IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S BRIEF ON THE MERITS

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I.
INTRODUCTION

In his habeas petition, Mark Crew alleged that his attorneys violated prevailing professional norms by not investigating Mr. Crew's social history and that, as a result, they were unable to present a persuasive case for life at the penalty phase of his trial. It was further alleged that these failures stemmed from lead counsel's debilitating drinking problems, which left him largely incapacitated from the time he was appointed to represent Mr. Crew until shortly before trial. By the time counsel sought and obtained the appointment of a second attorney to whom he could delegate responsibility for the penalty phase it was too late to launch an effective case in mitigation.

The petition also alleged that had trial counsel investigated Mr. Crew's background and upbringing they would have been able to give the jury a far more compelling and realistic portrayal of Mr. Crew than the expedient presentation counsel cobbled together at the last minute – that Mr. Crew had a decent upbringing and was essentially a kind and generous

person. A timely and competent investigation would have revealed a legacy of incest, mental illness and substance abuse on both sides of Mr. Crew's family. Counsel would have discovered that Mr. Crew had been molested by his mother, exposed to sexually aberrant behavior by his grandfather, and encouraged by his father and other male role models to drink excessively and use drugs. Counsel would have learned that Mr. Crew suffered from lifelong mental health problems resulting from his traumatic experiences and family history, including depression, substance abuse, low self-esteem, insomnia and the inability to form meaningful relationships.

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 the petition. An order to show cause "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.)

After an evidentiary hearing at which the facts alleged in the petition were established, the Referee found that: 1) trial counsel did not even begin to investigate mitigating evidence until mere weeks before the penalty phase began; 2) counsel failed to investigate petitioner's social history; 3) counsel's reasons for failing to timely and adequately investigate – lead counsel's drinking problems and both attorneys' belief that the case would not reach a penalty phase – were neither reasonable nor tactical; and 4) there was credible and available mitigating evidence of Mr. Crew's traumatic upbringing and deeply disturbed family history, and its psychological impact upon him.

Petitioner has proved with substantial evidence the allegations this

Court previously ruled would entitle him to relief. His death sentence must therefore be vacated.

II.

SUMMARY OF PROCEEDINGS

By September 19, 1988, the date Mark Crew's capital trial was to begin, his attorney, Joseph O'Sullivan, had been representing him for more than a year. (CT 2018, 2060.) Incapacitated by alcohol abuse, O'Sullivan was unprepared for trial, and had done absolutely no investigation or preparation for the penalty phase. Eleven days before trial, O'Sullivan was forced to seek a six month continuance. (CT 2062.) The continuance was granted, and Joseph Morehead, who had no prior involvement in the case, was appointed as second counsel on November 29, 1988 – less than five months before the new trial date. (CT 2087.)[1]

On April 17, 1989, jury selection began. (CT 2257.) On July 26, 1989, the jury found Crew guilty of first degree murder and grand theft, and found the financial gain special circumstance true. (CT 2275, 2276, 2279.) The penalty phase began six days later, on August 1, 1989. (CT 2290.) The jury rendered its death verdict on August 10, 1989. (CT 2298-2300.)

On February 23, 1990, the trial judge, Hon. John Schatz, found the jury's determination that the aggravating circumstances outweighed the mitigating circumstances was contrary to the evidence presented, and granted the defense motion for modification of sentence pursuant to Penal Code section 190.4(e). Judge Schatz set aside the death penalty and sentenced Crew to life without possibility of parole. (Trial RT 5173-5182.)

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[1] "CT" refers to the clerk's transcript of the trial; "Trial RT" refers to reporter's transcript of the trial; "RT" refers to the reporter's transcript of the evidentiary hearing.

The 190.4(e) ruling was reversed by the Court of Appeal, on the ground that the judge improperly engaged in intercase proportionality review, and the case was remanded for a new hearing. (*People v. Crew* (1991) 1 Cal.App.4th 1591.) Upon remand, on July 22, 1993, after Judge Schatz was determined to be unavailable and Judge Robert Ahern was assigned to replace him, the 190.4(e) motion was denied and a sentence of death was imposed. (CT 3004, 3016.)

The judgment was affirmed on appeal on August 25, 2003. (*People v. Crew* (2003) 31 Cal.4th 822.)

Crew filed a habeas corpus petition on June 26, 2002. On February 2, 2005, 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)."

On October 12, 2005, a reference hearing was ordered at which a Santa Clara Superior Court judge would take evidence and make findings of fact relating to petitioner's ineffective assistance of counsel claim. On December 14, 2005, this Court appointed Hon. Brian Walsh to preside over the reference hearing. Judge Walsh recused himself on March 22, 2006, in the "interest of justice," based on what he stated was "an inadvertent disclosure concerning the case." On September 13, 2006, this Court appointed Hon. Andrea Y. Bryan as referee.

