IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARK CHRISTOPHER CREW,	)	No. S107856
	)	
Petitioner,	)	[Related Appeal No. S034110]
	)	
On Habeas Corpus	)	**CAPITAL CASE**
	)	
	)	

PETITIONER'S REPLY TO RESPONDENT'S RETURN; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner MARK CHRISTOPHER CREW filed a habeas corpus petition on June 26, 2002, challenging his confinement on San Quentin's Death Row. On February 2, 2005, after informal briefing by both parties, this Court issued an order to show cause why relief should not be granted "as a result of trial counsel's failure to adequately investigate and present mitigating evidence at the penalty phase of petitioner's trial as alleged in Claim VI(B)." Respondent filed its return on March 10, 2005.

Petitioner hereby files his reply to respondent's return:

I.

INTRODUCTION

In his habeas corpus petition, petitioner alleged that trial counsel did not investigate petitioner's social history and, consequently, failed to obtain and present mitigating evidence of precisely the sort that capital jurors find powerfully effective and lead them to render life verdicts. Specifically,

counsel failed to present evidence of petitioner's deeply disturbed family background, the fact that petitioner was sexually abused by his mother, and his resulting lifelong struggle with depression, addiction to drugs and alcohol, and other mental health problems. Counsel's inadequate performance was not an informed tactical choice. To the contrary, it was a result of lead counsel's incapacity due to alcohol abuse and second counsel's late entry into the case. The superficial penalty phase defense that was presented glossed over petitioner's traumatic childhood while emphasizing his positive attributes. As a result, the jurors were given a grossly misleading and incomplete picture of petitioner's life history, and their decision that petitioner deserved to die was made without considering the compelling evidence of petitioner's tragic upbringing and its destructive impact on his functioning and well-being.

This Court issued an order to show cause on this claim, which "signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) This puts the burden on respondent to plead facts in the return which "respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful." (*Id.* at p. 476.)

Respondent has utterly failed to meet its burden – and demonstrated its inability to do so: It does not deny any of the material factual allegations; it accepts the credibility of petitioner's expert witnesses; and it does not challenge the availability or reliability of petitioner's lay witnesses. In its return, respondent does not dispute what trial counsel did with regard to penalty phase investigation, what counsel failed to do, and what evidence was readily available had counsel undertaken a timely and adequate social

history investigation In short, respondent concedes facts sufficient to justify issuance of the writ.

Unable to challenge petitioner's factual allegations, respondent distorts well-established legal principles in an attempt to avoid the granting of relief to petitioner. Respondent contends that counsel's performance in investigating and presenting mitigating evidence was adequate – *not* by disputing the facts alleged by petitioner or alleging additional facts – but by refusing to acknowledge that prevailing professional norms require a thorough and independent social history investigation. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524; *Williams v. Taylor* (2000) 529 U.S. 362, 396; *In re Lucas* (2004) 33 Cal.4th 682, 725.)

In addition to ignoring *Wiggins* and all other legal authority regarding counsel's obligations to conduct an adequate penalty phase investigation, respondent repeatedly misrepresents the legal standard for assessing prejudice from counsel's failures. Rather than confront the wealth of compelling evidence that competent counsel would have obtained by assessing 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*, *supra*, 529 U.S. at p. 398 [emphasis added]), respondent selectively addresses in isolation discrete aspects of petitioner's life history and argues that its introduction at the penalty phase would not have affected the outcome of the case.

This Court has made it clear that the People's return is an invaluable resource to the Court in determining whether to grant relief. No less so when the return is found wanting. Where, as here, respondent fails to carry its pleading burden, and "effectively admits the material factual allegations .

. . by not disputing them," there is no need for an evidentiary hearing and relief must be granted to petitioner. (*In re Sixto* (1989) 48 Cal.3d 1247, 1252 [where return did not dispute material factual allegations of ineffective assistance of counsel but merely challenged claimed prejudice flowing from counsel's deficiencies, issues were resolved and relief granted without an evidentiary hearing].) Any other result would sanction respondent's perfunctory efforts and undermine the validity of the procedural requirements for habeas corpus proceedings.

II.

INCORPORATION BY REFERENCE

Petitioner hereby incorporates and realleges by reference each and every paragraph alleged in the petition for writ of habeas corpus filed on June 26, 2002, as if fully set forth herein. Petitioner also incorporates all exhibits appended to the petition as if fully set forth herein. Specifically, petitioner relies on every material fact in Claim VI.B of the petition, and the exhibits filed in support of Claim VI.B.

Petitioner hereby incorporates all legal and factual arguments set forth in the memorandum of points and authorities accompanying this reply, and incorporates the exhibits appended hereto, as if fully set forth herein.[1]

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[1] Petitioner has submitted with this reply declarations from trial counsel, Joseph Morehead (Exhibit 1-A), and his trial investigator, John Murphy (Exhibit 3-A). These declarations provide additional support for allegations previously raised in the habeas petition and not disputed by respondent regarding the nature and scope of counsel's penalty phase investigation.

III.

PETITIONER IS ENTITLED TO RELIEF BECAUSE OF RESPONDENT'S FAILURE TO CONTRADICT PETITIONER'S MATERIAL FACTUAL ALLEGATIONS

This Court has stressed the importance of the People's return in assisting the Court "in determining what material facts are truly disputed by the parties." (*People v. Duvall, supra,* at p. 483, fn. 6.) Respondent must either "admit the factual allegations set forth in the habeas corpus petition, or *allege additional facts* that *contradict* those allegations." (*Id.* at p. 483 [emphasis in original].) In addition, respondent should "'provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.'" (*Id.* at p. 476, quoting *In re Lewallen* (1979) 23 Cal.3d 274, 278, fn. 2.) While respondent need not counter the expert declarations presented by a habeas petitioner with its own expert declarations, respondent must at minimum "inform the court it intends to dispute the credibility of petitioner's expert." (*People v. Duvall, supra*, 9 Cal.4th at p. 485.) Furthermore, if respondent believes it is unable to gain access to facts to counter those alleged by the petitioner, it must set forth with specificity: 1) why the information is not readily available; 2) the steps that were taken to try to obtain it; and 3) why respondent believes in good faith that certain alleged facts are untrue. (*Ibid.*)

Petitioner has alleged facts, supported by the trial record, by sworn declarations of lay and expert witnesses, and by documentary evidence, which establish that trial counsel failed adequately to investigate and present mitigating evidence at petitioner's penalty phase. The return fails to contradict the material factual allegations in the petition, includes no documentary evidence and accepts the credibility of petitioner's expert witnesses.

Respondent's return is divided into thirteen paragraphs. Paragraph I is a description of the capital crime. Paragraphs II through IV provide a procedural history of the case. Paragraph V simply states the names of trial counsel and counsel's investigator. Paragraph VI alleges the undisputed fact that counsel hired two mental health experts to evaluate petitioner's mental state at the time of the crime and made a tactical decision not to present their testimony at either phase of the trial. Paragraph VII is a description of the penalty phase witnesses that trial counsel did present. Paragraph VIII is respondent's summary of petitioner's penalty phase ineffective assistance of counsel claim. Paragraph IX alleges that counsel's penalty phase investigation was adequate but does not dispute petitioner's allegations as to what counsel did or failed to do. Rather, respondent alleges that the mitigating evidence counsel presented was sufficient and the mitigating evidence counsel failed to obtain would not have made a difference in the outcome of the case. Paragraph X alleges that counsel was not ineffective "for failing to present the retained mental health experts at the penalty phase," a claim petitioner does not raise. Paragraph XI alleges that counsel was not ineffective for failing to present a male childhood abuse expert. Respondent does not dispute the credibility of petitioner's sexual abuse expert or the evidence upon which he relied, but instead alleges that such testimony would not have made a difference in the outcome. Paragraph XII is a general denial and paragraph XIII is a boilerplate request for a hearing if there are material facts in dispute.

This Court must grant petitioner relief without an evidentiary hearing because respondent has failed to dispute the material facts alleged in the petition. (*People v. Duvall, supra,* 9 Cal.4th at p. 483; *In re Sixto, supra,* 48 Cal.3d at p. 1252.) Alternatively, should this Court find that the return has

alleged facts sufficient to create any material factual disputes, an evidentiary hearing is required to resolve such disputes. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 478.)

IV.

PETITIONER'S ADMISSIONS AND DENIALS OF RESPONDENT'S ALLEGATIONS

1. Petitioner admits that the prosecution presented circumstantial evidence that petitioner killed Nancy Andrade on or about August 23, 1982, and then obtained her money and personal property. Petitioner denies respondent's characterization of the record facts of the crime. (Return, ¶ I.) Respondent's summary relies primarily on the testimony of Richard Elander, who was the only witness to testify about the manner in which Andrade was allegedly killed. Petitioner alleges that Elander's credibility was suspect, and that the jury did not necessarily accept as true all of his testimony. Elander admitted giving numerous false statements to the police about the crime. (RT 4025-4032.) On cross-examination, he acknowledged lying at the preliminary hearing (RT 4041, 4078), to the homicide detectives (RT 4042-4052), to the FBI (RT 4052-4056), and to the District Attorney's investigator. (RT 4060-4070.) Elander only implicated petitioner after Elander himself became a suspect in the murder, and he received immunity from prosecution. (RT 4079-4081.) In addition, the defense presented evidence that Elander was a drug addict who could not be trusted. (RT 4504-4506.)

2. Petitioner denies that the evidence presented at trial established that petitioner married Andrade "to advance his plan to kill her on a cross-country trip so that her body would not be found." (Return, ¶ I.) The record shows that petitioner and Andrade were married on June 4,

1982, and that their marriage was troubled from the start. (RT 3669, 3709.) Petitioner soon decided to move to South Carolina *without* Andrade, with both parties considering an annulment. (RT 3542, 3557, 3581, 3584, 3671, 3710, 3973.) At that point, petitioner had no intention of seeing Andrade again, much less murdering her. Andrade then unexpectedly visited petitioner in early July 1982, and after her return to California, the two discussed reconciliation, with Andrade deciding to move to South Carolina to be with petitioner. (RT 3678-3679.) The prosecution presented evidence that an alleged conversation regarding a plan to kill Andrade between petitioner and Elander did not occur until August 1982, when petitioner and his stepfather were about to leave for California to pick up Andrade and bring her back to South Carolina. (RT 3974.)

3. Petitioner admits the procedural history of the case as summarized by respondent (Return, ¶ II-IV), and hereby provides additional relevant procedural facts. The trial commenced with jury selection on April 17, 1989. (CT 2126.) The prosecution's guilt phase case began on June 28, 1989. (CT 2259.) The prosecution rested and the defense began its guilt phase case-in-chief on July 17, 1989. (CT 2270.) The defense concluded its case the following day. (CT 2272.) The jury began its deliberations on July 24, 1989 (CT 2275), and on July 26, 1989, found petitioner guilty of first degree murder and grand theft, and found the financial gain special circumstance true. (CT 2279.) The penalty phase portion of the trial commenced on August 1, 1989. (CT 2290.) The jury began its deliberations on August 8, 1989. (CT 2298.) On August 10, 1989, the jury rendered its verdict of death. (CT 2300.) On February 23, 1990, the trial court found the jury's determination that the aggravating circumstances outweighed the mitigating circumstances was contrary to the evidence

presented, and granted petitioner's motion for modification of sentence pursuant to Penal Code section 190.4(e). The court set side the death penalty and sentenced petitioner to life without possibility of parole. (RT 5173-5182.) This ruling was reversed in *People v. Crew* (1991) 1 Cal.App.4th 1591. Upon remand, on June 22, 1993, after the trial judge was determined to be unavailable, a newly assigned judge denied the 190.4(e) motion and imposed a sentence of death. (CT 3004, 3016.)

4. Petitioner admits that he was represented at trial by Joseph O'Sullivan and Joseph Morehead, and that counsel were assisted by investigator John Murphy. (Return, ¶ V.)

5. Petitioner admits that counsel retained two mental health experts, Dr. David Smith and Dr. Frederic Phillips. (Return, ¶ VI.) Petitioner further admits that the two experts were retained initially "for use at the guilt phase in support of a potential mental state defense that [petitioner's] depression, sleep deprivation, and cocaine and alcohol use at the time of the crime negated specific intent." (Return, ¶ VI; Petition, Exh. 1, at p. 3.)[2] Petitioner further admits that counsel made a tactical decision not to call these experts to testify at the guilt phase after deciding not to call petitioner to testify on his own behalf and admit the crime. (Return, ¶ VI; Exh. 1, at p. 3.)

6. Petitioner admits that counsel "considered using Dr. Smith and Dr. Phillips at the penalty phase in the same manner as [counsel] had considered using them at the guilt phase, presenting evidence on [petitioner's] mental state at the time of the crime." (Exh. 1, at p. 3.)

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[2] Citations to numbered exhibits (Exh. 1 - Exh. 119) refer to exhibits filed in support of the habeas corpus petition. Citations to Exhibits 1-A and 3-A refer to exhibits filed with this reply to the return.

Petitioner further admits that counsel made a tactical decision not to call these experts at the penalty phase to testify about petitioner's mental state at the time of the crime in order to not "open the door to cross-examination on the facts of the crime" and avoid having the focus of the penalty phase be the circumstances of the crime. (Return, ¶ VI; Exh. 1, at p. 3; Declaration of Joseph Morehead, attached hereto as Exhibit 1-A, at pp. 2-3.)

7. Whether counsel had tactical reasons for not presenting the retained mental health experts regarding petitioner's mental state at the time of the crime is irrelevant to whether counsel was ineffective for failing to present mental health experts, as well as lay witnesses, regarding petitioner's upbringing and family history. As petitioner alleges – and respondent does not dispute – the decision not to present evidence of petitioner's traumatic background was not an informed, reasonable tactical decision and was the result of lack of preparation and investigation rather than trial tactics. (Petition, ¶ 370, at p. 109.)

8. Petitioner admits that counsel called nine witnesses at the penalty phase as described by respondent, and that these witnesses portrayed petitioner as a "compassionate, generous, worthwhile person who would pose no future danger in prison." (Return, ¶ VII.) In addition, the parties stipulated that petitioner had never suffered a prior felony conviction. (RT 4931.) The prosecution did not introduce any additional aggravating evidence in its case-in-chief at the penalty phase, and relied on the circumstances of the crime presented at the guilt phase. (RT 4687-4688.)

9. Petitioner alleges that trial counsel rendered ineffective assistance at the penalty phase for failing adequately to investigate and present mitigating evidence. Petitioner denies that his allegations are

limited to the description of the claim set forth by respondent. (Return, ¶ VIII; compare Petition, ¶¶ 370-371, at p. 109.)

10. Petitioner denies that counsel's penalty phase investigation was constitutionally adequate. (Return, ¶ IX; see Petition, ¶¶ 318-390, at pp. 95-114.)

11. Petitioner admits that Joseph Morehead was the attorney primarily responsible for the penalty phase and was appointed on November 29, 1988, less than five months before the trial began on April 17, 1989. (Return, ¶ IX.A; Exh. 1, at p. 1; Exh. 2, at p. 10; CT 2087, 2126.) As alleged, lead counsel, Joseph O'Sullivan, delegated all aspects of preparation and presentation of the penalty phase to Morehead. (Exh. 1, at p. 1; Exh. 2, at p. 3; Exh. 3, at p. 12; Exh. 1-A, at p. 1.)

12. Petitioner alleges, and respondent does not dispute, that in addition to his responsibilities for the penalty phase, Morehead's duties included maintaining relations with the client, assisting in jury selection, consulting with experts, drafting and arguing pre-trial motions, directing investigation for the guilt phase, and second chairing the guilt phase. (Exh. 1, at p. 1.)

13. Petitioner admits that investigator John Murphy was hired in February 1989, two months before the trial began. (Return, ¶ IX.A; Exh. 1, at p. 1; Exh. 3, at p. 12.) Petitioner alleges, and respondent does not dispute, that Murphy was responsible for investigation of both guilt and penalty phase aspects of the trial, and that he devoted his time prior to trial exclusively to guilt phase investigation. (Exh. 3, at pp. 12-14.) Indeed, from the time he was hired in February 1989, until July 1989, well after the trial was underway, Murphy's investigative efforts were devoted to the guilt phase. (Declaration of John Augustus Murphy, attached hereto as Exhibit

3-A, at pp. 1-3; see ACT 987.9, at pp. 177-201.)

14. Petitioner alleges, and respondent does not dispute, that the focus for Morehead and Murphy upon their entry into the case was guilt phase preparation and that no investigation for the penalty phase was undertaken prior to trial. (Petition, ¶ 335, at p. 98; Exh. 3-A, at pp. 1-3.)

15. Petitioner alleges, and respondent does not dispute, that by the time Morehead became involved in the case there was little time to prepare to go to trial, and that he barely had time to review the preliminary hearing transcripts and discovery to get up to speed by the time of jury selection. (Exh. 1, at p. 1; see ACT 987.9, at p. 11 [request for investigative and expert funds reflects that the police reports and preliminary hearing transcripts referred to approximately 100 guilt phase witnesses, and that there were more than 60 interviews on cassette tapes that needed to be evaluated].)

16. Petitioner alleges, and respondent does not dispute, that Morehead was under enormous time pressure and as he states in his declaration, "I did my best to put the guilt phase defense together. This left very little time for preparing for the penalty phase, which was scheduled to begin less than a week after the guilt phase concluded." (Exh. 1, at pp. 1-2; see also Exh. 3, at p. 12.) Furthermore, as Murphy recalls, "[w]hat little penalty phase investigation was accomplished was done at the last minute and almost as an afterthought. Counsel and I were scrambling to try to get the case ready for trial and had little time to devote to the penalty phase." (Exh. 3, at p. 13.)

17. Petitioner admits that counsel requested funding for investigation but denies that the requests were timely. (Return, ¶ IX.B.)

18. On December 12, 1988, counsel filed their first ex parte

application for funds for investigation, experts and other expenses related to the guilt and penalty phases. (ACT 987.9, at pp. 10-13.) This funding application included a request for "an initial psychiatric interview." (*Id.* at p. 12.) The only designated penalty phase-related request was limited to an "initial work up, defendant's background, *locating favorable lifestyle and witness [sic] that would militate against imposition of Death.*" (*Ibid.* [emphasis added].)

19. On or about March 30, 1989, counsel filed a second ex parte application for funds for investigation, experts and other expenses related to the guilt and penalty phases. (*Id.* at pp. 23-27.) This application included requests for funding for a substance abuse expert and a psychiatrist. (*Id.* at pp. 25-26.)

