crew lied about Nancy's "disappearance" after their "divorce" because it made it easier to sell her property, not because of a need to avoid confronting the shame of childhood sexual molestation; and that he assumed a false name and fled to another state in order to avoid being arrested for murder, not because he suffered from low self-esteem.

B. Dr. Morris's testimony would have portrayed Crew unfavorably. Even if Crew had the kind of childhood hypothesized by Dr. Morris and engaged in compulsive sexual behavior as a consequence thereof, evidence that he frequently peeked in windows and watched people having sex, and that he liked "three-way sexual activity," would likely have offended many jurors and ultimately cast Crew in a negative and unsympathetic light.

C. Evidence that Crew abused drugs and alcohol generally, even if in response to a traumatic childhood, would not likely have generated sympathy with many jurors, especially in light of other evidence that he planned Nancy's murder over a period of several months (during which he met her children and assured her parents he would take good care of her), and the complete absence of evidence that he was intoxicated when he killed Nancy.

D. There is no reasonable probability the jury would have voted for life without possibility of parole if counsel had presented a male childhood sexual abuse expert. Evidence that Crew engaged in deviant sexual behavior and substance abuse would not have been more compelling than evidence that he was a compassionate, useful person who was unlikely to commit future acts of violence.

E. The aggravated nature of the crime itself would have outweighed any evidence presented by a male childhood sexual abuse expert. Crew deceived Nancy into thinking he wanted to start a new life with her and even married her

when in fact he was planning all along to kill her; he had met her parents and children and knew they would be devastated by her death; after Crew shot Nancy she apparently suffered overnight in a ditch, alive but mortally wounded, knowing that Crew had betrayed her and she would never see her family again; her body was mutilated and disposed of in a shockingly depraved manner; and Crew's failure to ever reveal the location of her body deprived her parents of their expressed desire for a decent burial.

F. Crew's reliance on juror declarations to show prejudice is speculative and patently inadmissible. (Evid. Code, § 1150, subd. (a); see Petition at pp. 157-159; Exhs. 39-44.)

## **XII.**

Except as otherwise indicated, respondent denies each and every allegation of the petition, denies that Crew's confinement is in any way illegal, and denies that Crew's rights have been violated in any respect. Each and every legal characterization contained in the petition is erroneous as a matter of law, and none of the facts alleged in the petition demonstrate any entitlement to relief.

## **XIII.**

If Crew disputes any fact asserted in this return and deemed by this Court to be material, a referee should be appointed and an evidentiary hearing held to resolve any conflict thus discerned.

WHEREFORE, respondent respectfully submits that the petition for writ of habeas corpus should be denied and the order to show cause discharged, unless petitioner disputes any material assertion contained herein. If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged.

Dated: March 10, 2005

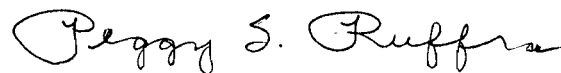
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**DECLARATION OF SERVICE**

Case Name: In re Mark Christopher Crew, on Habeas Corpus, No. S107856

I declare that:

I am employed in the Office of the Attorney General, at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the U.S. 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 U.S. Postal Service that same day in the ordinary course of business.

On March 10, 2005, I placed the attached

**RETURN TO ORDER TO SHOW CAUSE**

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Room 11000, San Francisco, CA 94102, for deposit in the U.S. Postal Service that same day, in a sealed envelope, postage fully postpaid, addressed as follows:

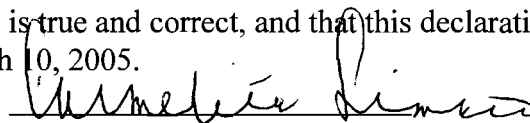
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on March 10, 2005.

  
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