The hearing was held before Judge Bryan from September 10 to September 14, 2007. Petitioner presented the testimony of his two trial attorneys (Joseph O'Sullivan and Joseph Morehead), the trial investigator (John Murphy), and the two psychiatrists who were retained by trial counsel. (Frederic Phillips, M.D., and David Smith, M.D.) Dr. Larry

Morris, Ph.D., a psychologist specializing in the evaluation of perpetrators and survivors of childhood trauma and sexual abuse, presented mitigating evidence of Crew's family and upbringing. In particular, Dr. Morris testified about the history of sexual abuse on both sides of Crew's family and the sexual abuse Crew suffered. Dr. Smith, a psychiatrist with an expertise in addiction and substance abuse, testified about Crew's dependence on drugs and alcohol beginning at an early age, the factors which led to his addiction, and its impact on his development.[2]

Petitioner also presented testimony about his background from several lay witnesses. Three witnesses testified via deposition: Eddie Richardson (maternal uncle), Cheryl Norrid (uncle's daughter) and Debbie Murphy (uncle's stepdaughter). The parties stipulated to the sworn declarations of John Turner (maternal grandfather's stepson), Maurice Lambert (paternal cousin), Margie Crow (paternal cousin) and Darla McFarland (paternal cousin). The sworn declaration of Kenneth Lovitt (childhood friend), who is deceased, was admitted into evidence by court order. Petitioner presented the testimony of the following witnesses at the hearing: Gail Frost (family neighbor), Cynthia Pullman (girlfriend), Patricia Silva (first wife), Emily (Bates) Vander Pauwert (girlfriend), and Doug Thompkins (stepbrother). In rebuttal, respondent presented the testimony of Dr. Daniel Martell, Ph.D., and Doug Thompkins.

The parties stipulated to several undisputed facts related to counsel's performance. (See Joint Statement of Undisputed Facts ["JSUF"].) Judicial notice was taken of the court file and trial transcripts in *People v.*

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[2] Dr. Morris and Dr. Smith presented their direct testimony by sworn declaration (hereafter "Morris Declaration" and "Smith Declaration"). They were both subject to cross-examination at the evidentiary hearing.

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Judge Bryan issued her Findings of Fact on February 28, 2008.

III.

STANDARD OF REVIEW

" 'A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]' " (*In re Lucas* (2004) 33 Cal.4th 682, 694, quoting *In re Cudjo* (1999) 20 Cal.4th 673, 687.)

It is well settled that this Court gives great weight to a referee's findings of fact when they are supported by substantial evidence. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1256; *In re Lucas, supra,* 33 Cal.4th at p. 694; *In re Cox* (2003) 30 Cal.4th 974, 998.) As this Court has noted:

> This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations (*In re Scott* (2003) 29 Cal.4th 783, 824 []); consequently, we give special deference to the referee on factual questions "requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying." (*In re Malone* (1996) 12 Cal.4th 935, 946 [].)

(*In re Thomas*, *supra*, 37 Cal.4th at p. 1256; see also *In re Bell* (2007) 42 Cal.4th 630, 639-640; *In re Freeman* (2006) 38 Cal.4th 630, 635.)

The Referee's Findings of Fact in this case, which resolved all factual questions and credibility determinations in petitioner's favor, are

supported by substantial evidence.

IV.

ARGUMENT

A. PREVAILING PROFESSIONAL NORMS REQUIRE COUNSEL IN A DEATH PENALTY TRIAL TO CONDUCT A TIMELY AND COMPREHENSIVE SOCIAL HISTORY INVESTIGATION

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.)

Counsel's performance does not meet the "objective standard of reasonableness" if it is not reasonable under "prevailing professional norms." (*In re Lucas*, *supra*, 33 Cal.4th at p. 721, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 521.) Further, counsel's performance is reasonable only where counsel has made "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 by the United States Supreme Court in *Wiggins v. Smith*, for assessing counsel's performance at the penalty phase of a capital trial: "[O]ur 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].) As put by the Ninth Circuit, "[a] decision not to . . . offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision." (*Lambright v. Schriro* (9th Cir. 2007) 490 F.3d 1103, 1116, citing *Wiggins v. Smith*, *supra*, 539 U.S. at pp. 522-523; *Stankewitz v. Woodford* (9th Cir. 2004) 365 F.3d 706, 719.)