20. Petitioner admits that counsel received a total of $27,000, pursuant to these two funding requests, for investigation, experts and other expenses. (Return, ¶ IX.B.) However, as the record plainly shows, this amount was for expenses for both guilt and penalty phases of the trial. (ACT 987.9, at pp. 10-14, 23-28.)

21. On July 28, 1989, only four days before the commencement of the penalty phase, counsel filed a third ex parte application for funds. (*Id.* at pp. 60-61.) This application included a request for $7500 in investigative costs to "locate, screen and interview Penalty Phase witnesses . . . ." (*Id.* at p. 61.) This request was not ruled on prior to the conclusion of the trial, and such funds were not expended.

22. Petitioner alleges that the sum total of funds for mental health experts expended in preparation for the trial in this case was as follows: Dr. Phillips was paid a total of $1000 and Dr. Smith was paid a total of $2000. (*Id.* at pp. 283-284.)

23. Petitioner alleges that counsel failed to gather evidence of petitioner's pervasive and long-standing symptoms of depression, sleep disorders and substance abuse that was readily available from a wide array of witnesses. (Petition, ¶¶ 486-508, 525-531, at pp. 138-144, 151-153.) Petitioner admits that the jury was aware of isolated episodes – which primarily occurred shortly before and immediately after his wife's disappearance – of petitioner's depression, sleep disorders and substance abuse from four lay witnesses identified by respondent: Beverly Ward, Lisa Moody, Irene Watson and Emily Bates. (Return, ¶ IX.C.)

24. Beverly Ward was a prosecution witness at the guilt phase. She met petitioner at a bar in San Jose, California, on July 1, 1982, and saw him again on July 3rd. (RT 3938-3939.) Ward also spent two days with petitioner beginning on August 13, 1982, in South Carolina. (RT 3939.) Ward testified that when she saw him in August, petitioner drank constantly and could not sleep. On the two nights they were together in July, petitioner drank but did not have any problems sleeping. (RT 3947.)

25. Lisa Moody was a prosecution witness at the guilt phase. On or about August 28, 1982, after Andrade's disappearance, Moody left California for South Carolina with petitioner. (RT 4148.) Moody testified that petitioner underwent a drastic mood change after receiving a telephone call at petitioner's grandmother's home in Texas, where they had stopped on their way across the country. Petitioner subsequently became withdrawn and quiet. (RT 4151-4152.)

26. Irene Watson, petitioner's grandmother, testified at the penalty phase that when petitioner and Lisa Moody stayed with her for one night in Texas on their way to South Carolina, petitioner acted like a different person. Watson described petitioner as not wanting to eat and not

sleeping. (RT 4796.)

27. Emily Bates, petitioner's former girlfriend, testified for the defense at the penalty phase that she saw petitioner drunk on two occasions in 1980, and that by the end of 1981, he was drinking more when he was with his friend Elander. (RT 4767-4769, 4771.)

28. Petitioner alleges, and respondent does not deny, that no evidence was presented to the jury regarding the pervasive and long-standing nature of petitioner's depression, sleep disorders and substance abuse. There was no expert testimony at either the guilt phase or penalty phase to explain the significance of these mental health symptoms or to put them in the context of petitioner's life history. In addition, the jury was never informed that such symptoms were relevant to mitigating evidence at the penalty phase. Neither in outlining the penalty phase presentation in his opening statement (RT 4708-4723), nor in his penalty phase opening or closing arguments did trial counsel mention that evidence of petitioner's depression, sleep disorders or substance abuse was relevant to mitigating factors. (RT 5033-5058; 5070-5083.) In fact, counsel acknowledged that "there is really not a great deal of evidence your defendant was under emotional stress, no psychiatric explanation here." (RT 5042.) A jury instruction proposed by the defense and given to the jury which specified the mitigating evidence for the jury to consider did not refer to evidence of petitioner's depression, sleep disorders or substance abuse. (RT 5094-5096; CT 2553-2554.) As Morehead acknowledges, there simply was no attempt to have the jury consider as mitigating evidence petitioner's long-standing substance abuse problems or any mental health symptoms such as sleep disorders or depression. (Exh. 1-A, at p. 2.)

29. Petitioner alleges, and respondent does not dispute, that

counsel did not obtain social history records or interview petitioner's out-of-state relatives. (Return, ¶ IX.D.)

30. Petitioner admits that trial counsel interviewed petitioner's father and mother, and met with his grandmother before she testified, but did not interview any other family members with regard to the penalty phase. (Return, ¶ IX.D; Exh. 1, at p. 2-3.) Petitioner alleges that even the interviews counsel did conduct were not designed to elicit meaningful information about petitioner's background. The limited scope of counsel's discussions with petitioner's father and grandmother is reflected in their testimony which provided superficial evidence of petitioner's life history. (See *infra* at pp. 53-55.) Counsel's and counsel's investigator's interviews of other family members, including petitioner's mother, were focused on issues relevant to the guilt phase as opposed to family or social history. (Exh. 1-A, at pp. 1-2; Exh. 3-A, at p. 2; Exh. 16, at p. 212.)

31. Petitioner alleges, and respondent does not deny, that neither counsel nor his investigator undertook an investigation "which would have encompassed interviewing [petitioner's] family, including relatives who lived in Texas and South Carolina, friends and neighbors in California, and others who may have had knowledge of [petitioner] and his family upbringing." (Exh. 1, at p. 2; see also Exh. 3, at p.14.)

32. Petitioner admits that counsel sought to obtain petitioner's military records and jail records. (Return, ¶ IX.D.) Counsel obtained petitioner's jail records but failed to obtain his military records. (Exh. 1, at p. 2; Exh. 3, at p. 14; Exh. 3-A, at pp. 2-3.)

33. Petitioner alleges, and the record reflects, that Murphy did not begin seeking petitioner's military and jail records until July 1989. He ultimately ran out of time before he could obtain petitioner's military

records. He obtained petitioner's jail records on July 31, 1989, a day before the penalty phase began. (Exh. 3-A, at pp. 2-3; ACT 987.9, at pp. 198-210.)

34. Petitioner alleges, and respondent does not deny, that counsel failed to obtain or seek to obtain any other records of petitioner and his family, including medical records, psychiatric records, school records, marital and divorce records, and civil and criminal court records. (Return, ¶ IX.D; Exh. 1, at p. 2; Exh. 3, at pp. 14-15.)

35. Petitioner denies that these other documents, including those specified in paragraph 34, *supra*, had little or no relevance. (Return, ¶ IX.D.) Respondent's allegation in this regard is unsupported by any facts and raises a question that can be resolved as a matter of law.

36. Petitioner alleges that the documents counsel failed to obtain were relevant to petitioner's social history and would have been critical information to be considered by mental health experts. (See e.g., Exh. 4, at p. 19; Exh. 5, at p. 84.) For example, such documents would have provided information supporting a family history of:

a) mental illness (Exh. 105, at pp. 880-882 [mental illness of grandfather's brother]; Exh. 117, at pp. 973-1194 [mental illness of grandfather]; Exh. 93, pp. 789-792 [mental health symptoms of father]);

b) medical problems relevant to mood disorders (Exh. 84, at pp. 654-663 [petitioner's high blood pressure]; Exh. 86, at p. 668 [mother's high blood pressure and duodenal ulcer]);

c) marital discord, neglect, abandonment and domestic violence (Exhs. 109 & 110, at pp. 893-903 [marriage and divorce records of petitioner's great grandparents]; Exh. 116, at pp. 942-972 [dismissed divorce proceedings of petitioner's maternal grandparents]; Exhs. 98 & 100, at pp. 826-831, 834-874 [divorce records of petitioner's paternal

grandparents, and additional marriage and divorce records of petitioner's paternal grandmother]; Exhs. 90 & 91, at pp. 706-726 [dismissed divorce proceedings of petitioner's parents and subsequent divorce records]; Exh. 92, at pp. 728-788 [father and stepmother's divorce records]; Exh. 96, at pp. 797-823 [brother's divorce records]); and

d) sexual abuse (Exh. 92, at p. 785 [father's molestation of stepdaughter]).

37. Respondent does not dispute, and therefore admits, the availability, credibility and truthfulness of petitioner's out-of-state witnesses that trial counsel failed to interview, and does not dispute petitioner's experts' reliance on these witnesses. Instead, respondent alleges, without any factual support, that most of them had little knowledge of petitioner's family life. (Return, ¶ IX.D.) Petitioner denies that these witnesses who resided in Texas (where petitioner was born and petitioner's parents were raised) and South Carolina (where petitioner's mother moved after divorcing petitioner's father and remarrying) had little actual knowledge relevant to petitioner's family life. The undisputed facts provided by these witnesses would have been relevant to:

a) petitioner's family history of mental illness and alcoholism (Exh. 30 [dec. of Eddie Lee Richardson], at pp. 248, 250-251; Exh. 28 [dec. of Cheryl Norrid], at p. 244);

b) petitioner's maternal grandfather's violence, domestic violence and alcoholism, his beating and sexual molestation of petitioner's mother, and his molestation of other girls (Exh. 30, at pp. 247-250; Exh. 28, at pp. 240-244; Exh. 35 [dec. of John Turner], at p. 263; Exh. 15 [dec. of Joyce Cox], at p. 208);

c) petitioner's maternal uncle's domestic violence and sexual

molestation of his daughters and other girls (Exh. 28, at pp. 240-244; Exh. 9 [dec. of Debbie Bumgardner Bell], at pp. 195-196);

d) the abandonment of petitioner's father by his parents, and the emotional instability of petitioner's paternal grandmother (Exh. 21 [dec. of Maurice Lambert], at p. 224; Exh. 26 [dec. of Darla McFarland], at p. 235; Exh. 17 [dec. of Margie Crow], at pp. 214-215);

e) petitioner's mother's depression, anxiety, social isolation and emotional withdrawal (Exh. 30, at p. 250; Exh. 15, at pp. 206-207; Exh. 13 [dec. of Kay Chesney], at p. 202; Exh. 24 [dec. of Dolly Lynn], at p. 231);

f) petitioner's father's womanizing (Exh. 15, at pp. 205-206).

38. Respondent does not dispute, and therefore admits, the availability, credibility and truthfulness of petitioner's in-state witnesses, including family friends, petitioner's friends, and neighbors, and does not question petitioner's experts' reliance on these witnesses regarding:

a) petitioner's mother's depression and withdrawal, and her inappropriate sexual responses (Exh. 18 [dec. of Gail Frost], at pp. 217-218; Exh. 23 [dec. of Kenneth Lovitt], at p. 229; Exh. 14 [dec. of Doug Cox], at p. 203; Exh. 12 [dec. of Leslie Bringel], at p. 201; Exh. 25 [dec. of Glenn McCormick], at p. 233; Exh. 38 [dec. of Cheryl Watts], at p. 270; Exh. 31 [dec. of Larry Rider], at p. 252);

b) the social isolation of the Crew family (Exh. 23, at p. 229; Exh. 32 [dec. of Bernice Sebastian], at p. 254; Exh. 38, at p. 270);

c) petitioner's father's womanizing, sexually inappropriate behavior, and alcoholism (Exh. 14, at p. 203; Exh. 18, at p. 218; Exh. 32, at 254; Exh. 38, at p. 270; Exh. 33 [dec. of Patricia Silva], at pp. 255-256; Exh. 34 [dec. of Doug Thompkins], at pp. 260-261; Exh. 27 [dec. of

Barbara Miller], at pp. 236-238; Exh. 36 [dec. of Emily Vander Pauwert], at pp. 265-267);

d) neglect and lack of supervision of petitioner by his parents (Exh. 10 [dec. of Michael Boumann], at p. 197; Exh. 22 [dec. of Cathy Logsdon], at p. 226; Exh, 23, at p. 230; Exh. 25, at p. 232; Exh. 31, at p. 252; Exh. 33, at p. 256);

e) petitioner's exposure to the sexually aberrant behavior of his maternal grandfather (Exh. 14, at p. 204; Exh. 23, at pp. 229-230; Exh. 25, at pp. 232-233; Exh. 31, at p. 252);

f) petitioner's exposure to alcohol and drug use and sexually inappropriate behavior of male role models (Exh. 14, at p. 203; Exh. 23, at p. 229; Exh. 31, at p. 252);

g) petitioner's brother's symptoms of anxiety, depression, substance abuse, and inappropriate sexual behavior (Exh. 11 [dec. of Don Bringel], at p. 198; Exh. 12, at p. 200; Exh. 22, at pp. 226-228; Exh. 23, at p. 229; Exh. 25, at pp. 232-233; Exh. 31, at p. 252; Exh. 33, at p. 256; Exh. 38, at p. 270);

h) petitioner's long-standing symptoms of depression, sleep disorders, low self-esteem and substance abuse (Exh. 10, at p. 197; Exh. 19, at p. 219; Exh. 20, at pp. 221-222; Exh. 23, at pp. 229-230; Exh. 29 [dec. of Cynthia Pullman], at pp. 245-246; Exh. 31, at pp. 252-253; Exh. 33, at pp. 255-258; Exh. 34, at p. 261; Exh. 36, at pp. 265-268; Exh. 37 [dec. of Beverly Ward], at p. 269).

39. Petitioner denies respondent's allegation that "there was no reasonable probability" that the information cited in paragraphs 36-37,

supra, would have affected the outcome.[3] (Return, ¶ IX.D.) This allegation is unsupported by any facts and raises a question that can be resolved as a matter of law. (See *In re Sixto*, *supra*, 48 Cal.3d at p. 1252.) Petitioner discusses the undisputed information that would have been disclosed by an adequate investigation and addresses whether the presentation of such information would have affected the outcome of the case in the attached memorandum of points and authorities. (See *infra*, at pp. 71-83, 88-95.)

40. Petitioner admits that Morehead had a "good relationship" with petitioner. (Return, ¶ IX.E; Exh. 1, at p. 4.) Petitioner alleges, and respondent does not deny, that Morehead believed that his "late entry in the case precluded having as in depth and trusting a relationship as [he] normally would have with a capital client." (Exh. 1, at p. 4.) Petitioner further admits that Murphy spoke to petitioner in person or on the phone numerous times before and during trial. (Return, ¶ IX.E.)

41. Petitioner admits that he never told counsel or counsel's investigator that his mother sexually molested him or that his father's depiction of their family life was inaccurate. (Return, ¶ IX.E.) Petitioner further alleges that counsel was unaware that petitioner had been sexually abused, and that counsel's discussions with petitioner were geared primarily toward establishing a relationship with him and obtaining evidence relevant to the guilt phase of the trial. (Exh. 1-A, at pp. 1-2; see also Exh. 3-A, at pp. 1-2.)

42. Petitioner denies respondent's allegation that counsel cannot be faulted for failing to discover what petitioner neglected to disclose.

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[3] Respondent does not address the evidence cited in section IV, paragraph 38, *supra.*

(Return, ¶ IX.E.) This raises a question that can be resolved as a matter of law. (See *In re Lucas*, *supra,* 33 Cal.4th at p. 368 ["contemporary professional standards required counsel to conduct an adequate investigation of petitioner's background even if petitioner himself failed to come forward with evidence of his difficult history"].) Petitioner addresses this issue in greater detail in the attached memorandum of points and authorities. (See *infra* at pp. 63-65; see also Petition, ¶¶ 371-378, at pp. 109-111.)

43. Petitioner alleges, and respondent does not deny, that trial counsel believed that there was not enough time to adequately investigate the penalty phase and that he therefore chose the "easier and much less time-consuming" path of presenting petitioner as a "caring, generous, loving person." (Return, ¶ IX.F; Exh. 1, at pp. 2-3; see also Exh. 3, at pp. 14-15.) Petitioner denies that this statement by counsel runs afoul of any rule requiring a contemporaneous assessment of counsel's performance. (Return, ¶ IX.F.) Counsel's statement is an explanation based on what counsel knew at the time of trial as to why a more comprehensive investigation was not undertaken.

44. Petitioner denies respondent's allegation that "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." (Return, ¶ IX.F.) Petitioner alleges that counsel was ineffective for failing to introduce evidence of petitioner's traumatic upbringing *in addition to* the evidence of petitioner's positive attributes that was presented. (See Petition, ¶¶ 380, 542-544, at pp. 111, 155-156.) Furthermore, petitioner alleges, and respondent does not deny, that counsel's failure to undertake a comprehensive social history investigation

precluded counsel from making an informed decision with regard to the kind of mitigating evidence to present. (Petition, ¶ 370, at p. 109.)

45. Respondent's allegation that trial counsel "were not ineffective for failing to present the retained mental health experts at the penalty phase" is irrelevant to petitioner's claim. (Return, ¶ X.) Petitioner does not allege that trial counsel were ineffective in failing to present the two experts they retained, given the limited scope of the experts' evaluations and the absence of a comprehensive social history investigation.

46. Petitioner admits that trial counsel retained two psychiatrists, one of whom was a substance abuse expert, who were both well qualified to make a forensic evaluation of petitioner's mental state. (Return, ¶ X.A.) Petitioner alleges, and respondent does not deny, that these experts were consulted solely with regard to petitioner's mental state at the time of the crime, i.e., whether petitioner's depression, sleep deprivation and substance abuse at the time of the crime negated specific intent. (Exh. 1, at p. 3.)

47. Petitioner admits that trial counsel was aware of petitioner's symptoms of depression, substance abuse and insomnia. (Return, ¶ X.A; Exh. 1, at p. 2.) Petitioner further alleges that counsel did not seek to develop this information except as it related to a defense to murder (i.e., petitioner's mental state at the time of the crime). (Exh. 1-A, at p. 1.)

48. Petitioner admits that petitioner's symptoms of depression, substance abuse and insomnia should not necessarily have alerted trial counsel to the fact that petitioner had been sexually abused. Petitioner further admits that based on trial counsel's awareness of these symptoms alone, trial counsel had no duty to retain an expert who specialized in male childhood sexual abuse. (Return, ¶ X.A.)

49. Petitioner alleges that under prevailing professional norms

trial counsel had an obligation to conduct a timely and competent social history investigation. (Petition, ¶¶ 312-316, 341-344, at pp. 92-94, 100-1011 see also *infra* at pp. 57-60.) Petitioner alleges, and respondent does not deny, that had trial counsel undertaken a timely and competent social history investigation, he would have uncovered evidence of the serious and substantial dysfunction in petitioner's family and upbringing, including the fact that petitioner was sexually abused by his mother and resorted to drugs and alcohol to self-medicate his trauma-related symptoms, and petitioner's genetic and environmental predisposition to addiction and the long term effects of chronic substance abuse. (Petition, ¶¶ 371, 374-378, at pp. 109-111; Exh. 1, at pp. 4-5.)

50. Petitioner admits that Morehead orally provided Dr. Smith and Dr. Phillips with information about the crime. Petitioner admits that there is no evidence that either expert requested additional information. (Return, ¶ X.B; Exh. 1, at p. 3.)

51. Petitioner denies respondent's allegation that Morehead had no duty to provide the experts with additional information in preparation for the penalty phase unless the experts requested it. (Return, ¶ X.B.) This allegation raises a question that can be resolved as a matter of law. (See *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1116 [counsel for the penalty phase of a capital trial has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request"].) Petitioner addresses counsel's duty to provide background information to experts in more detail below. (See *infra*, at pp. 65-68; see also Petition, ¶¶ 316, 332, 362, 373-374, at pp. 94, 97-98, 106-107, 109-110.)

52. Petitioner alleges that Dr. Phillips and Dr. Smith prepared no

written reports and that their findings were limited to petitioner's mental state at the time of the crime. (Exh. 5, at p. 83; Exh. 6, at p. 145; Exh. 1-A, at p. 2.)

53. Petitioner admits that he did not tell Dr. Phillips that he had been sexually molested by his mother during the course of a preliminary interview conducted by Dr. Phillips in January 1989. (Return, ¶ X.C; Exh. 6, at p. 145.) Petitioner further admits that his mother was alive at the time of his interview with Dr. Phillips, and that by the time petitioner disclosed that he had been sexually abused by his mother, she was deceased. (Return, ¶ X.C.)

54. Petitioner does not allege that counsel should 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." (Return, ¶ X.C.) Petitioner's failure to tell Dr. Phillips that he was sexually abused is irrelevant and does not excuse counsel's failure to investigate petitioner's social history. (See *supra*, section IV, paragraph 42.) It is undisputed that trial counsel unreasonably failed to undertake a comprehensive social history investigation which would have revealed "a history of sexual abuse in [petitioner's] family, together with [petitioner's] symptoms of depression, chronic use of drugs and alcohol, and his compulsive womanizing," and had such information been provided to a competent mental health expert, such expert would have advised counsel "that there was a strong likelihood that [petitioner] was sexually abused as a child," and such expert, after interviewing petitioner, would have been able to testify regarding petitioner's social history, the sexual abuse and trauma he suffered and its devastating impact on his life. (*Ibid*; see also Exh. 4, at p. 63.)

55. Petitioner admits that Morehead made a tactical decision not to call Dr. Smith or Dr. Phillips at the penalty phase with regard to petitioner's mental state at the time of the crime because he did not want to have petitioner admit his guilt or to "open the door to cross-examination on the facts of the crime." (Return, ¶ X.D; Exh. 1, at p. 3.) Since the prosecution's only aggravating factor was the circumstances of the crime, counsel believed it was more effective to stress mitigating evidence not directly related to the crime, and that presenting evidence of petitioner's mental state at the time of the crime would have shifted the focus of the penalty phase away from other mitigating factors and back to the crime. (Exh. 1-A, at pp. 2-3.)

56. Petitioner denies that Morehead "now believes 'there would have been an effective way to present this evidence [i.e., evidence of petitioner's mental state at the time of the crime] without delving back into the crime.'" (Return, ¶ X.D.) Respondent quotes Morehead out of context to reach this conclusion. It is clear from the preceding paragraphs of his declaration that the evidence Morehead believes could have been presented without "delving back into the crime" was not evidence of petitioner's mental state at the time of the crime but evidence of petitioner's dysfunctional family and upbringing, sexual abuse by his mother and his resulting substance abuse and trauma-related symptoms. (Exh. 1, at pp. 4-5.) After discussing the information that would have been uncovered by an adequate social history investigation in paragraphs 19 and 20 of his declaration, Morehead states in paragraph 21: "There was no tactical reason for not obtaining and presenting *this* information at the penalty phase, and there would have been an effective way to present this evidence without delving back into the crime." (Exh. 1, at p. 5 [emphasis added].)

57. Petitioner does not allege that trial counsel was ineffective for failing to call at the penalty phase the two retained experts to testify regarding petitioner's mental state at the time of the crime. Thus, whether counsel's decision not to call them was a reasonable tactical decision is irrelevant. (Return, ¶ X.D.)

58. Petitioner denies that counsel was not ineffective for failing to present a male childhood sexual abuse expert. (Return, ¶ XI.)

59. Respondent does not dispute the credibility of petitioner's expert witnesses or the truthfulness of the evidence upon which they rely. Respondent does not dispute the reliability or availability of any of the mitigating evidence petitioner alleges would have been discovered and presented by competent counsel. Instead, respondent misleadingly attempts to: a) isolate various aspects of petitioner's claim into discrete parts and argue that each individual omission by counsel (e.g., the failure to present a particular kind of expert or a particular mitigating aspect of petitioner's life) in and of itself would not have affected the outcome; b) misrepresent the nature of the mitigating evidence that competent counsel would have presented (e.g., describing the impact of sexual abuse merely as evidence of "deviant sexual behavior") in order to demonstrate that the failure to present such evidence was not prejudicial; and c) further obscure the assessment of prejudice by selectively applying a "more likely than not" preponderance of the evidence test rather than the *Strickland* "reasonable probability" standard.[4] (See, e.g., Return, ¶¶ XI.A ("the jury would not likely have accepted . . ."), XI.B (evidence "would likely have offended many jurors") and XI.C (evidence "would not likely have generated sympathy . . . .")

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[4] See *Strickland v. Washington* (1984) 466 U.S. 668, 688, 693.

60. Petitioner does not allege merely that counsel should have presented an expert in male childhood sexual abuse (Return, ¶ XI), but that reasonably competent counsel would have: a) undertaken a competent and timely investigation of petitioner's background and family history; b) provided the fruits of that investigation to reasonably competent mental health experts; c) presented lay and expert testimony regarding petitioner's family history of sexual abuse, violence, abandonment, neglect, marital discord, substance abuse and mental illness; d) presented lay and expert testimony regarding petitioner's traumatic upbringing including being sexual abused by his mother, and the impact of his family and trauma history on his development and mental health; e) presented lay and expert testimony regarding petitioner's genetic and environmental predisposition to addiction and the long term effects of his chronic substance abuse. (Petition, ¶¶ 309, 370-380, 391-539, at pp. 91, 109-111, 114-155.)

61. Petitioner alleges, and respondent does not deny, that petitioner was sexually abused by his mother and had a family history of sexual abuse, mental illness, substance abuse, violence, abandonment, neglect, and marital discord, and that petitioner could have presented credible expert testimony that his childhood trauma manifested in the form of depression, sleep disorders, lying, substance abuse and compulsive sexual behavior. (Petition, ¶¶ 391-539, at pp. 114-155.) Respondent merely alleges that the testimony of a sexual abuse expert would not have affected the outcome of the case. (Return, ¶ XI.A-E.) Petitioner denies that counsel's failure to present such an expert – together with other readily available mitigating evidence – was not prejudicial. This is an issue that can be resolved as a matter of law. (See *In re Sixto*, *supra*, 48 Cal.3d at p. 1252.) It is addressed in detail below. (See *infra*, at pp. 88-95; see also

Petition, ¶¶ 540-550, at pp. 155-159.)

62. Petitioner denies respondent's allegation that the jury would not have accepted expert testimony that petitioner's adult behavior stemmed from his traumatic experiences in childhood because the prosecutor could have countered that petitioner's mental health symptoms around the time of the crime had to do with his fear that his wife's body would be found and that he would be arrested. (Return, ¶ XI.A.) Petitioner alleges, and respondent does not deny, that there was substantial readily available evidence which established that petitioner suffered symptoms of depression, sleep disorders, substance abuse and compulsive sexual behavior well before his wife disappeared. (Petition, ¶¶ 486-508, at pp. 138-144.) Such evidence need not be connected to the crime to have an impact on the jury's sentencing decision. (See *Williams v. Taylor*, *supra*, 529 U.S. at p. 398 ["Mitigating 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"].)

63. Petitioner denies respondent's allegation that the failure to present the testimony of a male childhood sexual abuse expert was not ineffective because such testimony would have portrayed petitioner unfavorably. (Return, ¶ XI.B.) Respondent alleges that testimony that the sexual abuse petitioner suffered as a child provided the foundation for non-violent sexually compulsive behavior including voyeuristic acts which are common among individuals who have had child sexual abuse experiences (Petition, ¶ 477, at p. 136; Exh. 4, at p. 53) "would likely have offended many jurors and ultimately cast Crew in a negative and unsympathetic light." (Return, ¶ XI.B.) This allegation raises a question that can be resolved as a matter of law, and is discussed in greater detail below. (See

infra, at pp. 85-95; see also Exh. 1-A, at pp. 3-4.)

64. Respondent does not call into question the credibility of petitioner's substance abuse expert, Dr. David Smith, and does not refute the allegations that trial counsel failed to investigate and present readily available evidence regarding petitioner's predisposition to addiction and his long term dependence on drugs and alcohol and its impact. (Return, ¶ XI.C; Petition, ¶¶ 515-539, at pp. 147-155; Exh. 5, at pp. 85-94.)

65. Petitioner denies respondent's allegation that counsel's failure to introduce evidence of petitioner's long term dependence on drugs and alcohol and its impact was not prejudicial because such evidence "would not likely have generated sympathy with many jurors" in light of other evidence regarding the murder[5] and the absence of evidence that petitioner was intoxicated at the time of the crime.[6] (Return, ¶ XI.C.) Petitioner alleges that evidence regarding petitioner's predisposition to addiction and his long term dependence on drugs and alcohol and its impact would have generated sympathy with the jury even if it did not mitigate the capital crime. (See *Williams v. Taylor*, *supra*, 529 U.S. at p. 398 ["Mitigating 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"].) Whether the introduction of evidence of petitioner's substance abuse history – in combination with other readily available mitigating evidence – would have affected the outcome of the case is a

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[5] Petitioner denies respondent's allegation that the record evidence establishes that he was planning the murder over a period of several months. (See *supra*, section IV, paragraph 2.)

[6] Petitioner denies that there is no evidence in the record suggesting that petitioner was intoxicated when Andrade was killed. (See RT 3983.)

question that can be resolved as a matter of law (see *In re Sixto*, *supra*, 48 Cal.3d at p. 1252), and is addressed in greater detail below. (See *infra*, at pp. 88-95.)

66. Petitioner denies respondent's allegation that there is no reasonable probability that the jury would have voted for life without possibility of parole if counsel had presented a male childhood sexual abuse expert. (Return, ¶ XI.D; see *supra*, section IV, paragraph 60.) This is a question that can be resolved as a matter of law and is addressed below. (See *infra*, at pp. 88-95.)

67. Petitioner denies that the relevant question of prejudice from counsel's failure to investigate and present mitigating evidence is whether or not "evidence that Crew engaged in deviant sexual behavior and substance abuse would . . . have been more compelling than evidence that he was a compassionate, useful person who was unlikely to commit future acts of violence." (Return, ¶ XI.D.) Moreover, petitioner does not allege that competent counsel merely would have presented a sexual abuse expert to testify that "Crew engaged in deviant sexual behavior and substance abuse."

68. While petitioner denies that evidence that petitioner was a compassionate, useful person who was unlikely to commit future acts of violence would have been more compelling than evidence of petitioner's social history, petitioner alleges that reasonably competent counsel would have presented both kinds of evidence. Petitioner alleges that competent counsel would have presented evidence of petitioner's social history and its psychological effects in addition to petitioner's positive traits to show that despite the destructive impact of petitioner's traumatic upbringing, other than the capital offense, he had been convicted of no other felonies and had

no history of violence, he was an excellent soldier, a model prisoner and as described at trial by his grandmother, high school friend and former girlfriend, was kind, generous, helpful and caring. (Petition, ¶¶ 380, 542-544, at pp. 111, 155-156; Exh. 1-A, at p. 3.)

69. Petitioner denies that the aggravated nature of the crime would have outweighed evidence presented by a male childhood sexual abuse expert. (Return, ¶ XI.E.) As discussed above, petitioner's claim of ineffective assistance of counsel is not limited to a claim that counsel merely failed to present the testimony of a sex abuse expert. (See *supra*, section IV, paragraph 60.) In any event, whether or not counsel's failure to adequately investigate and present mitigating evidence was prejudicial is a question that can be resolved as a matter of law (see *In re Sixto*, *supra*, 48 Cal.3d at p. 1252) and is addressed below. (See *infra*, at pp. 88-95.)

70. Petitioner takes exception to respondent's unsupported summary of the circumstances of the crime. (Return, ¶ XI.E; see also *supra*, section IV, paragraphs 1-2.)

71. Petitioner alleges that the sentencing determination was very close as reflected, inter alia, in the jury's deliberations. (Petition, ¶ 546, at pp. 156-157.) Juror declarations filed in support of the petition include undisputed evidence that the initial vote during penalty deliberations was close to an even split between death and life without possibility of parole (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. (Exh. 40, at p. 273; Exh. 41, at p. 274; Exh. 43, at p. 276; Exh. 44, at p. 277.)

72. Petitioner denies that his reliance on juror declarations to show prejudice is speculative and inadmissible under Evidence Code section 1150(a). (Return, ¶ XI.F.) This is a question of law that is

addressed below. (See *infra*, at p. 93, fn. 12.)

73. Respondent does not specifically controvert any of the allegations in the petition related to counsel's failure to investigate petitioner's background, the availability or reliability of the underlying evidence of petitioner's social history or the credibility of petitioner's experts. Respondent's general denial is inadequate to refute petitioner's allegations. (Return, ¶ XII.) This Court has repeatedly expressed its disapproval of general denials. (*People v. Duvall*, *supra,* 9 Cal.4th at pp. 475-480; *In re Gay* (1998) 19 Cal.4th 771, 783, fn. 9; *In re Lewallen*, *supra,* 23 Cal.3d at p. 278, fn. 2.)

74. Petitioner denies respondent's unsupported allegations that petitioner's constitutional rights have not been violated, that the legal characterizations in the petition are erroneous as a matter of law and that none of the facts alleged demonstrate any entitlement to relief. (Return, ¶ XII.)

75. By failing to inform the Court it intends to dispute the credibility of petitioner's experts, respondent has effectively admitted the credibility of petitioner's experts.

76. By failing to deny any material facts alleged in the petition, by failing to offer any factual or legal support for any of its allegations, and by failing to specifically deny the accuracy, credibility or reliability of any of the facts regarding petitioner's background, family history and mental state or state that the factual support for any denial is unavailable, respondent has effectively admitted petitioner's allegations.

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V.

CONCLUSION

Respondent has admitted facts sufficient to justify the issuance of a writ of habeas corpus without an evidentiary hearing. To the extent that there are disputed facts material to the claim identified in the order to show cause, petitioner requests this Court order an evidentiary hearing to resolve such disputes.

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VI.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Take judicial notice of the record on appeal in *People v. Crew* (No. S03411) and all pleadings filed therein, all pleadings, files and exhibits in *In re Crew* (No. S017856), and all pleadings, files and exhibits in *In re Crew* (No. S084495) pursuant to Evid. Code §§ 452(d)(1) & 459.

2. Issue a writ of habeas corpus to vacate the judgment imposed against petitioner; or alternatively refer the matter for an evidentiary hearing before a neutral finder of fact. In light of the claims raised in *In re Crew*, No. S084495, which alleged misconduct on the part of the judges on the Santa Clara Superior Court bench in precluding the trial judge from resentencing petitioner, petitioner requests that any fact-finder be unaffiliated with the Santa Clara Superior Court.

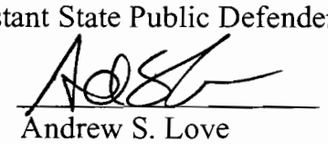
3. Grant petitioner such further relief as the Court deems appropriate.

Dated: June 9, 2005

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ANDREW S. LOVE
Assistant State Public Defender

BY: 
Andrew S. Love

ATTORNEYS FOR PETITIONER
MARK CHRISTOPHER CREW

VII.

VERIFICATION

Andrew S. Love declares as follows:

I am an attorney admitted to practice law in the State of California. I am an Assistant State Public Defender and am assigned to represent Mark Christopher Crew on appeal and in any related habeas corpus proceedings.

Mr. Crew is confined and restrained of his liberty at San Quentin Prison, San Quentin, California. This reply to the return was prepared with his knowledge and authorization.

I am authorized to file this reply to the return on behalf of Mr. Crew. I am making this verification on his behalf because Mr. Crew is incarcerated in Marin County and because these matters are more within my knowledge than his.

I have read the foregoing reply to the return and know the contents to be true.

Executed under penalty of perjury this 9th day of June, 2005, at San Francisco, California.

Andrew S. Love

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Respondent does not dispute that trial counsel failed to undertake a penalty phase investigation prior to trial, or that the rushed and belated investigation ultimately conducted was restricted to developing evidence of petitioner's positive attributes. Respondent contends, rather, that counsel was not required to do anything further, a position wholly at odds with decisions of this Court and the United States Supreme Court that require counsel in a capital case to conduct a timely investigation into petitioner's family background and upbringing aimed at discovering all reasonably available mitigating evidence. (See *In re Lucas* (2004) 33 Cal.4th 682, *Wiggins v. Smith* (2003) 539 U.S. 510, and *Williams v. Taylor* (2000) 529 U.S. 362.)

Respondent also concedes that had counsel undertaken an adequate social history investigation, a wealth of mitigating evidence would have been discovered. This readily available evidence reveals a remarkably disturbed family history culminating in petitioner's sexual abuse by his mother, the destructive effects of which were magnified and exacerbated by exposure to inappropriate sexual conduct and substance abuse by his father, grandfather and other male figures in his life.

Respondent does not question the credibility of petitioner's experts, the correctness of their opinions or the reliability of the evidence upon which they rely. Instead, respondent argues that the evidence trial counsel did present – that petitioner was a worthwhile, caring individual who would not pose a danger in prison – was adequate and that evidence of

petitioner's traumatic background and its effects on him would have made no difference in the outcome of the trial.

Thus, the return essentially accepts petitioner's material factual allegations but denies any prejudice arising from counsel's failure to meet prevailing professional norms. This contention is untenable and can be resolved as a matter of law.[7]

The mitigating evidence that counsel failed to investigate or present was substantial, reliable and of the type that would have a powerful effect on jurors. The evidence also would have been consistent with the evidence of petitioner's positive character traits that counsel did present, and it would have invited no damaging rebuttal. By contrast, the aggravating evidence presented was relatively weak. Petitioner had no prior history of violence or criminal activity. The prosecutor relied solely on the circumstances of the crime and presented no additional aggravating evidence. The jury was initially close to evenly divided between life and death, and it was only after many votes and intense deliberations that it ultimately reached a unanimous death verdict. Moreover, the trial judge, after reviewing the evidence, found that the mitigating circumstances outweighed the aggravating circumstances. (RT 5179.) While the judge's decision to reduce petitioner's death sentence to life without possibility of parole was overturned on appeal (see *People v. Crew* (1991) 1 Cal.App.4th 1591), his

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[7] See *In re Sixto* (1989) 48 Cal.3d 1247, 1252 [where return does not dispute material facts alleging ineffective assistance of counsel but only challenges claimed prejudice flowing from alleged deficiencies of counsel, issues may be resolved without an evidentiary hearing]; *In re Ross* (1995) 10 Cal.4th 184, 205, citing *In re Cordero* (1988) 46 Cal.3d 161, 171, fn. 1 [question of prejudice is suitable for resolution by this Court and not a factual question to be resolved in an evidentiary hearing by a referee].

findings do confirm that this was a very close case.