In *Wiggins v. Smith*, the Supreme Court held that counsel's failure to investigate the defendant's life history fell below reasonable professional standards. The Court relied on the well-defined norms articulated by the American Bar Association to determine counsel's reasonableness: "ABA Guidelines provide that investigation into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence . . . .'" (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 524 [emphasis in original]; see also *ibid.*, 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"]; *In re Lucas*, *supra*, 33 Cal.4th at p. 723.)

Thus, in determining the reasonableness of counsel's investigation, prevailing norms require that counsel conduct a "reasonably thorough independent investigation of the defendant's social history – as . . . reflected in the ABA standards relied on by the court in the *Wiggins* case." (*In re Lucas*, *supra*, 33 Cal.4th at p. 725; see also *id.* at p. 708 [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"];[3] *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) This Court also noted in *Lucas* that then-existing standards "emphasized the importance of uncovering evidence of childhood trauma." (*In re Lucas*, *supra*, 33 Cal.4th at p. 725.)

As consistently held by the Ninth Circuit, "[t]o perform effectively . . . counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.' " (*Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 1000, citing *Mayfield v. Woodford* (9th Cir. 2001)(en banc) 270 F.3d 915, 927.) "To that end, the investigation should include inquiries into social background and evidence of family abuse." (*Summerlin v. Schriro* (9th Cir. 2005) 427 F.3d 623, 630, citing *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1176.) "The defendant's history of drug and alcohol abuse should also be investigated." (*Summerlin v. Schriro*, *supra*, 427 F.3d at p. 630, citing *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1016-17.)

It is unquestioned that such an investigation into a client's family and

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

personal history is a time consuming task:

> [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, supra,* 395 F.3d at p. 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 v. Taylor*, counsel's failure to begin preparing for the penalty phase until one week before trial was unreasonable and precluded adequate investigation and presentation of mitigating evidence. (*Williams v. Taylor* (2000) 529 U.S. 362, 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.)

Here, there is substantial evidence to support the Referee's findings that: 1) counsel's penalty phase investigation did not begin until after the trial began and only weeks before the start of the penalty phase; 2) counsel failed to investigate petitioner's social history; and 3) evidence in counsel's possession suggested an investigation of petitioner's background and upbringing would have been fruitful. When these findings are given their proper weight, the conclusion is inescapable that, as in *Lucas*, *Wiggins* and *Williams,* trial counsel's tardy and narrowly proscribed investigation was deficient under prevailing professional norms.

B. TRIAL COUNSEL FAILED TO UNDERTAKE A TIMELY OR ADEQUATE INVESTIGATION OF PETITIONER'S BACKGROUND OR UPBRINGING

1. Trial Counsel Did Not Conduct Any Penalty Phase Investigation Until Weeks Before the Penalty Phase Began

Joseph O'Sullivan was retained to represent Mark Crew on July 7, 1987. (JSUF #1; CT 2018.) The trial was set to begin on September 19, 1988, but on September 8th, O'Sullivan sought a six month continuance. (JSUF #2, 3; CT 2060, 2062.)

O'Sullivan had been diagnosed with Alcohol Dependence, accompanied by depressive symptoms and generalized anxiety. (Findings of Fact ("Findings"), p. 1; JSUF #4; CT 2065.) In support of the motion for continuance, O'Sullivan's doctor testified that O'Sullivan had been alcohol dependent for several years, but that in the previous two years – a period encompassing his representation of Crew – his condition had "gotten way out of hand." O'Sullivan was drinking daily, and cutting back on his work so he could indulge in alcohol consumption. He had reportedly stopped drinking by early September 1988, and as part of his treatment plan required

a period of time without the stress of working on a death penalty case in order to fully recover. (Findings, p. 2; JSUF #5; 9/16/88 Trial RT 20-22.)

On November 29, 1988, a continuance was granted to April 17, 1989 – less than five months – to give O'Sullivan time to recover from his alcohol abuse and other mental health problems. At the same time, Joseph Morehead was appointed as second counsel. (JSUF #8; CT 2087.)

The Referee found that, "O'Sullivan did no investigation of potential mitigating evidence before Morehead was appointed" and "delegated the preparation of the penalty phase to Morehead" after Morehead entered the case. (Findings, p. 10; RT 196-197, 239, 265.) As the trial record establishes, before Morehead was appointed, O'Sullivan had not prepared for the guilt phase of trial, either. He had not sought investigative or expert funds pursuant to Penal Code section 987.9, had not hired an investigator, and had failed to prepare or file any pre-trial motions.