It is therefore reasonably probable that the jurors would have found the uncontested and available evidence of petitioner's tragic and traumatic background and its crippling effects on petitioner important to their penalty phase decision and – together with the evidence counsel did present regarding petitioner's positive traits and the lack of a violent or criminal history – a basis for the exercise of mercy. Petitioner is therefore entitled to relief.

II.

THE UNDISPUTED FACTS ESTABLISH THAT PETITIONER IS ENTITLED TO RELIEF AS A MATTER OF LAW

A claim of ineffective representation has two components. A petitioner must show that: 1) counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness; and 2) the deficiency was prejudicial to the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; see also *In re Lucas*, *supra*, 33 Cal.4th at p. 721.)

With respect to what constitutes "an objective standard of reasonableness," the emphasis is on what is reasonable under "prevailing professional norms" rather than "specific guidelines for appropriate attorney conduct." (*In re Lucas*, *supra*, 33 Cal.4th at p. 721, quoting *Wiggins v. Smith*, *supra*, 539 U.S. at p. 521.) However, "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Lucas*, *supra*, 33 Cal.4th at p. 721, quoting *In re Marquez* (1992) 1

Cal.4th 584, 602; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691 ["strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"].)

This Court has endorsed the inquiry made in *Wiggins* for assessing counsel's performance at the penalty phase of a capital trial: "our primary focus is not on evaluating whether, in light of the evidence in their possession, counsel properly decided not to present evidence in mitigation. 'Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background *was itself reasonable*.'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 725, quoting *Wiggins v. Smith, supra*, 539 U.S. at p. 522 [emphasis in original].) Furthermore, in determining the reasonableness of counsel's investigation, prevailing norms require that counsel conduct a comprehensive investigation of the client's social history. (*In re Lucas*, *supra*, 33 Cal.4th at p. 725; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.)

To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) A determination of prejudice for claims of ineffective assistance of counsel at the penalty phase requires the court to "'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 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*, *supra*, 529 U.S. at p. 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.)

As set forth below, in petitioner's case, just as in *Lucas*, *Wiggins* and *Williams,* trial counsel's tardy and limited investigation was deficient under prevailing professional norms, the readily available mitigating evidence was weighty and compelling, and had such evidence been presented to the jury it is reasonably probable that the outcome would have been different.

A. WHAT ACTIONS DID TRIAL COUNSEL TAKE TO INVESTIGATE POTENTIAL MITIGATING EVIDENCE AND WHAT WERE THE RESULTS OF THAT INVESTIGATION?

The investigation actually conducted by trial counsel for purposes of obtaining mitigating evidence for the penalty phase is not disputed by respondent in the return. (Return, ¶ IX.A-IX.F.) As alleged in the petition and described below, shortly before the trial was set to begin, Joseph O'Sullivan, petitioner's counsel, acknowledged his incapacity due to alcohol dependence and requested a continuance to permit him a period of time to recover. The trial judge granted a five-month continuance and appointed Joseph Morehead as second counsel. Upon his appointment, Morehead immediately devoted his time to preparing for the guilt phase. No investigation for the penalty phase was undertaken prior to trial. The penalty phase investigation that ultimately was done – marred by lack of time – was extremely limited, and focused on petitioner's positive attributes rather than his troubled and traumatic life history. These facts have either

been admitted or have not been controverted by respondent, and therefore must be taken as true. (*People v. Duvall* (1995) 9 Cal.4th 464, 483; *In re Sixto*, *supra*, 48 Cal.3d at p. 1252.)

1. No Investigation Related to the Penalty Phase Was Done Prior to Morehead's Entry into the Case

Petitioner was originally represented by the Santa Clara Public Defender. During the time the Public Defender represented petitioner, they did not conduct any investigation aimed at uncovering mitigating evidence. (Petition, ¶ 319, at p. 95; Exh. 3, at p. 13.) On July 7, 1987, the Public Defender was relieved as counsel, and was replaced by private counsel, Joseph O'Sullivan. (7/7/87 RT 3.) O'Sullivan, who was hired by petitioner's father (Exh. 2, at p. 8; Exh. 16, at p. 212), did no penalty phase investigation. (Petition, ¶ 327, at pp. 96-97; Exh. 1, at p. 1; Exh. 3, at p. 13.)

In fact, O'Sullivan was fairly incapacitated prior to trial. On September 8, 1988, eleven days before the trial was set to commence (CT 2060), O'Sullivan requested a six-month continuance because of alcohol abuse and other stress-related mental health problems. (CT 2062.) At the time he requested the continuance he had been diagnosed with Alcohol Dependence, accompanied by depressive symptoms and generalized anxiety. (CT 2065.) He was emotionally disorganized, his capacity to concentrate was impaired, and he suffered from bouts of depression and "unbound anxiety." (9/16/88 RT 26-27; Exh. 1, at p. 1; Exh. 2, at p. 8; Exh. 3, at p. 12.)

According to testimony from O'Sullivan's doctor, O'Sullivan had been alcohol dependent for several years and in the previous two years it had "gotten way out of hand." This included drinking daily, and cutting

back on his work so he could indulge in alcohol consumption. O'Sullivan had reportedly stopped drinking by early September 1988, and needed a period of time to recover so as not to resume drinking. (9/16/88 RT 21-22; Exh. 1, at p. 1; Exh. 2, at p. 8; Exh. 3, at p. 12.) In his sworn declaration in support of his request for a continuance, O'Sullivan admitted that there was no way he could "handle the mental and emotional commitments" of a capital case and could not try the case "in my present posture." (CT 2066; 9/13/88 RT 13, 9/16/88 RT 28-29, 33.) His psychologist agreed. (9/16/88 RT 25.)

On November 29, 1988, the continuance was granted to April 17, 1989, to permit O'Sullivan to recover from his alcohol abuse and other mental health problems, and Joseph Morehead was appointed as second counsel for petitioner. (CT 2087.)

From the time of his retention as counsel until the appointment of second counsel, O'Sullivan had not sought investigative or expert funds pursuant to Penal Code section 987.9, had not hired an investigator, had failed to prepare or file any pre-trial motions, had failed to obtain any records other than what he had received from the prosecutor in discovery and from the Public Defender, and was not in any way ready to go to trial. (Exh. 1, at p. 1; Exh. 3, at pp. 12-13.)

2. Morehead Had Many Guilt Phase Responsibilities and Was Solely Responsible for the Preparation and Presentation of the Penalty Phase

Morehead was brought into the case because of O'Sullivan's incapacity. He was required to serve several critical roles within a short time. He was designated to maintain relations with the client, assist in selecting the jury, consult with experts, draft and argue pre-trial motions, direct the investigation for the guilt phase, second chair the guilt phase, and

prepare for the possibility of a penalty phase. (Exh. 1, at p. 1.) With regard to the guilt phase, as reflected in counsel's first request for investigative and expert funds, "the police reports and preliminary hearing transcripts referred to approximately 100 witnesses, and that there were more than 60 interviews on cassette tapes that needed to be evaluated." (ACT 987.9, at p. 11.)

O'Sullivan delegated all aspects of preparation and presentation of the penalty phase to Morehead. (Exh. 1, at p. 1; Exh. 2, at p. 10; Exh. 3, at p. 12; Exh. 1-A, at p. 1.)

3. No Penalty Phase Investigation Was Done Prior to Trial

Morehead hired John Murphy as an investigator in February 1989, two months prior to trial. Morehead and Murphy had little time to become familiar with the case and prepare to go to trial, and they focused on investigating and preparing for the guilt phase. As Morehead concedes, "I hired an investigator, John Murphy, in February 1989, and he and I barely had time to review the preliminary hearing transcripts and discovery, and to get up to speed by the time the trial was set to commence with jury selection in April 1989." (Exh. 1, at p. 1.)

The trial began with jury selection on April 17, 1989. (CT 2126.) The defense case at the guilt phase commenced on July 17, 1989, and concluded the following day. (CT 2270-2274.) Appellant was found guilty of grand theft and first degree murder with a financial gain special circumstance on July 26, 1989. (CT 2279.) The penalty phase commenced on August 1, 1989. (CT 2290.)

No investigation for the penalty phase was undertaken until well after the trial began. (Exh. 3-A, at pp. 1-3; see also ACT 987.9, at pp. 198-210.) According to Morehead: "Given the enormous time pressures, I did

my best to put the guilt phase defense together. This left very little time for preparing for the penalty phase, which was scheduled to begin less than a week after the guilt phase concluded." (Exh. 1, at pp. 1-2.)

Investigator John Murphy agrees that:

> the preparation for trial, including investigation of both the guilt and penalty phases was plagued by a lack of time. Because of Mr. Morehead's and my late entry into the case and O'Sullivan's incapacity prior to having Morehead appointed, everything was being done at the last minute, from locating and interviewing witnesses, obtaining and reviewing documents, identifying and retaining experts, and seeking funding for investigation and experts.

(Exh. 3, at p. 12.)

Murphy further states that:

> In this case, there was no time to do an adequate investigation. By the time I had familiarized myself with the discovery and other information about the case necessary to conduct an investigation, the trial was starting. In the months that followed . . . the focus of the investigation was on the guilt phase. What little penalty phase investigation was accomplished was done at the last minute and almost as an afterthought. Counsel and I were scrambling to try to get the case ready for trial and had little time to devote to the penalty phase.

(Exh. 3, at p. 13.)

Morehead agrees that he did not have enough time to adequately investigate and present a case in mitigation at the penalty phase. (Exh. 1, at p. 2.)

4. Document Gathering Was Limited to Seeking Petitioner's Military Records and Jail Records

The only records related to petitioner's background sought by trial counsel were petitioner's county jail records and military records. Even these records, however, were not timely sought.

Murphy did not begin the time-consuming task of trying to obtain petitioner's jail records (to show petitioner's positive adjustment to incarceration) and military records (to prove petitioner's honorable discharge) until July 1989. Murphy was not able to get petitioner's service records prior to the conclusion of the trial.[8] He did obtain petitioner's jail records on July 31, 1989, the day before the penalty phase began.[9] (Exh. 3-A, at pp. 2-3; ACT 987.9, at pp. 198-210.)

It is undisputed that trial counsel did not obtain or seek to obtain records pertaining to petitioner and his family's social history, including, but not limited to, vital records, school records, medical records, psychiatric records, legal records, and civil and criminal court records.

Morehead confirms that:

> One area where the lack of time was particularly problematic was in obtaining family and social history records, which I was aware was a crucial aspect of penalty phase investigation. Had there been more time, I would have ensured that medical records, school records, marital and divorce records, court records of Mark and his

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[8] Evidence of petitioner's military status was introduced through the testimony of petitioner's father who confirmed petitioner's honorable discharge. (RT 4739.)

[9] Petitioner's jail records were reviewed by Jerry Enomoto in anticipation of his testimony regarding petitioner's institutional adjustment. (RT 4931.)

> family were obtained from California, Texas and South Carolina. Unfortunately, we only had time to seek Mark's military and jail records.

(Exh. 1, at p. 2.)

Murphy agrees that he did not obtain critical social history records because of a lack of time:

> I did not seek to obtain any of the social history records essential to an adequate investigation of Mr. Crew's background. I was aware at the time that obtaining such records as school records, medical records, psychiatric records, civil and criminal records pertaining to a client and his family were necessary to develop and present a capital defendant's social history at the penalty phase of a capital trial and to provide to mental health experts so that they can properly assess the client. Unfortunately, none of this record gathering was done prior to my entry into the case as it should have been. By the time I was involved in the case, there was insufficient time to undertake this task and my focus and the focus of counsel was primarily on the guilt phase.

(Exh. 3, at pp. 14-15.)

5. The Investigation for the Penalty Phase Was Limited to Petitioner's Military Service, Institutional Adjustment and Other Positive Traits

It is undisputed that other than interviewing petitioner's father and mother, and meeting with petitioner's grandmother just before her testimony, Morehead did not interview any other family members with regard to the penalty phase. (Exh. 1, at pp. 2-3.) Morehead states that they "relied for family information on Mark's father who presented a fairly idyllic picture of Mark's life. While he told us that Mark's mother was somewhat cold and withdrawn, he portrayed himself as a loving, devoted,

caring father who made up for whatever difficulties Mark may have had with his mother." (Exh. 1, at p. 2.)

Even the interviews counsel did conduct were unreasonably limited in scope and not designed to elicit meaningful evidence of petitioner's life history. The extent of counsel's discussions with petitioner's father and grandmother, hampered by the lack of a social history investigation, were unduly circumscribed as reflected in their testimony, which described petitioner as having a normal childhood and upbringing. Counsel's and counsel's investigator's interviews of other family members, including petitioner's mother, were focused on issues relevant to the guilt phase as opposed to family or social history. (Exh. 1-A, at p. 2; Exh. 3-A, at p. 2.)

Neither Morehead nor Murphy attempted to elicit from petitioner information regarding his background except as it related to developing positive aspects of his life, such as his military service and generosity to others. (Exh. 1-A, at pp. 1-2; Exh. 3-A, at pp. 1-2.)

Murphy did not seek to obtain information regarding petitioner's life history. His primary tasks for the penalty phase, in addition to seeking to obtain petitioner's jail and military records, were to locate and interview petitioner's superior officer, Colonel Donald Pearce, to locate jail deputies who would testify on petitioner's behalf, and to identify an expert who could testify regarding prison confinement. (Exh. 3, at p. 14.) Murphy was informed by Morehead that Morehead would take care of preparing for the testimony of Emily Bates, a former girlfriend of petitioner's who had testified at the guilt phase, and that petitioner's father, William Crew, would handle his mother (Mark's grandmother), Irene Watson, with regard to her testimony. (Exh. 3-A, at pp. 2-3.)

After the defense rested at the guilt phase on July 18, 1989, Murphy

spent several days merely trying to locate witnesses previously identified by Morehead, particularly Colonel Pearce, and to obtain military and jail records through various means.

The jury reached its guilty verdict and found true the special circumstance on July 26, 1989. (CT 2279.) On July 27-29, 1989, Murphy interviewed petitioner's high school friend and Army buddy, James Gilbert (in the presence of Morehead and William Crew), and three deputy sheriffs (Varnado, Yount and Council). He also spoke over the telephone with Colonel Pearce, who he had finally located. On July 31, 1989, Murphy secured petitioner's jail records from the Santa Clara County Jail. (Exh. 3-A, at p. 3, ACT 987.9, at pp. 200-210.)

Beginning on August 2, 1989, a day after the penalty phase began, Murphy attempted to find an expert who could testify on prison classification and on how petitioner would adjust if sentenced to life without possibility of parole. On the night of August 3, 1989, after talking with several potential experts, Murphy was able to confirm the availability of Jerry Enomoto. (Exh. 3-A, at p. 3.)

Counsel's requests for funds reflect the untimely and unreasonably truncated penalty phase investigation. In counsel's first application for funds, filed December 18, 1988 – four months before trial – the only designated penalty phase-related request, far from seeking to discover all available mitigating evidence, was limited to $4600 for an "initial work up, defendant's background, *locating favorable lifestyle and witness [sic] that would militate against imposition of Death.*" (ACT 987.9, at p. 12 [emphasis added].) An application for funds filed on July 28, 1989, a mere four days before commencement of the penalty phase, requested $7500 in investigative costs to "locate, screen and interview Penalty Phase witnesses

. . . ." (ACT 987.9, at p. 61.) This belated request was never ruled on.

6. Counsel Was Aware That Petitioner Suffered from Symptoms of Depression, Substance Abuse and Sleep Disorders But Did No Investigation

Trial counsel suspected that petitioner's father's portrayal of petitioner's family life was inaccurate, and that there "was much more dysfunction going on in Mark's background." (Exh. 1, at p. 2.) Counsel was also aware that petitioner suffered from depression, sleep disorders, and substance abuse problems. (Exh. 1, at p. 2; Exh. 1-A, at p. 1.)

Information confirming petitioner's drug and alcohol abuse, depression, and sleep disorders was contained in police reports provided to counsel in discovery. For example, Cindy Koelsch-Erdelyi (aka Cynthia Pullman) informed the police that petitioner was an alcoholic, went on periodic drinking binges and smoked marijuana. (Exhs. 45 & 46, at pp. 278-279). Debra Lund, petitioner's ex-wife, informed the police that petitioner was "into drugs, speed, coke and marijuana." (Exh. 47, at p. 280.) Jeanne Meskell informed the police that petitioner drank, suffered from depression, and often stayed out all night. (Exh. 48, at pp. 281-286.) Beverly Ortiz Ward informed the police that petitioner drank a lot and suffered from insomnia. (Exh. 49, at pp. 287-288.) Also noteworthy was a report from an investigator hired by Andrade's family that referred to an incident in December 1981, in which petitioner's father became intoxicated and made sexual advances towards petitioner's girlfriend. (Exh. 50, at p. 290.)

Except as it related to a defense to murder, counsel did not seek to develop this information. (Exh. 1-A, at p. 1.) Thus, while counsel considered the impact of petitioner's depression, sleep disorders and his drug and alcohol use on his mental state at the time of the offense, they did

not investigate the nature and extent of these mental health symptoms or their likely causes. According to Morehead, "there was simply not the time to pursue these additional areas of potential mitigating evidence." (Exh. 1, at p. 2.) Similarly, as Murphy put it, "[c]ounsel and I were aware that Mr. Crew had substance abuse problems and likely had mental health problems, but we simply did not have the time to devote to developing such evidence." (Exh. 3, at p. 15.) According to Murphy, "[a]lthough several witnesses mentioned Mr. Crew's drug or alcohol problems, and there were indications that Mr. Crew's father had a drinking problem, this was not an area that we developed." (Exh. 3, at p. 15.) This was due to a lack of time rather than any tactical choice.