As the Referee noted, Morehead's "first function was to assist O'Sullivan in the guilt phase of petitioner's case." (Findings, p. 2.) Morehead's tasks included assisting counsel with jury selection, preparing pre-trial motions, exploring the possibility of a mental state defense for the guilt phase, and second-chairing the guilt phase, which required him to be in court throughout the trial. (RT 194-195, 264.) Thus, while O'Sullivan delegated the penalty phase investigation and presentation to Morehead – who had no prior death penalty experience (Findings, p. 2; RT 193-195, 263) – Morehead's responsibility for several other aspects of the case prevented him from working on the penalty phase until well after the trial began.

In fact, no penalty phase investigation of any kind was conducted in the months after Morehead was appointed. John Murphy, the investigator

for both phases of the trial, was not hired by Morehead until February 21, 1989. With the trial set to begin in two months, Morehead directed Murphy to concentrate on investigation for the guilt phase rather than the penalty phase. (Findings, p. 3; RT 202-203, 238, 240-241.) Murphy confirmed that nothing was done to obtain mitigating evidence until weeks before the penalty phase began on August 1, 1989. (RT 237-240.) Murphy, like Morehead, had no prior experience in death penalty cases. (Findings, p. 3; RT 236-237.)

Counsel's exclusive focus on the guilt phase was a function not just of the limited time available to them, but also of their misguided belief that there would be no penalty phase. (RT 207, 265.) Morehead spent three weeks in March 1989 researching and drafting a motion to strike the financial gain special circumstance. (RT 203.) The motion was filed on April 4, 1989 (Supp CT 48), with an amended motion filed on April 10th. (CT 2107.) It was argued on April 17, 1989, the day jury selection began. (RT 205; CT 2126.) Judge Schatz took the motion under submission, stating, "I'm not thoroughly convinced at this point that it is an appropriate special circumstance in this case. It may be, but I want to hear the testimony before coming to some conclusion on the matter." (RT 206; Trial RT 544.) In addition to these comments, Judge Schatz provided the defense and prosecution with a legal memorandum prepared by his law clerk that recommended striking the special circumstance. (RT 207; CT 2523-2526.) As the Referee found, Morehead "was confident that he had filed a viable motion to strike the special circumstance allegation and the trial judge had indicated that the motion was meritorious." (Findings, p. 3.)

The Referee recognized that trial counsel were "optimistic" that the trial judge would strike the special circumstance, and thus did not anticipate

the case would proceed to a penalty phase. However, "[t]his optimism was misplaced." (Findings, p. 19.) On July 17, 1989, the prosecution rested and the trial judge denied the motion to strike the special circumstance. (CT 2270.) The Referee found that, "it was only when that motion was denied on July 17, 1989 that Morehead accepted the reality that there might be a penalty phase. The penalty phase began two weeks later on August 1, 1989 and the death verdict rendered on August 10, 1989." (Findings, p 3.)

As discussed above, well-established professional norms required that an investigation of potential mitigating evidence begin immediately upon counsel's entry into the case. (See ABA Guidelines, 11.4.1; *Williams v. Taylor*, *supra,* 529 U.S. at p. 395; *In re Lucas*, *supra*, 33 Cal.4th at pp. 725-726.) The Ninth Circuit has 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 Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases* (1983) 58 N.Y.U. L.Rev. 299, 320, 324.)

Counsel's inexcusable failure to begin any investigation for the penalty phase until well after the trial began violated well-established standards for reasonably competent representation in a death penalty case.

2. Trial Counsel Failed To Investigate Petitioner's Background and Upbringing

As the Referee found, the belated investigation of potential mitigating evidence did not include any meaningful exploration of petitioner's social history. (Findings, pp. 10-11.)

Morehead interviewed Crew and Crew's father, but even using these limited sources, he never sought to learn whether Crew's background was traumatic or whether his family history was abnormal. This is because, as the Referee recognized, Morehead only considered the following potential mitigating themes for the penalty phase:

- Petitioner had a positive background in that he had no criminal history.
- Not all of petitioner's relationships with women were manipulative and exploitative.
- Petitioner had been a model inmate during the three years that he had been incarcerated in county jail.

(Findings, p. 3.)

As a result, when Morehead interviewed Crew in preparation for the penalty phase, he focused on positive aspects of Crew's life. (RT 228.) The Referee summarized Morehead efforts:

> As Morehead testified, "under the constraints of time that I had . . . what I wanted to get from [petitioner] was the names and locations of various witnesses who could give positive reinforcement to his claim that he should not be executed," by which Morehead meant, showing "that some of his relationships were good. He was caring and loving. That his military record was outstanding. That he was good to friends and associates. That he was an ideal prisoner." Morehead acknowledged that he focused on

> these aspects of Crew's character "to the exclusion of other things."