7. The Psychiatrists Retained By Counsel Were Limited to Evaluating Petitioner's Mental State at the Time of the Crime

Two psychiatrists were retained for the guilt phase, Dr. David Smith, M.D., and Dr. Frederic Phillips, M.D. They were asked to determine whether petitioner was under the influence of drugs and alcohol at the time the murder was committed in anticipation of a potential guilt phase defense. They were provided with no documents or information other than an oral recitation of the facts of the crime. Dr. Smith did not interview petitioner, and Dr. Phillips conducted only a "preliminary" interview of petitioner. Neither expert provided a written report to counsel. (Exh. 1, at p. 3; Exh. 5, at p. 83; Exh. 6, at p. 145.)

It is undisputed that the experts' evaluations were limited to petitioner's mental state at the time of the crime. According to Morehead: "The two experts were retained initially for use at the guilt phase in support of a potential mental state defense that Mark's depression, sleep deprivation, and cocaine and alcohol use at the time of the crime negated

specific intent." (Exh. 1, at p. 3.) However, counsel determined that this defense only would have been effective if the client testified and admitted the crime, and they chose not to have petitioner testify. (*Ibid.*)

Counsel also considered using Dr. Smith and Dr. Phillips at the penalty phase in the same manner as at the guilt phase, i.e., to present evidence on petitioner's mental state at the time of the crime. Counsel, however, decided not to put on this evidence because they did not want the penalty phase to be focused on the crime, particularly given that there were no aggravating factors other than the circumstances of the crime. (Exh. 1, at p. 3.) Morehead explains:

> I decided not to present psychiatric testimony regarding Mr. Crew's mental state at the time of the offense at the penalty phase because it would have required that we affirmatively admit that Mr. Crew committed the crime. This would have opened the door to cross-examination of the experts on the facts of the crime, and would have shifted the focus of the mitigation case away from other mitigating factors and back to the crime. Since the prosecutor's only aggravating factor was the circumstances of the crime I believed it was more effective to stress mitigating evidence not directly related to the crime.

(Exh. 1-A, at pp. 2-3.)

Counsel did not investigate petitioner's lifelong mental health symptoms, and did not seek to develop evidence of petitioner's mental state other than as it related to petitioner's ability to form specific intent at the time of the crime. (Exh. 1, at pp. 3-5; Exh. 1-A, at pp. 1-3.)

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8. Counsel Obtained and Presented to the Jury Information That Petitioner Was A Kind, Generous, Non-Violent Person

Trial counsel obtained and presented evidence of petitioner's exemplary conduct in the military and his excellent behavior in jail. Counsel also introduced evidence that portrayed petitioner as a caring, generous, loving person, through the testimony of petitioner's grandmother, a former girlfriend, and a high school friend with whom he served in the Army. Petitioner's father and grandmother provided superficial evidence of petitioner's background, which was characterized as fairly normal. As stated by Morehead, "This kind of presentation was easier and much less time-consuming than attempting to investigate and present more troubling aspects of Mark's life and background." (Exh. 1, at p. 3.)

According to Morehead, the penalty phase witnesses testified in accordance with the information they provided. There was no other information counsel obtained regarding petitioner's social history and upbringing that was not used because of any tactical reason. There were no other witnesses who counsel contemplated presenting with regard to petitioner's life history. Counsel simply had not done an investigation into petitioner's background which would have enabled them to present such testimony. (Exh. 1-A, at p. 1.)

Petitioner's father, William Crew, was the primary witness for the defense with regard to petitioner's background. He testified that petitioner had a normal childhood. (RT 4727-4729.) William worked as a pressman and petitioner's mother, Jean, was a housewife. The family lived in Forth Worth, Texas until petitioner was about three years old, at which time they moved to California. (RT 4725-4726.) For a period of time the family lived on a ranch in Petaluma, California, where they had a garden, a horse

and raised animals. (RT 4728-4729.) According to William, he and Jean had no problems at all in the early years of their marriage, but later had marital difficulties because Jean wanted to marry a more mature man with more money, and was unhappy that William was working so much. (RT 4726-4728, 4730.) Petitioner and his father had a great relationship. They were buddies, and went fishing and hunting together. (RT 4729.)

William referred to occasions when petitioner's mother was uncommunicative, which he described as follows: "She would just go into the bedroom and close the door and just stay there, sometimes not even talk to us for two or three days." (RT 4731.)

William testified that he and petitioner's mother got divorced when petitioner was about 13 years old. Petitioner lived with his father after his parents separated, and William played the role of mother and father. (RT 4732-4733.) Everything was going well until William married his second wife, Barbara, in late 1970. Petitioner, who was 14 or 15 years old, found himself increasingly isolated when he unsuccessfully tried to integrate into his stepmother's family, which included her three children. (RT 4734-4736.)

Petitioner decided to join the Army at the age of 17. He was stationed in Georgia, served for four years, made sergeant, and was honorably discharged. (RT 4736-4739.) Petitioner returned to California from Minnesota in 1978-1979, after a failed marriage to Debra Lund. Petitioner went to school and worked as a truck driver. (RT 4739-4741.)

According to William, petitioner inexplicably changed in 1981-1982, and became guarded, less communicative, and not as happy as he had been. (RT 4744.) William did not think petitioner was using drugs, but "it was kind of like that – like that someone or something had a, had more of a

control over him than ever before." (RT 4744.)

Petitioner's paternal grandmother, Irene Watson, testified briefly regarding petitioner's background as well as his helpful and caring nature. Ms. Watson lived in Texas. She saw the family often until they moved to California. (RT 4785.) According to Ms. Watson, petitioner had a normal, happy childhood, although his parents did not get along too well. (RT 4786.) Ms. Watson affirmed that after William married Barbara, who had three children of her own, petitioner felt left out and was not happy. (RT 4789.)

Ms. Watson testified that petitioner stayed with her in Texas for two to three months, after the breakup of his marriage to Debra Lund, and he was very helpful to her. (RT 4791-4792.) Petitioner had less contact with Ms. Watson after he returned to California. (RT 4792.) Like petitioner's father, Ms. Watson hinted that petitioner underwent some kind of change in behavior which she could not explain. She merely noted that when petitioner visited Ms. Watson in July 1982, with his friend Elander, he was nervous and not himself. (RT 4793-4794.) She also stated that when petitioner returned in September 1982, with Lisa Moody, he was not the person she knew. He did not eat or sleep. (RT 4795.)

Emily Bates, a former girlfriend, testified that she dated petitioner for a couple of months in 1977. Petitioner treated her well, but then suddenly married someone else. (RT 4762-4763.) In 1980, after petitioner's marriage broke up and petitioner returned to California, petitioner and Bates resumed dating, and moved in together. (RT 4766-4767.) They had a good relationship for a period of time. Bates described petitioner as "nice" and "always sweet." (RT 4770.) Petitioner never treated her cruelly or violently. (RT 4772.) The relationship ended,

however, because petitioner wanted to date other people, and was, in fact, doing so. (RT 4767, 4769-4770.)

James Gilbert met petitioner in high school, where petitioner's main interest was fixing cars. (RT 4801-4802.) Gilbert described petitioner as a patient, caring person. (RT 4803.) Petitioner and Gilbert enlisted in the Army together. (RT 4803.) Petitioner did well in the Army, while Gilbert struggled because of a drinking problem. Petitioner was supportive of Gilbert and took care of him after Gilbert injured himself in drinking-related accidents. (RT 4807-4813.)

Colonel Donald Pearce, petitioner's superior officer, testified regarding petitioner's military service. Pearce, who had served three tours in Vietnam, was Commander of Headquarters at Fort Gordon when petitioner was there. (RT 4826, 4834-4840.) Petitioner was assigned to be Pearce's driver in 1976-1977. Pearce described petitioner as among the very top soldiers with whom he served. (RT 4841-4843.) He described petitioner as being intelligent, dependable, and having common sense, charisma, and mechanical ability. (RT 4846-4847.)

The defense also presented the testimony of law enforcement personnel who had contact with petitioner during the four years he was incarcerated in Santa Clara County jail awaiting trial. These officers, Ron Yount, Toby Council and Donald Varnado, all testified that petitioner was an ideal prisoner. (RT 4852-4894.) Petitioner never caused any problems and interacted well with prisoners and staff. (RT 4856-4857.) He was helpful, non-violent, cooperative and a stabilizing influence. (RT 4867-4871.) Petitioner took care to protect some of the younger and more vulnerable prisoners from harm. (RT 4857-4858, 4890.) Without being an informant, he could always be relied upon to keep the peace and to alert jail

staff as to potential dangers. (RT 4867, 4891.)

Jerry Enomoto, the former head of the California Department of Corrections, testified that if sentenced to life without possibility of parole, petitioner would be classified at the maximum level, and always would remain at that level. (RT 4932-33.) Enomoto explained that a prisoner sentenced to life without possibility of parole would never appear before a parole board and would live a very restrictive, very confined environment under constant supervision. (RT 4935-4936.) Enomoto opined that petitioner would be a stable, calming influence, and his interest in avoiding violence and protecting younger prisoners would be valuable. (RT 4940-4945.)

B. WAS THAT INVESTIGATION CONDUCTED IN A MANNER TO BE EXPECTED OF REASONABLY COMPETENT COUNSEL, AND IF NOT, IN WHAT RESPECTS WAS IT INADEQUATE?

The prevailing professional norms for capital defense at the time of petitioner's trial were that "defense counsel should secure an independent, thorough social history of the accused well in advance of trial." (*In re Lucas*, *supra*, 33 Cal.4th at p. 708.) As this Court has noted, this is "consistent with the standards referred to by the United States Supreme Court in *Wiggins v. Smith*, *supra*, 539 U.S. [at pp. 522-525] and other cases." (*Ibid.)*

In *Wiggins*, the Supreme Court held that counsel's failure to undertake an investigation into the defendant's life history fell below reasonable professional standards. The Court relied on the well-defined norms articulated by the American Bar Association ("ABA Guidelines") to determine counsel's reasonableness. (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) As the high court noted: "ABA Guidelines provide that

investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524 [emphasis in original]; see also *In re Lucas*, *supra*, 33 Cal.4th at p. 723.)

Trial counsel in *Wiggins* was found to have unreasonably abandoned their investigation of the client's background "[d]espite these well-defined norms." (*Wiggins v. Smith*, *supra,* 539 U.S. at p. 524, citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 11.8.6 at p. 133 ["noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences"]; see also *In re Lucas*, *supra*, 33 Cal.4th at p. 723.)

Prior to *Wiggins,* in *Williams v. Taylor*, *supra*, 529 U.S. 362, the Supreme Court acknowledged that "long-standing professional standards direct that investigation into the background of persons charged with capital crimes ordinarily be undertaken, for the purpose of the penalty phase of trial." (*In re Lucas*, *supra,* 33 Cal.4th at p. 728, citing *Williams v. Taylor*, *supra,* 529 U.S. at 396.)

In *Lucas*, this Court held that "counsel's failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial,[10] norms that directed counsel in death penalty cases to conduct a reasonably thorough independent

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[10] The trial in *Lucas* pre-dated the trial in petitioner's case. See Docket in *People v. Lucas*, Case No. S004788 (death judgment rendered November 4, 1987).

investigation of the defendant's social history – as . . . reflected in the ABA standards relied upon by the court in the *Wiggins* case." (*In re Lucas*, *supra,* 33 Cal.4th at p. 725.) The Court also noted that then-existing standards "emphasized the importance of uncovering evidence of childhood trauma." (*Ibid.*)

It is unquestioned that an investigation into a client's family and personal history required by prevailing norms is a far reaching and time consuming task. As described recently by the Ninth Circuit:

> [I]t is necessary to identify and interview the defendant's family members as well as past and present friends, fellow workers, etc., in order to adequately prepare for a capital trial. It is also necessary to obtain records, such as school records, employment records and medical records that may result in identifying mitigation themes and mitigation witnesses.

(*Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 1001; see also *Karis v. Woodford* (9th Cir. 2002) 283 F.3d 1117, 1133, fn. 9 ["Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends . . . ." (quoting with approval expert testimony of criminal law specialist who had testified at evidentiary hearing without contradiction)].)

For counsel to compile a comprehensive, reliable and well-documented social history, investigation must therefore begin immediately

upon counsel's entry into the case. (See ABA Guidelines, 11.4.1.) As the United States Supreme Court noted in *Williams*, it was unreasonable for counsel to wait until one week before trial to prepare for the penalty phase, thus resulting in a failure to adequately investigate and put on mitigating evidence. (*Williams v. Taylor*, *supra,* 529 U.S. at p. 395.) This Court has also recognized the necessity for a timely penalty phase investigation. (*In re Lucas*, *supra*, 33 Cal.4th at pp. 725-726.)

In *Allen v. Woodford*, the Ninth Circuit noted the consensus that an adequate penalty phase investigation must begin well before trial:

> [L]egal experts agree that preparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase: "Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial . . . . The timing of this investigation is critical. If the life investigation awaits the guilt verdict, it will be too late."

(*Allen v. Woodford, supra,* 395 F.3d at p. 1001, quoting Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L.Rev. 299, 320, 324 (1983); see also *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 841.)

Respondent does not dispute that trial counsel did no penalty phase investigation prior to trial, failed to conduct a social history investigation, and that the penalty phase investigation counsel ultimately undertook focused exclusively on petitioner's positive attributes. (Return, ¶ IX.)

As described above, lead counsel was appointed well in advance of trial but was incapacitated by a drinking problem and failed to undertake

any penalty phase investigation. Because second counsel, Joseph Morehead, was appointed only five months before the trial was scheduled to begin, he had to devote his time exclusively to preparation of the guilt phase of the case and failed to undertake or direct any penalty phase investigation until the trial was well underway.

Despite being aware of petitioner's problems with drugs and alcohol, and symptoms of depression and insomnia, counsel did no investigation to develop this information beyond its potential relation to a guilt phase defense. Counsel made no effort to obtain life history documents other than jail records and military records, and even these efforts were belated and with regard to military records, unsuccessful. (See Exh. 1, at p. 2; Exh. 3, at pp. 14-15; Exhibit 3-A, at p. 3.)

Counsel relied on petitioner's father to provide information about petitioner's upbringing because of time constraints. Although counsel "suspected that there was much more dysfunction going on in [petitioner's] background, and was aware from police reports that [petitioner] suffered from depression, sleep disorders, and substance abuse problems, there was simply not the time to pursue these additional areas of potential mitigating evidence." (Exh. 1, at p. 2.)

It is undisputed that trial counsel failed to interview or direct his investigator to interview family, friends, neighbors or any other individuals with regard to uncovering potential mitigating evidence. Interviews of potential witnesses were generally restricted to obtaining information related to the guilt phase of the trial. (Petition, ¶ 349, at pp. 102-103.) Counsel's interviews of petitioner's parents and grandmother were superficial and not designed to elicit meaningful information regarding petitioner's upbringing or family history. (Exh. 1-A, at p. 2; Exh. 3-A, at p.

2.)

Morehead acknowledges the failure to "undertake a reasonably comprehensive background investigation which would have encompassed interviewing Mark's family, including relatives who lived in Texas and South Carolina, friends and neighbors in California, and others who may have had knowledge of Mark and his family upbringing." (Exh. 1, at p. 2.)

Counsel's investigator, John Murphy, was not instructed to investigate petitioner's background:

> I was not asked nor did I conduct a social history investigation, which would have been aimed at obtaining information regarding Mr. Crew's family history and background. What little I was asked to do in this regard was focused on positive or good aspects of Mr. Crew's life rather than any of the more troubling aspects such as a family history of drugs and alcohol, domestic violence, marital discord, abuse, neglect and abandonment. As a result, there was no real family history investigation in this case. There were no trips to Texas or South Carolina or any other locale where potential mitigation could have been gathered.

(Exh. 3, at p. 14.)

Counsel retained two psychiatrists, Dr. Phillips and Dr. Smith, but limited their evaluations to petitioner's mental state at the time of the crime. These two experts were initially retained for the guilt phase and were provided with no information other than being orally informed of the facts of the crime. Dr. Smith did not see petitioner and Dr. Phillips conducted only one preliminary interview. (Exh. 1, at p. 3.) As Dr. Phillips recalls: "When I interviewed Mark Crew I was unaware of the family history of

sexual abuse, substance abuse, marital dysfunction, and mental illness. I was also unaware of Mark Crew's long term abuse of drugs and alcohol, his symptoms of depression or his trauma history." (Exh. 6, at p. 146.)

Neither expert, therefore, had sufficient relevant information to make an informed evaluation as to potential mitigating evidence. As Morehead states: "Their findings, which were limited to Mr. Crew's mental state at the time of the crime, were based on Mr. Crew's self-reporting of his drug and alcohol use and the information I gave them orally regarding the crime." (Exh. 1-A, at p. 2.) In any event, Dr. Phillips and Dr. Smith were only asked to evaluate petitioner's mental state at the time of the crime and were not consulted with regard to potential mitigating aspects of petitioner's life. (Exh. 1, at p. 3; Exh. 5, at p. 83; Exh. 6, at p. 145.)

Respondent concedes the facts which establish that counsel's investigation was untimely and inadequate under prevailing professional norms, but offers predictable but meritless excuses for counsel's failings: 1) the client failed to disclose his traumatic upbringing and family history; and 2) the retained experts failed to advise that additional investigation or expert evaluation was warranted.

Respondent's attempt to shift the blame to petitioner for counsel's inadequate investigation is unavailing. (Return, ¶¶ IX.E, X.C.) As this Court held in *Lucas*, a defendant's failure to disclose facts about his background does not excuse counsel from doing a competent social history investigation. (*In re Lucas*, *supra,* 33 Cal.4th at p. 729.)

The defendant in *Lucas* did not disclose to counsel or to mental health experts that he had been abused or had an unhappy childhood. (*In re Lucas*, *supra,* 33 Cal.4th at pp. 699, 729.) The State argued that counsel was therefore not obligated to conduct any significant investigation of the

defendant's background and social history. This Court rejected the State's argument, and made clear that a client's silence does not excuse counsel's perfunctory investigation: "contemporary professional standards required counsel to conduct an adequate investigation of petitioner's background even if petitioner himself failed to come forward with evidence of his difficult history." (*In re Lucas*, *supra,* 33 Cal.4th at p. 729.)

Petitioner's trial counsel has acknowledged that his conversations with petitioner were geared primarily toward establishing a relationship with him and obtaining evidence relevant to the guilt phase of the trial, and whatever information counsel sought regarding the penalty phase had to do with favorable information about petitioner's life. (Exh. 1-A, at pp. 1-2.) Similarly, the investigator's discussions with petitioner centered on guilt phase issues and consistent with trial counsel's objectives, focused on petitioner's positive traits with regard to developing potential mitigating evidence. (Exh. 3-A, at pp. 1-2.) Neither counsel nor investigator attempted to discover information about petitioner's family background or social history, or family patterns with regard to mental illness, substance abuse or sexual abuse. (Exh. 1-A, at pp. 1-2; Exh. 3-A, at pp. 1-2.)

There is no dispute that petitioner was cooperative with counsel with regard to whatever strategy counsel sought to pursue. (Exh. 1, at p. 4.) Particularly in petitioner's case, where the mental health expert's inquiry was limited to petitioner's mental state at the time of the crime and counsel determined – given the lack of time – only to develop evidence of petitioner's positive attributes for mitigation purposes, petitioner "would not necessarily understand the significance" of his troubled and traumatic history "that would be uncovered by such an investigation [into his background]." (*In re Lucas*, *supra,* 33 Cal.4th at p. 729; see also *ibid*

["nondisclosure [to expert] did not constitute failure to cooperate, however, particularly in the absence of any indication that [the expert] pressed petitioner to reveal such evidence"].) Accordingly, "[i]t was counsel, not petitioner who should have decided what information was relevant to the case in mitigation." (*Ibid.*)

In addition, although counsel and counsel's investigator interviewed petitioner's parents, their inquiries were unreasonably limited and did not involve questions of sexual abuse. (Exh. 1-A, at p. 2; Exh. 3-A, at 2.) In any event, petitioner's parents would not be likely to volunteer a disturbed family history or that petitioner suffered a difficult and abusive upbringing. As in *Lucas*, the failure of the defendant's mother to mention that she abused her son and abandoned him did not excuse counsel from seeking to discover potential mitigating evidence since "she was hardly a likely source of such information." (*In re Lucas*, *supra,* 33 Cal.4th at p. 729.)

As alleged, and not disputed by respondent, evidence of petitioner's traumatic background was readily obtainable from a timely and adequate investigation of petitioner's social history. Had counsel undertaken such an investigation, they would have discovered "a history of sexual abuse in [petitioner's] family, together with [petitioner's] symptoms of depression, chronic use of drugs and alcohol, and his compulsive womanizing." (Exh. 6, at p. 146.) Had such information been provided to a competent mental health expert, such expert would have advised counsel "that there was a strong likelihood that [petitioner] was sexually abused as a child," and such expert, after interviewing petitioner, would have been able to testify regarding petitioner's social history, the sexual abuse and trauma he suffered and its devastating impact on his life. (*Ibid*; see also Exh. 4, at p. 63.)

Respondent's attempt to excuse counsel's actions by contending that counsel appropriately relied on the mental health experts they retained, and were not obligated to provide any additional information to those experts or to seek out any other appropriate experts, is equally unpersuasive. (Return, ¶ X.B.).

It is hardly surprising that the experts consulted by trial counsel did not uncover potential mitigating evidence or advise counsel on the need for further investigation because they were retained only to evaluate petitioner for purposes of a mental state defense at the guilt phase and were provided with no information regarding petitioner's background. In addition, one of the psychiatrists conducted only a preliminary interview and the other never saw petitioner at all.

Although counsel considered using the experts at the penalty phase, counsel never sought an evaluation of petitioner's mental state untethered to the crime. Such a narrow focus for purposes of the penalty phase was inconsistent with prevailing professional norms that required efforts "to discover *all reasonably available* mitigating evidence . . . ." (*Wiggins v. Smith*, *supra,* 539 U.S. at p. 524 [emphasis in original]; see also *In re Lucas*, *supra,* 33 Cal.4th at p. 723.)

Moreover, while the failure to provide mental health experts with information unless requested at the guilt phase may not be deficient, the same lack of diligence constitutes ineffective assistance at the penalty phase. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1037-1039; see also *In re Gay* (1998) 19 Cal.4th 771, 807 [counsel unreasonably failed to provide mental health expert with background information or documentation].)

The Ninth Circuit has made clear that "counsel has an affirmative

duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." (*Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1254-1255, citing *Wallace v. Stewart* (9th Cir.1999) 184 F.3d 1112, 1116 [counsel has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request"]; *Clabourne v. Lewis* (9th Cir.1995) 64 F.3d 1373, 1385; *Bean v. Calderon* (9th Cir.1998) 163 F.3d 1073, 1079-1080.) The *Wallace* Court explained why there is a greater burden at the penalty phase than the guilt phase:

> Mental state is relevant at the guilt phase for issues such as competence to stand trial and legal insanity – technical questions where a defendant must show a specific and very substantial level of mental impairment. Most defendants won't have problems this severe, and counsel can't be expected to know that further investigation is necessary to develop these issues. By contrast, all potentially mitigating evidence is relevant at the sentencing phase of a death case, so a troubled childhood and mental problems may help even if they don't rise to a specific, technically-defined level.

(*Wallace v. Stewart*, *supra,* 184 F.3d at p. 1117.)

The consultation with mental health experts in petitioner's case, far from providing counsel with an excuse for failing to investigate mitigating evidence, demonstrates further counsel's ineffectiveness. In *In re Gay, supra*, 19 Cal.4th 771, this Court found counsel's performance woefully inadequate where counsel unduly limited the scope of his expert's evaluation to the client's mental state at the time of the crime and failed to provide the expert with background information and documentation. This

Court's description of and conclusion regarding counsel's failures in *Gay* are equally applicable here:

> [Counsel's] conduct in this regard clearly falls below the level of performance expected of even minimally competent attorneys representing a defendant in a capital case. He failed to undertake any inquiry into the possible existence of mitigating mental health evidence until petitioner had been found guilty of the murder . . . . He failed to supply Dr. Weaver with any background information or documentation . . . . He asked Dr. Weaver only to determine if petitioner suffered from any mental illness at the time of the crime. In addition to his failure to discover and develop available potentially mitigating mental health evidence, [counsel] also failed to investigate, discover, and present evidence regarding petitioner's early childhood and family relationships which was both relevant to the mental health diagnosis and potentially mitigating in and of itself. These omissions also manifest incompetence.

(*Id.* at p. 807.)

In sum, counsel's inadequacies in petitioner's case mirror those spelled out by this Court in *Lucas*: 1) counsel failed to conduct a reasonably thorough independent investigation of defendant's social history; 2) counsel failed to proceed in a timely fashion with his investigation; 3) counsel failed to investigate facts relating to petitioner's social history despite suggestive evidence in his possession (in petitioner's case of substance abuse, sleep disorders and depression, and father's drinking problems) which should have alerted counsel to the need for further investigation; 4) counsel failed to seek to uncover evidence of childhood trauma. (*In re Lucas, supra,* 33

Cal.4th at p. 725.)

This Court examines "the reasonableness of the investigation in light of defense counsel's actual strategy." (*In re Lucas*, *supra,* 33 Cal.4th at p. 725.) Here, as in *Lucas* and *Wiggins*, "it does not appear that counsel's failure to investigate was the result of a 'reasoned strategic judgment.'" (*Ibid.*, quoting *Wiggins v. Smith*, *supra,* 539 U.S. at p. 526.) Counsel's minimal investigation was the product of lead counsel's incapacity and second counsel's late entry into the case rather than any reasonable strategy. As counsel admits: "We presented evidence of Mark's conduct in the military and his excellent behavior in jail, as well as the testimony of family and friends who portrayed Mark as a caring, generous, loving person. This kind of presentation was easier and much less time-consuming than attempting to investigate and present more troubling aspects of Mark's life and background." (Exh. 1, at p. 3.)

While respondent contends that counsel's decision to investigate petitioner's positive traits and present them to the jury was an appropriate strategy, the failure to investigate petitioner's social history precluded counsel's ability to make an informed decision. Counsel "were not in a position to make a reasonable strategic choice . . . because the investigation supporting that choice was unreasonable." (*Wiggins v. Smith*, *supra,* 539 U.S. at p. 536.)

Moreover, had counsel undertaken an appropriate investigation and uncovered readily available mitigation, they could have presented it without undermining the mitigating evidence of petitioner's positive traits that was presented. Morehead agrees that evidence of petitioner's traumatic background "would have been consistent with the evidence we did present that Mr. Crew was a generous, caring, worthwhile human being who would

not be a danger if sentenced to life without possibility of parole." (Exh. 1-A, at p. 3.) Indeed, it would have made the evidence that was presented all the more compelling, demonstrating that *despite* his upbringing and its destructive impact on his functioning and mental health, petitioner had many positive attributes, including an absence of a history of violent or criminal behavior. Thus, as this Court stated with regard to *Lucas*: "[A]dditional investigation into petitioner's background would have been consistent with counsel's asserted penalty phase strategy." (*In re Lucas*, *supra,* 33 Cal.4th at p. 730.)

C. WHAT ADDITIONAL INFORMATION WOULD AN ADEQUATE INVESTIGATION HAVE DISCLOSED AND WOULD COUNSEL HAVE INTRODUCED THE FRUITS OF SUCH INVESTIGATION IN MITIGATION?

Respondent effectively admits that had trial counsel conducted a reasonable investigation, they would have uncovered readily available information through document gathering, witness interviews, and expert consultation, including: a) a family history of mental illness, substance abuse, physical and sexual abuse, abandonment and neglect; b) petitioner's traumatic upbringing which included being sexually abused by his mother; c) the lack of any ameliorative intervention and instead, the exacerbation of this abuse by others; d) the impact of petitioner's upbringing on his functioning and mental health, including an inability to form appropriate relationships, compulsive sexual behavior, depression, substance abuse, and sleep disorders; and e) petitioner's addiction to drugs and alcohol for which he was genetically and environmentally predisposed. (Petition, ¶¶ 391-539, at pp. 114-155; Exhs. 4-6, 9-38, 45-50, 79-119.)

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1. Family History

Petitioner's mother, Jean was born on July 25, 1931, to Jack and Irene Richardson in Fort Worth, Texas. (Exh. 85, at p. 664.) Jack Richardson had a history of mental health problems and his brother was institutionalized due to suffering from mental illness. (Exh. 105, at pp. 880-882; Exh. 117, at pp. 987, 994-995, 1005, 1156, 1161.) Jack's marriage to Jean's mother was marked by neglect, abandonment and violence. (Exh. 116, at pp. 942-972.)

Jean was raised in an extremely violent and sexualized household, and was subjected to physical and sexual abuse by her father. Jack Richardson also physically assaulted his son (Jean's brother) and wife (Jean's mother), and, in later years, sexually molested his granddaughter and other young girls. (Exh. 4, at pp. 27-32; Exh. 14, at p. 204; Exh. 15, at p. 208; Exh. 16, at p. 210; Exh. 28, at pp. 240-244; Exh. 30, at pp. 247-250; Exh. 35, at p. 263.) Jean's brother, Eddie Richardson, initially a victim of his father's assaultive conduct, like his father, later sexually abused young girls. (Exh. 4, at pp. 32-33; Exh. 9, at pp. 195-196; Exh. 28, at pp. 240-244.)

Petitioner's father, William Crew, was born on November 23, 1929, in Fort Worth, Texas to Warnell and Irene Crew. (Exh. 88, at p. 704.) William was three years old when his parents divorced and abandoned him. William was raised by his grandparents. (Exh. 4, at pp. 34; Exh. 16, at p. 209; Exh. 21, at p. 224; Exh. 26, at p. 235; Exh. 98, at pp. 826-832.) William's mother, Irene, was known to be an emotionally unstable and alcoholic woman who married and divorced several times. (Exh. 16, at p. 209; Exh. 17, at p. 215; Exh. 21, at p. 224; Exh. 100, at pp. 834-874.) Her marriage to Warnell Crew at a very young age, the breakup of the marriage

and the abandonment of their child mirrored Irene's own upbringing and foreshadowed William's marriage to petitioner's mother. (Exh. 4, at pp. 35-36.) Irene's parents divorced when she was young and she did not see her mother for several years while she was growing up. (Exh. 16, at p. 209; Exh. 17, at pp. 214-215; Exh. 21, at pp. 223-224; Exh. 99, at p. 833; Exh. 101, at p. 875; Exh. 102, at p. 876.)

Petitioner's parents met in high school and were married in 1947, when William was 17 and Jean was 16. (Exh. 16, at p. 209; Exh. 89, at p. 705.) Petitioner's brother, Michael, was born on August 28, 1950, and petitioner was born on December 25, 1954. (Exh. 79, at p. 578; Exh. 94, at p. 793.)

Contrary to the evidence presented at trial (see RT 4726), there were difficulties in the marriage early on. William admits that he and Jean separated a few times in the early years of their marriage, and each of them engaged in extramarital affairs. On March 2, 1955, Jean filed for divorce, indicating that she and William had "separated on several occasions, until about the 28th day of February, 1955, at which time they permanently separated, and have since lived wholly separate and apart." The complaint was dismissed two weeks later for failure to prosecute, and at some point the couple reconciled. (Exh. 16, at p. 210; Exh. 90, at pp. 706-710.)

In the late 1950s, after several moves, the family settled in California. William Crew worked long hours as a pressman and was not home very much. The family lived in a mobile home park for a period of time, and then moved to Petaluma, California in 1958. (Exh. 16, at pp. 210-211.)

While petitioner's mother was portrayed at trial as emotionally

withdrawn on occasion,[11] available evidence demonstrates that her symptoms of depression were much more extreme and long-standing. She was often unavailable and emotionless. She is described by many sources as frequently failing to get dressed, spending days at a time in her room or around the house in her nightclothes, allowing housework to pile up while she sat quietly at the kitchen table. (Exh. 4, at pp. 38-40; Exh. 12, at p. 201; Exh. 14, at p. 203; Exh. 15, at pp. 206-207; Exh. 16, at p. 211; Exh. 18, at pp. 217-218; Exh. 23, at p. 229; Exh. 25, at p. 233; Exh. 30, at p. 250; Exh. 31, at p. 252; Exh. 38, at p. 270.)

William Crew showed signs of depression and anxiety. By several accounts, William was a heavy drinker who relentlessly pursued women and molested or attempted to molest young girls, including his own stepdaughter. (Exh. 4, at pp. 41-42, 45-48; Exh. 14, at p. 203; Exh. 15, at pp. 205-206; Exh. 16, at pp. 210, 212; Exh. 18, at p. 218; Exh. 21, at p. 224; Exh. 27, at pp. 236-238; Exh. 32, at p. 254; Exh. 33, at pp. 255-256; Exh. 34, at pp. 260-261; Exh. 36, at pp. 265-267; Exh. 38, at p. 270; Exh. 50, at p. 290; Exh. 92, at p. 785; Exh. 93, at pp. 789-792.)

Jean's parents lived with or near the Crew family for several years while petitioner was growing up. Petitioner's grandfather, Jack Richardson, created a highly inappropriate and damaging environment by regularly talking about sex and encouraging petitioner and his brother to engage in sexual activity with peers, while the grandfather watched and sometimes

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[11] Petitioner's father testified that petitioner's mother was uncommunicative, and that if she became angry about something, rather than discuss the problem, she would go into the bedroom and lock the door. (RT 4749.) He recalled that she would "go into the bedroom and close the door and just stay there, sometimes not even talk to us for two or three days." (RT 4731.)

participated. (Exh. 4, at pp. 20-21, 50-52.) Petitioner's and his brother's friends confirm Jack's highly disturbed sexuality in petitioner's presence. (Exh. 14, at p. 204; Exh. 23, at pp. 229-230; Exh. 25, at pp. 232-233; Exh. 31, at p. 252.)

Petitioner's brother, Mike, was anxious and hyperactive as a child and young adult. Under Jack Richardson's influence, Mike became sexually active, and by some accounts, sexually aggressive, at a young age. He also began using and abusing alcohol and drugs as a youth, a pattern that continued into adulthood. Mike became involved with motorcycle gangs, lived as an itinerant for a period of time, and during his first marriage (he married at the age of 18), continued to drink and use drugs and have sexual relationships with other women. Mike was physically abusive to petitioner, and exposed petitioner to drinking, drugs and age-inappropriate sexual activity when petitioner was quite young. (Exh. 4, at pp. 53-55; Exh. 11, at p. 198; Exh. 12, at p. 200; Exh. 15, at p. 208; Exh. 22, at pp. 226-228; Exh. 23, at p. 229; Exh. 25, at pp. 232-233; Exh. 31, at p. 252; Exh. 33, at p. 256; Exh. 38, at p. 270; Exh. 95, at pp. 794-796; Exh. 96, at pp. 797-823.)

Doug Cox, the son of a family friend, who was roughly Mike's age, lived with the Crew family when petitioner was a young teenager. Petitioner and Doug were permitted to spend a great deal of unsupervised time together, during which time Doug provided petitioner with easy access to alcohol and drugs, and involved him in sexual exploits with young girls in the neighborhood. (Exh. 4, at pp. 55-56; Exh. 14, at pp. 203-204; Exh. 15, at p. 208; Exh. 23, at p. 229; Exh. 31, at p. 252.)

Petitioner's parents separated when petitioner was thirteen or fourteen years old, and petitioner subsequently lived with his father. When petitioner's father remarried in 1970, petitioner was often exposed to

unorthodox, overtly sexual parties with heavy drinking hosted by his father and stepmother. In later years, petitioner and his father drank together to excess on several occasions. (Exh. 4, at pp. 46; Exh. 5, at p. 90; Exh. 10, at p. 197; Exh. 14, at p. 204; Exh. 16, at p. 212; Exh. 33, at pp. 255-256; Exh. 34, at p. 261; Exh. 36, at pp. 265-266; Exh. 91, at pp. 711-726; Exh. 92, at pp. 727-786.)

In December 1970, Jean married Bergin Mosteller. Jean was 39 years old and Bergin was 23. They moved to Arizona and later to South Carolina. Although there were no reports about her drinking prior to moving to South Carolina, at least beginning at that time, Jean was reportedly drinking a great deal and was often depressed and withdrawn. (Exh. 4, at p. 48; Exh. 13, at p. 202; Exh. 15, at p. 207; Exh. 22, at p. 227; Exh. 24, at p. 231; Exh. 87, at p. 703.)

After Jean's mother died of cancer in December 1973, Jean's father, Jack, moved to South Carolina, where Jean and Bergin lived. Jack married Ola Forrester in 1976 (Exh. 13, at p. 202; Exh. 24, at p. 231; Exh. 103, at p. 878; Exh. 118, at p. 1195), and continued his sexually aberrant ways. John Turner, Ola's son, reports that Jack molested John's granddaughter and John's brother's granddaughter. (Exh. 35, at p. 263.)

2. Petitioner's Trauma History and Its Effects

Had counsel undertaken a reasonably competent investigation, they would have obtained the above-described mitigating information about petitioner's background, including that petitioner's maternal grandfather and uncle molested young girls, that petitioner's mother had been molested by her father, that petitioner's father molested his stepdaughter, and that petitioner was exposed to sexually inappropriate behavior by his grandfather. Any of these facts, particularly when combined with

information that petitioner had substance abuse problems, showed symptoms of depression and sleep disorders, and engaged in compulsive sexual behavior, inevitably would have led reasonably competent counsel to retain appropriate experts and to discover that petitioner had been molested by his mother. (Exh. 4, at p. 63; Exh. 6, at p. 146.)

As Dr. Phillips, an expert retained by trial counsel, states: "Had I been provided with the background materials that show a history of sexual abuse in Mark's family, together with Mark's symptoms of depression, chronic use of drugs and alcohol, and his compulsive womanizing, I would have advised counsel that there was a strong likelihood that Mark was sexually abused as a child, and would have inquired of Mark as to whether he had been sexually abused as a child." (Exh. 6, at p. 146.)

Dr. Morris, an expert in male childhood sexual abuse, reviewed the social history information which was readily available to reasonably competent counsel and interviewed petitioner. He concluded as follows:

> In my professional opinion, Mark Crew was sexually abused and traumatized when he was young, and this abuse included molestation by his mother, exposure to age-inappropriate sexual experiences by his maternal grandfather, and sexual victimization by others. I found the evidence of sexual abuse to be credible based on: a) my experience and training as a clinician; b) the consistency of the details Mark gave of his experiences, as well as his demeanor and affect, with others who have suffered the type of abuse he described; c) the fact that while the details Mark provided of the abuse as well as 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 be fabricated; d) the consistency of Mark's sexual,

> emotional and behavioral patterns and problems with those experienced by male victims of sexual abuse; e) the prevalence of sexual abuse and its symptomotology in the family history; and f) the consistency between the mental health and behavioral symptoms suffered by Mark's mother and those generally associated with female perpetrators of male sexual abuse.

(Exh. 4, at p. 24.)

According to Dr. Morris, petitioner's family exhibited factors that are commonly found in families where mother-son incest has occurred, including: 1) 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; 2) a mother who was depressed and socially withdrawn; and 3) a family history of sexual and physical abuse, including a mother who was herself a victim of childhood sexual abuse. (Exh. 4, at p. 24.)

The sexual abuse petitioner experienced as a child was compounded by other relationships in his extremely disturbed family with his grandfather, father, brother and the son of a family friend. In addition, the lack of any appropriate or ameliorative intervention in petitioner's formative years caused severe psychological damage. (Exh. 4, at pp. 22-23.)

The childhood sexual abuse petitioner suffered "had a profound negative effect on his emotional, social and behavioral development." (Exh. 4, at p. 25.) Petitioner "did not receive family affection and nurturing most children require for healthy development." (*Ibid.*) His mother was "mostly withdrawn, depressed and emotionally unavailable" and the affection he received from her "was provided mostly in the context of a highly sexualized relationship." (*Ibid.*) Dr. Morris states that this was

"frightening, confusing and overly intense for a young boy" and "crippled his ability to develop the capacity for intimate, long-term relationships with others and, at the same time, developed a desperate need in him for relationships in order to feel whole." (*Ibid.*)

Petitioner, "like many male victims of sexual abuse, had difficulty maintaining intimate relationships, was unfaithful to partners, engaged in compulsive sexual behavior including numerous one-night-stands, and had multiple relationships at the same time." (Exh. 4, at p. 25.) Dr. Morris points out that "these behaviors, commonly characterized as 'womanizing' was for Mark an addiction that he neither could control nor find emotionally satisfying. It stemmed from a desperate need not to be alone due to feelings of shame and self-loathing, but it also produced overwhelming anxiety, and brought back the conflict and confusion he experienced as a child." (*Ibid.*)

Petitioner suffered from many of the common symptoms of male sexual abuse, including drug and alcohol abuse, depression, low self-esteem, and sleep disturbances. (Exh. 4, at pp. 25-26.) Evidence of petitioner's long standing history of depression, low self esteem, and sleep disorders was plentiful. Friends, an ex-wife, and several former girlfriends described him as often being depressed, and becoming withdrawn for days at a time. He also suffered from insomnia, although during depressive episodes he slept a great deal. (Exh. 19, at p. 219; Exh. 20, at p. 221; Exh. 29, at p. 245; Exh. 31, at p. 253; Exh. 33, at p. 258; Exh. 36, at pp. 266-267; Exh. 37, at p. 269.)

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3. Family History of Substance Abuse and Petitioner's Addiction

A reasonably competent and timely investigation would have revealed petitioner's family history of substance abuse, genetic and environmental factors which predisposed petitioner to addiction, and the fact that petitioner was dependent on drugs and alcohol. (Exh. 5, at pp. 85-93.)

Petitioner's family history indicates that he was genetically predisposed toward addiction. (Exh. 5, at pp. 86-87.) His brother, father, paternal grandmother, paternal and maternal grandfathers and maternal great uncle abused alcohol. It was also reported that petitioner's mother became a heavy drinker later in her life. (Exh. 13, at p. 202; Exh. 16, at pp. 209, 212; Exh. 21, at p. 224; Exh. 22, at pp. 227-228; Exh. 27, at pp. 236, 239; Exh. 28, at p. 244; Exh. 30, at pp. 248, 251; Exh. 33, at pp. 255-256; Exh. 34, at p. 261; Exh. 36, at pp. 265-266.)

The family history also shows signs of mental illness, particularly mood disorders. (Exh. 5, at p. 87.) This is significant because it is common for persons with mood disorders to self-medicate with drugs and alcohol to alleviate the symptoms of their diseases such as over-whelming anxiety and depression. (*Ibid.*)

Jack Richardson was psychologically disturbed in many respects, including suffering from extreme nervousness and "chronic anxiety," and Jack's brother, Dewey, was institutionalized due to suffering psychotic episodes. (See *supra*, at p. 71, and exhibits cited therein.) Petitioner's paternal grandmother was described as nervous and was reportedly emotionally unstable. (See *supra*, at pp. 71-72, and exhibits cited therein.) Petitioner's mother appeared to suffer from major depression, and his father reported symptoms of depression and anxiety. (See *supra*, at pp. 72-73, and

exhibits cited therein.) Petitioner's brother has been described as hyperactive, anxious, and having symptoms of depression. (Exh. 12, at p. 200; Exh. 22, at p. 227-228, Exh. 23, at p. 229.)

There is also a history in petitioner's family of diabetes and high blood pressure, which are known to affect mood. (Exh. 5, at p. 87.) Petitioner's father and paternal grandfather suffered from diabetes, and his mother had high blood pressure and developed a duodenal ulcer. Petitioner was diagnosed with high blood pressure after his arrest. (Exh. 16, at p. 212; Exh. 26, at p. 235; Exh. 84, at pp. 654-663; Exh. 86, at p. 668.)

Dr. Smith explains that, "in addition to being genetically predisposed to addiction, petitioner turned to drugs and alcohol in an attempt to ward off the feelings of depression, anxiety, shame, and self-loathing that stemmed from his traumatic childhood experiences." (Exh. 5, at p. 85.) "Addiction is one of the most common consequences of sexual abuse. It has been well documented that children who are subjected to trauma and abuse are more likely to turn to drugs and alcohol to 'self-medicate' in an attempt to dull the pain they are experiencing." (Exh. 5, at p. 88.) In addition, in petitioner's case, "the environment in which he was raised fostered drug and alcohol use because of its availability, the lack of supervision and the encouragement or at least acquiescence by role models." (Exh. 5, at p. 89.)

Multiple sources provide consistent, reliable information that constitutes a basis for Dr. Smith's conclusion:

> Mark's polysubstance dependence began in his early youth. By age 13 or 14, he smoked marijuana daily, drank, and used hallucinogens frequently. In high school he continued to drink, smoke marijuana and use hallucinogens, and also used amphetamines and barbiturates. He reportedly passed out from drinking and drugs at least once a week. Mark's excessive

> drinking and drug use continued in the military, which he entered at the age of 17, and throughout his adulthood. In the years prior to the events for which he was arrested he was drinking every day, smoking marijuana, and using whatever other drugs were available, including cocaine and methamphetamine.

(Exh. 5, at pp. 90-93; Exh. 10, at p. 197; Exh. 19, at p. 219; Exh. 20, at p. 222; Exh. 23, at pp. 229-230; Exh. 29, at p. 245; Exh. 31, at p. 252; Exh. 33, at pp. 255-258; Exh. 34, at p. 261; Exh. 36, at p. 265-266; Exh. 37, at p. 269.)

According to Dr. Smith:

> The cumulative effects of chronic dependence on alcohol and drugs such as marijuana and hallucinogens beginning at a young age are widely recognized in the medical and scientific community and were so recognized in 1989. They include significantly impaired judgment, deficits in cognitive functioning (e.g., difficulty concentrating), and depressive symptoms.

(Exh. 5, at p. 93.) In particular,

> The heavy use of drugs and alcohol as an adolescent thwarts psychological development. For example, petitioner never developed the ability to cope with depression, anxiety or stress without resort to drugs and alcohol because at the age when he would otherwise be developing these skills, he was already self-medicating. As a result, his emotional and psychological development was derailed at the time his addiction began.

(Exh. 5, at p. 94.) In addition, petitioner's symptoms of depression, anxiety, low self-esteem and sleep disorders were all exacerbated by drug and alcohol abuse and/or withdrawal. (*Ibid.*)

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4. Social History Conclusions

In sum, it is undisputed that had counsel retained appropriate mental health experts and provided those experts with the readily available information described above and detailed further in the petition, testimony regarding petitioner's social history, the sexual abuse and trauma he suffered and its devastating impact on his life could have been presented at the penalty phase of his capital trial. (Exh. 4, at p. 63, Exh. 5, at 94, Exh. 6, at p. 146.)

As Dr. Morris concludes:

> Mark Crew's life cannot be understood without considering the impact of his social history, and in particular, the sexual abuse he suffered from his earliest memories and throughout his childhood. His early traumatic experiences resulted in confusion, shame, insecurity, a poor self-image and extreme emotional distress. Early on, Mark, like other sexual abuse survivors, began developing strategies to deal with his traumatic childhood experiences. Unfortunately, these strategies were formed based upon a breach of basic trust between a parent or other family members and child, unmet childhood needs, a fractured self-image, confusion about sexuality and serious misconceptions about interpersonal relationships. For example, many of these strategies included methods such as denial and substance abuse to insulate himself from painful childhood memories and emotional distress. He also learned to protect himself emotionally by not allowing people, especially desirable persons, to get too close, even though he yearned for the affection found in close relationships. While these strategies may have provided some utility as a child and adolescent, collectively they became a serious liability as an

> adult, leaving Mark with few resources to help him understand and cope with his emotional distress and normal life events. As a result, he became increasingly depressed, desperate and self-destructive.

(Exh. 4, at pp. 61-62.)

Respondent does not dispute that had Dr. Phillips been provided at the time of trial with the fruits of a competent social history investigation, he would have been able to testify in a manner consistent with the above-described facts. (Exh. 6, at pp. 146-147.) Nor does respondent dispute that had Dr. Smith been provided with information regarding petitioner's family background, trauma history, and substance abuse history, and been given an opportunity to interview petitioner, he could have provided evidence that petitioner "suffered from chronic alcohol and drug dependence which stemmed from his traumatic upbringing and family history, and which had a long term deleterious effect on his mental health and functioning." (Exh. 5, at p. 94.)

Moreover, respondent does not dispute that trial counsel would have uncovered this information if they had conducted an adequate investigation. As Morehead states, had they conducted an investigation that included record gathering and interviewing family, friends and neighbors, "I feel confident we would have uncovered the information presented in the declarations of Dr. Morris and Dr. Smith, including the serious and substantial dysfunction in Mark's family and upbringing, including the fact that Mark was sexually abused by his mother, and resorted to drugs and alcohol to self-medicate his trauma-related symptoms, and Mark's genetic and environmental predisposition to addiction and the long term effects of chronic substance abuse." (Exh. 1, at pp. 4-5.)

Finally, respondent does not dispute that trial counsel would have

presented this evidence if they had obtained it. According to Morehead, the evidence contained in the declarations of Dr. Morris and Dr. Smith "provides the kind of compelling mitigation case I would have liked to have presented in Mark's case." (Exh. 1, at pp. 4-5; Exh. 2, at p. 10.) Counsel believes it would have "provided a compelling and sympathetic explanation of Mark's character and background, and would have provided a meaningful response to the prosecutor's portrayal of Mark as a lying, manipulative womanizer." (Exh. 1, at p. 5; Exh. 2, at p. 10.)

D. WAS THIS EVIDENCE CREDIBLE AND WHAT WOULD HAVE BEEN AVAILABLE IN REBUTTAL IF SUCH EVIDENCE WERE INTRODUCED?

As shown above, evidence of petitioner's disturbed family background and traumatic upbringing is based on consistent, reliable information from multiple sources. Indeed, none of the documentary evidence or sworn declarations of lay and expert witnesses presented by petitioner has been called into question by respondent.

Respondent neither alleges facts which contradict petitioner's allegations or indicates that it believes in good faith that those allegations are untrue but that information needed to dispute those facts is not readily available. (*People v. Duvall*, *supra,* 9 Cal.4th at p. 485.) Respondent has not informed the Court that it intends to dispute the credibility of petitioner's experts. (*Ibid.*) Respondent has therefore effectively admitted the truthfulness and credibility of the mitigating evidence that would have been readily available to reasonably competent trial counsel.

Not only was this evidence credible, but there would have been no downside to presenting it. As Morehead concedes: "[t]his evidence would have been consistent with the evidence we did present that Mr. Crew was a generous, caring, worthwhile human being who would not be a danger if

sentenced to life without possibility of parole." (Exh. 1-A, at p. 3.)

Respondent does not raise the specter of any rebuttal evidence if this mitigating evidence were presented. As in *Wiggins*, petitioner "does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative." *(Wiggins v. Smith, supra*, 539 U.S. at p. 537.) The most respondent can do is grasp at defense evidence of petitioner's compulsive sexual behavior, including that petitioner peeked in windows to watch people have sex, and became involved in three-way sexual activity. (Return, ¶ XI.B; Petition, ¶ 477, at p. 136.) According to respondent, although this behavior stemmed from petitioner's sexual abuse history, it would likely have offended many jurors and would have cast petitioner in a negative or unsympathetic light. (Return, ¶ XI.B.)

However, particularly in the context of this case, this was not such loathsome conduct that there is a reasonable probability that it would have undermined the wealth of mitigating evidence that could have been presented or carried any weight in favor of a death sentence. (Exh. 4, at pp. 26-29; see also Exh. 1-A, at p. 3 [in trial counsel's view, such behavior would not have offended the jurors, but "would have served to confirm Mr. Crew's abuse history and . . . a competent mental health expert would have been able to provide an understandable explanation for it." (Exh. 1-A, at p. 3.)

This is a far cry from the kind of damaging rebuttal this Court has considered in determining that counsel's failure to present mitigating evidence was justified. (See, e.g., *In re Jackson* (1992) 3 Cal.4th 578, 610-612 [prior violent conduct]; *In re Ross, supra*, 10 Cal.4th at p. 206 [juvenile misconduct including four robberies and brandishing a weapon]; *In re*

Avena (1996) 12 Cal.4th 694, 733 [gang affiliation and assault on father]; *In re Andrews* (2002) 28 Cal.4th 1234, 1248-1249 [prior convictions involving violence].)

The jury already had found petitioner guilty of killing his wife. The prosecutor portrayed him as a relentless womanizer who engaged in multiple relationships with women (RT 3791, 3823-3824, 3830, 3866-3868, 3937-3940, 4114-4118, 4123, 4373), who was dating other women immediately after marrying the victim in this case (RT 3709, 3669-3672, 3941-3942), and who left with another woman after his wife's disappearance. (RT 4148.) What was required was a credible explanation for petitioner's sexually compulsive behavior and inability to maintain healthy relationships with women. A competent child abuse expert would have explained that voyeuristic acts and other sexually compulsive behaviors are common among individuals who have been raised in sexually charged environments and/or have child sexual abuse experiences as seen in petitioner's history (Exh. 4, at p. 53), and, in petitioner's case, resulted from "a desperate need not to be alone due to feelings of shame and self-loathing." (*Id.* at p. 25.)

In *Williams v. Taylor*, trial counsel was found ineffective for failing to conduct a timely and adequate social history investigation and instead focusing on the circumstances of the defendant's confession. The Supreme Court noted that some of the additional evidence that counsel was faulted for not obtaining was unfavorable, including juvenile records which revealed that Williams had been committed to the juvenile system three times. The Court, however, agreed with the district court's observation that "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to

focus on [the defendant's] voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." (*Williams v. Taylor, supra*, 529 U.S. at p. 396, citing ABA Standards for Criminal Justice (2d ed. 1980) 4-4.1, commentary, p. 4-55.)

While in petitioner's case, counsel did not undertake a sufficient investigation to make a reasonable determination whether potential mitigating evidence would have invited damaging rebuttal, there was no such rebuttal in this case. It is not reasonable to conclude that the potential introduction of petitioner's voyeurism as a symptom of being sexually abused would have been so harmful that it would have deterred reasonably competent counsel from presenting the available mitigating evidence. On the contrary, as discussed above, trial counsel would have presented the wealth of readily available mitigating evidence had they obtained it. (Exh. 1-A, at pp. 3-4.)

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E. WOULD THE INTRODUCTION OF SUCH EVIDENCE HAVE AFFECTED THE OUTCOME OF THE CASE?

It is well recognized that evidence of a defendant's tragic upbringing "may be the basis for a jury's determination that a defendant's relative moral culpability is less than would be suggested solely by reliance upon the crimes of which he stands convicted and the other aggravating evidence. (*In re Lucas*, *supra,* 33 Cal.4th at pp. 731-732; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 ["[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [noting that consideration of the offender's life history is "part of the process of inflicting the penalty of death"].)

Petitioner's trial counsel failed to present evidence of petitioner's disturbed family history and traumatic childhood not because of any tactical reason or the absence of reliable, obtainable evidence, but because counsel simply ran out of time. As a result, the jury that sentenced petitioner to death was never given a true understanding of petitioner's background and its impact. (Compare *In re Fields* (1990) 51 Cal.3d 1063, 1080 [no prejudice found where "evidence before the jury, and the argument of defense counsel at the penalty phase, gave the jury a fairly accurate picture of the case in mitigation"].)

Judge Alex Kozinski of the Ninth Circuit recently explained why the jury's consideration of a "warped view" of the defendant's background due to counsel's failure to present evidence of a family history of abuse is prejudicial:

> Of course, we cannot be certain what the jury

> would have done had it been given all of the relevant mitigating information . . . . But the fact that the task it actually undertook differed so profoundly from the one it would have performed had [petitioner's] counsel not been deficient is enough to undermine our confidence in the outcome.

(*Boyde v. Brown* (9th Cir. 2005) 404 F.3d. 1159, 1180.)

The superficial, inaccurate and uncompelling presentation of petitioner's life is amply demonstrated by the summary of evidence presented in trial counsel's closing argument:

> We had a childhood, he wasn't beat up. He was loved by his father. But he was neglected. He suffered an emotional neglect from both his mother and his stepmother. No, he wasn't sexually abused, wasn't battered, wasn't beat up. [¶] But he was deprived of something which I think is at the fiber of human beings, the love of his mother. He didn't have that. There's a hole in that part of him where that love should be, it's not there. [¶] So he goes through life, searching perhaps, going through woman to woman, marriage to marriage, maybe searching for what he never found. He didn't find it from his stepmother, he didn't find it from his wives, he didn't find it from his girlfriends.

(RT 5047.)

Counsel's presentation, as reflected in this argument, was not only hampered by the lack of evidence of petitioner's seriously troubled family history and abusive upbringing but was also undermined by the lack of expert opinion. This left the jury without critical evidence that would have credibly and sympathetically explained the factors that affected petitioner's development and functioning. (See *In re Lucas*, 33 Cal.4th at p. 732 ["Had

the jurors been provided with such evidence [of childhood abandonment and abuse], they would not have been left to consider inexplicable acts of violence, but would have had some basis for understanding how it was that petitioner became the violent murderer he was shown to be at the guilt phase"].)

The prosecutor predictably capitalized on counsel's inadequate presentation by arguing that petitioner deserved no mercy because he had squandered a good and decent upbringing and lacked the kinds of tragic life experiences that could shed light on his conduct:

> He had a father who loved him. He had a good home in the early years. There's nothing tragic about his circumstances. There's nothing that explains why he came here. He had more advantages than many. I doubt if any of us come from a perfect background, but he had a good background. There's no evidence in his early years of truancy, misconduct, inability to get along in school, learning disability, learning disabilities, drug or alcohol abuse. He made his own decisions, and his decision made on his own brought him to where he sits today.

(RT 5068-5069; see also RT 5065 ["He has a charisma, you heard from people, that talents, that he has intelligence, that capability, what I consider to be a good and decent background, that he turned his back on. Love of family, ability to do things, ability to get along, leadership abilities. He had all of these things. And he used them for incredible evil"].)

As described in detail above, there was substantial, reliable – indeed uncontested – evidence that petitioner was raised in a family with a history of mental illness, substance abuse, sexual abuse and domestic violence, abandonment and neglect. Petitioner's upbringing was in fact quite tragic. He did not have a "good background" as the prosecutor suggested. Nor was

he merely neglected by his mother, as defense counsel argued. Petitioner was sexually abused by her, and the impact of this abuse was exacerbated by the male figures in his life through neglect, exposure to additional inappropriate sexual experiences and drug and alcohol abuse. His abusive upbringing, genetic predisposition to mood disorders and substance abuse, and other environmental factors led petitioner to suffer from symptoms of depression and become addicted to drugs and alcohol. These facts had a destructive impact on petitioner's emotional well-being, his self-esteem and his ability to form and maintain healthy interpersonal relationships, and led to a life that was increasingly desperate, self-destructive and out of control.

Trial counsel had no tactical reason for not presenting this readily available mitigating evidence, and agrees that he would have liked to have presented it. As trial counsel states, "the presentation of this evidence would have made a difference in the outcome at the penalty phase because it provided a compelling and sympathetic explanation of Mark's character and background, and would have provided a meaningful response to the prosecutor's portrayal of Mark as a lying, manipulative womanizer." (Exh. 1, at p. 5.)

The absence of evidence of petitioner's traumatic upbringing resulted in a false picture of a relatively normal childhood which could only have left the jury with the belief – as the prosecutor argued – that petitioner was an evil person deserving of death. (See *Boyde v. Brown*, *supra*, 404 F.3d at pp. 1177-1178 [counsel's failure to investigate and present evidence of the abuse the defendant had suffered in childhood was not only harmful because it deprived the jury of relevant information about Boyde's childhood, but because the evidence counsel did elicit suggested that Boyde had a normal, non-violent childhood].)

There is no indication that the mitigating evidence counsel failed to present would have been subject to impeachment or potentially devastating rebuttal. (*See, e.g., In re Ross*, *supra*, 10 Cal.4th at p. 206.) In addition, it would have complemented the evidence that was presented at petitioner's penalty phase regarding petitioner's positive traits and non-violent history, to show that despite his upbringing, petitioner was a kind, generous person, with no history of prior felonies or violent criminal conduct, that he served honorably in the military, and would not pose a future danger in prison.

In contrast to the powerful evidence in mitigation that could have been presented, the aggravation was relatively weak. This case involved the murder of a single individual with one special circumstance, and whether or not the special circumstance even applied to petitioner's case was seriously debatable. (See CT 2523-2526 [memorandum from trial court's clerk which recommends striking the financial gain special circumstance]; see also *People v. Crew* (2002) 31 Cal.4th 822, 861 (conc. opn. of Moreno, J.)[concurrence expresses concern that the application of the financial gain special circumstance to this case is overbroad].) There was no aggravating evidence other than the circumstances of the crime. Petitioner had no prior felonies and no history of violent criminal activity.

Even in the absence of compelling mitigating evidence of petitioner's life, the sentencing determination was very close. The jury deliberated for a half hour on August 8, 1989 (CT 2298; RT 5101-5104), for a full day on August 9, 1989 (CT 2299, RT 5105-5106), and reached its verdict on August 10, 1989, at 2:45 p.m. (CT 2300, RT 5107-5108.) The initial vote during penalty deliberations was close to an even split between death and life without parole. (Exh. 40, at p. 273; Exh. 41, at p. 274.) It was only after many votes and intense deliberations that the jury voted for

death. (Exh. 40, at p. 273; Exh. 41, at p. 274; Exh. 43, at p. 276; Exh. 44, at p. 277.)[12]

Significantly, the trial judge, after reviewing the evidence presented at trial, found that the mitigating circumstances outweighed the aggravating circumstances. (RT 5179.) Whether or not the trial judge's decision to reduce petitioner's death sentence to life without possibility of parole was legally correct, his findings do suggest that the aggravating evidence was not substantial and that this was a close case.

In *In re Marquez* (1992) 1 Cal.4th 584, this Court found prejudice where substantial mitigating evidence was available and the aggravating evidence was not substantial. There, as here, the defendant had no prior convictions or uncharged crimes. Although Marquez was convicted of two murders with three special circumstances (multiple murder, murder during commission of burglary and murder during commission of robbery), the Court found "it was reasonably probable a jury would believe life in prison without possibility of parole was sufficient punishment." (*In re Marquez*,

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[12] Contrary to respondent's contention, Evidence Code section 1150 does not render the juror declarations submitted in support of the habeas petition inadmissible. The declarations do not implicate the juror's subjective mental processes to impeach a verdict but are "proof of overt acts, objectively ascertainable." (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) Juror statements regarding the number of votes undertaken during deliberations and the tally of such votes are clearly objective facts. (See *Silva v. Woodford*, *supra*, 279 F.3d at p. 850 [closeness of case supported by juror declaration which indicated several ballots were taken before a death verdict was reached and that some of the jurors were initially leaning towards a life verdict"]; cf. *People v. Ramos* (2004) 34 Cal.4th 494, 496, fn. 7 [juror declaration stating that during deliberations newspaper articles were not discussed constituted statement of objective fact that did not concern mental processes by which verdict was determined and was thus admissible under section 1150].)

supra, 1 Cal.4th at p. 609.) The Court's conclusion is equally applicable here: "We cannot put confidence in a verdict of a jury that decided the case without hearing the substantial mitigating evidence that competent counsel would have presented." (*Ibid.*)

Similarly instructive is *In re Lucas*, which involved the murder of an elderly couple who suffered multiple stab wounds. Lucas was convicted of two murders with two special circumstances (multiple murder and murder during commission of burglary). While this Court noted the brutality of the murders and the existence of a prior violent assault, it found prejudice due to counsel's failure to present mitigating evidence, particularly evidence of childhood abandonment and abuse. (*In re Lucas*, *supra*, 33 Cal.4th at p. 735.) This Court held that "a significant potential exists that this evidence would produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision." (*Ibid.*)

In *Wiggins v. Smith*, the United States Supreme Court held that, evaluating "the totality of the evidence – 'both that adduced at trial, *and the evidence adduced in the habeas proceeding*[*s*]'" (*Wiggins v. Smith*, 539 U.S. at 536, quoting *Williams v. Taylor*, 529 U.S. at 397-398 [emphasis added in *Wiggins*]), there was a reasonable probability that the jury would have reached a different sentence had it been "confronted with this considerable mitigating evidence." (*Id.* at p. 536.) This was the formula applied by this Court in *Lucas* to find prejudice from counsel's omissions. (*In re Lucas*, *supra*, 33 Cal.4th at p. 734.) Applying it here would reach the same result.

The aggravating evidence is spare and the potential mitigating evidence is substantial and unfettered by the potential of damaging rebuttal. The evidence that the jury would have heard had counsel not been deficient

is dramatically different and far more compelling than the evidence the jury weighed in determining petitioner's sentence. Reversal is therefore required because it cannot be concluded with confidence that the jury unanimously would have sentenced petitioner to death if counsel had presented and explained all of the available mitigating evidence. (See *Williams v. Taylor*, *supra*, 529 U.S. at pp. 368-369, 399).

III.

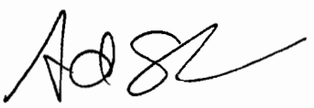
CONCLUSION

Based on the foregoing and due to respondent's failure to dispute any material facts raised in the petition, this Court should issue the writ of habeas corpus and vacate petitioner's death judgment.

Dated: June 9, 2005

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ANDREW S. LOVE
Assistant State Public Defender

Attorney for Petitioner
MARK CHRISTOPHER CREW

DECLARATION OF JOSEPH MOREHEAD

I, Joseph Morehead, declare as follows:

1. I am an attorney at law, admitted to practice in 1970. I practice criminal law and am a certified criminal law specialist.

2. I was appointed as second counsel in the capital murder case of *People v. Mark Crew* on November 29, 1988. In addition to my duties in preparing for the guilt phase of the trial, I was responsible for the presentation and preparation of the penalty phase.

3. The witnesses we presented at the penalty phase of Mr. Crew's trial were his father (William Crew), his grandmother (Irene Watson), an ex-girlfriend (Emily Bates), a school friend and Army buddy (James Gilbert), Crew's supervising officer (Col. Pearce), three jail deputies (Yount, Vernado and Council), and an expert on the prison system (Jerry Enomoto).

4. These witnesses testified in accordance with the information they provided to me and my investigator. I do not recall any information that we obtained regarding Mr. Crew's social history and upbringing that we decided not to use for any tactical reason. There were no other witnesses who we contemplated presenting with regard to Mr. Crew's life history. We were unaware of any other evidence which would have enabled us to present such testimony.

5. My discussions with Mark Crew were geared primarily toward establishing a relationship with him and obtaining evidence relevant to the guilt phase of the trial. From other witnesses as well as in the course of my conversations with Mr. Crew, I learned that he was a heavy user of drugs and alcohol, had difficulty sleeping at night and suffered from depression. Except as it related to a defense to murder (i.e., mental state at the time of the crime), I did not seek to develop this information. Whatever information I sought from Mr. Crew regarding the

penalty phase had to do with favorable information about his life as opposed to his substance abuse, mental health symptoms or any traumatic aspects of his background and upbringing. While I was aware from Mr. Crew's father that Mr. Crew's mother was somewhat cold and withdrawn, I was unaware that Mr. Crew had been sexually abused.

6. The extent of my discussions with Mark Crew's father and grandmother with regard to Mark's life and background are reflected in their testimony. While I spoke with Mark Crew's mother, the discussions of substance I had with her related to issues relevant to the guilt phase, such as her contacts with Richard Elander when Elander and Mr. Crew were staying with her in South Carolina, before and after Mr. Crew's wife's disappearance. I did not attempt to delve into family history or Mr. Crew's upbringing in my discussions with her. I never asked Mr. Crew's parents whether they or their children had been sexually abused.

7. There was no attempt to have the jury consider as mitigating evidence Mark Crew's long-standing substance abuse problems or any mental health symptoms such as insomnia or depression. The two psychiatrists we retained were only asked to evaluate Mr. Crew's mental state at the time of the crime. They did not prepare any written reports. Their findings, which were limited to Mr. Crew's mental state at the time of the crime, were based on Mr. Crew's self-reporting of his drug and alcohol use and the information I gave them orally regarding the crime.

8. I decided not to present psychiatric testimony at the penalty phase regarding Mr. Crew's mental state at the time of the offense because it would have required that we affirmatively admit that Mr. Crew committed the crime. This would have opened the door to cross-examination of the experts on the facts of the crime, and would have shifted the focus of

the mitigation case away from other mitigating factors and back to the crime. Since the prosecutor's only aggravating factor was the circumstances of the crime I believed it was more effective to stress mitigating evidence unrelated to the crime.

9. As I stated in my declaration of May 15, 2002, I believe the information developed by post-conviction counsel provides the kind of compelling mitigation case I would have liked to have presented in Mr. Crew's case, and that this information would have been available at trial if we had been able to conduct a reasonably adequate investigation.

10. Had we had the time and the funds to conduct an adequate investigation for the penalty phase, I feel confident we would have uncovered the information presented in the declarations of Dr. Morris and Dr. Smith, including the serious and substantial dysfunction in Mr. Crew's family and upbringing, including the fact that Mr. Crew was sexually abused by his mother, and resorted to drugs and alcohol to self-medicate his trauma-related symptoms, and Mr. Crew's genetic and environmental predisposition to addiction and the long term effects of chronic substance abuse. This evidence would have been consistent with the evidence we did present that Mr. Crew was a generous, caring, worthwhile human being who would not be a danger if sentenced to life without possibility of parole.

11. I would not have been at all deterred in presenting evidence regarding Mr. Crew's history of sexual abuse and its effects by the possibility that evidence that he engaged in compulsive sexual behavior as a consequence, including peeking into windows to watch people have sex and engaging in "three-way sexual activity" may have been introduced. I do not believe such behavior, particularly in the context of Mr. Crew's social history and traumatic experiences, would have offended the jurors. I believe that this conduct would have served to confirm Mr.

Crew's abuse history and that a competent mental health expert would have been able to provide an understandable explanation for it.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 9th day of May, 2005.

Joseph Morehead

Joseph Morehead

DECLARATION OF JOHN AUGUSTUS MURPHY

I, John Murphy, declare as follows:

1. I am a private investigator licensed in California (No. 9932), Nevada (No. 580), and Arizona (No. 0208003).

2. I received my private investigator's license in July 1983, and established Murphy & Associates in 1984.

3. In February 1989, I was hired by Joseph Morehead to work on the case of *People v. Mark Crew*.

4. In order to refresh my recollection with regard to the penalty phase investigation, I have reviewed my billing, reports and correspondence in this case, as well as my declaration dated May 2, 2002.

5. Although Joseph O'Sullivan was lead counsel, I received my direction and assignments with regard to investigation on the Crew case from Mr. Morehead.

6. My first meeting with Mr. Morehead on the case was on February 21, 1989. I was informed that the trial was going to begin in April 1989. From the time of my retention on the case until July 1989, well after the trial started, my investigation was devoted to the guilt phase aspects of the case.

7. While I spoke with Mark Crew many times in person and on the telephone, our conversations generally involved issues related to the guilt phase of the trial. The discussions we had regarding the penalty phase centered on positive facts about his life. I did not attempt to discover information about his family background or social history, family patterns with regard to mental illness or substance abuse, or information relevant to his experience with or his

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family's history of physical or sexual abuse.

8. I spoke with Mark Crew's father on several occasions but I did not interview him in order to develop evidence of Mark's upbringing or family history for the penalty phase.

9. I spoke with Mark Crew's brother, stepbrother and mother – all of whom were subpoenaed to testify by the prosecution. Our conversations focused on issues related to the guilt phase.

10. In July 1989, I first began trying to obtain Mark Crew's military records and jail records. Mr. Morehead asked me to get military records to confirm that Mark received an honorable discharge. I spent a great deal of time trying to obtain Mark's service records but ultimately ran out of time, and by the conclusion of the penalty phase had yet to obtain them.

11. In July 1989, I also sought to obtain Mark Crew's records from the Santa Clara County Jail. As with my attempts to get the military records, this was a time-consuming task, and I did not obtain the records until July 31st, a day before the penalty phase portion of the trial began.

12. Beginning in July 1989, I attempted to locate potential penalty phase witnesses identified by Mr. Morehead. These witnesses included James Gilbert (a high school friend who served in the Army with Crew); Colonel Donald Pearce (Crew's commanding officer); and three deputy sheriffs who could testify about Crew's good conduct in jail (Yount, Council and Vernado).

13. Mr. Morehead informed me that with regard to other penalty phase witnesses, he would interview Emily Bates, a former girlfriend of Mark's, and that Mark's father, William Crew, would handle his mother (Mark's grandmother), Irene Watson with regard to her

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testimony.

14. The defense rested at the guilt phase on July 18, 1989, at which time I was finally able to devote my time exclusively to penalty phase investigation. Most of the next several days were spent attempting to locate witnesses previously identified by Mr. Morehead, particularly Col. Pearce, and to obtain military and jail records through various means.

15. On July 27-29, 1989, I interviewed James Gilbert (in the presence of Morehead and William Crew), the three deputy sheriffs (Varnado, Yount and Council) and Colonel Pearce, who I had finally located and spoke with over the telephone.

16. On July 31, 1989, I secured Mark Crew's jail records from the Santa Clara County Jail.

17. Beginning on August 2, 1989, I attempted to find an expert who could testify on prison classification and on the likelihood of Mark being able to adjust well to prison if sentenced to life without possibility of parole. After talking with several potential experts, I was able to confirm the availability of Jerry Enomoto, who I reached on the night of August 3, 1989.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 10 day of May, 2005.

John Augustus Murphy

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Andrew S. Love, am the Supervising Deputy State Public Defender assigned to represent appellant, Mark Christopher Crew, in this Petitioner's Reply to Respondent's Return; and Memorandum of Points and Authorities in Support Thereof . I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 26,048 words in length excluding the tables and certificates.

Dated: June 9, 2005

Andrew S. Love

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 REPLY TO RESPONDENT'S RETURN; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

Peggy S. Ruffra
Supervising Deputy Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Mark Christopher Crew
P.O. Box E-48050
San Quentin State Prison
San Quentin, CA 94974

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 9, 2005, at San Francisco, California and that this declaration was executed on June 9, 2005, at San Francisco, California.

GLENICE FULLER