(Findings, p. 10, citing RT 228-229.)

Crew's father, William Crew, told Morehead that Crew's childhood was relatively normal, although Crew's mother was "cold and withdrawn," and that Crew began having difficulties after his parents divorced. (Findings, p. 10; RT 224-226.) Morehead did not interview Crew's mother. When she came out from South Carolina to testify for the prosecution at the guilt phase, Morehead did not attempt to speak with her because he did not believe it was appropriate to interfere with a prosecution witness. (Findings, p. 3; RT 215.)

Morehead told Murphy that he wanted to show the jury that Crew was a "good man." (RT 213, 228-229, 239.) Murphy was not asked to conduct a social history investigation. As a result, he did not seek to obtain any life history documents pertaining to either Crew or his family, other than Crew's military records (which he failed to get) and Crew's jail records. (RT 242-243, 253.) Murphy did not conduct interviews with Crew, Crew's relatives, or anyone else for the purpose of obtaining evidence of Crew's upbringing and family background. (RT 241-253, 257.)

The Referee found that "John Murphy performed no investigation of mitigating evidence until July 1989." (Findings, p. 10; RT 237-240.) In addition, "Murphy did not talk to petitioner about penalty phase-related issues until that time, and when he did, he did not ask petitioner about his family life or background." (Findings, pp. 10-11, citing RT 239-242, 257.)

Murphy's initial efforts in July 1989 were "limited to attempting to locate potential penalty phase witnesses." (Findings, p. 11.) Murphy did not conduct his first substantive interview of a potential penalty phase

witness until July 27, 1989 (RT 247-251), the day after the jury found Crew guilty of murder and found the special circumstance true, and five days before the penalty phase was to begin. (CT 2279.) As the Referee found: "On July 27, 1989, less than a week before the penalty phase was scheduled to begin, Murphy interviewed a high school and Army friend of petitioner's as well as a jail deputy. On July 28th, Murphy interviewed another jail deputy as well as petitioner's commanding officer in the Army. On July 29th, Murphy interviewed a third deputy." (Findings, p. 11, citing RT 251-253.)

The only other investigative task Murphy performed was locating an expert to testify regarding Crew's institutional adjustment to prison. He began this task on August 2, 1989, the day after the penalty phase began. (Findings, p. 11, citing RT 253-254.)

It is unquestionable that counsel's failure to conduct an investigation of Crew's background and upbringing was inconsistent with prevailing professional norms – "norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history." (*In re Lucas, supra,* 33 Cal.4th at p. 725.)

3. Trial Counsel Directed Mental Health Experts to Focus on Petitioner's Mental State at the Time of the Crime

Morehead retained Dr. Frederic Phillips, M.D., a psychiatrist specializing in geriatrics, as the mental health expert in this case. (Findings, p. 4; RT 164, 198.) Phillips had never worked on a death penalty case. (Findings, p. 4; RT 164-165.) He believed his role in this case was the same as in any other homicide case in which Morehead had retained him – to interview the client and evaluate whether he exhibited mental health symptoms relevant to his competency to stand trial and to a potential mental

state defense to the murder charges. (RT 165-167, 199.)

Both Morehead and Dr. Phillips confirmed that Phillips was not asked to consider the existence of mitigating circumstances for the penalty phase, and was not asked to do anything different in this case because it was a death penalty case. (RT 169, 199.) In fact, Dr. Phillips did not even know this was a death penalty case. (Findings, p. 4; RT 164.)

Dr. Phillips interviewed Crew on January 5, 1989. (RT 199.) Prior to the visit, Dr. Phillips was provided facts about the crime, either verbally or through a police report, which Phillips characterized as "brief and not very informative." (RT 167, 202.) The interview conditions were far from ideal in assessing Crew, as both petitioner's current expert and respondent's expert agreed. (RT 160, 449-450.) As summarized by the Referee:

> Dr. Phillips testified that he visited petitioner in jail on one occasion and was only able to spend 20 minutes with him. During this interview, the door was ajar, a guard was posted outside and petitioner was shackled. Dr. Phillips did not generate a report in the matter. He testified that he never expected to be called to testify at the guilt phase of the trial and did not even know that there would be a penalty phase.

(Findings, p. 4.)

Dr. David Smith, a psychiatrist specializing in addiction and substance abuse, consulted with Morehead. His consultation also was limited to the issue of Crew's mental state at the time of the crime, and specifically whether Crew's use of drugs may have impaired his conduct on the day in question. Dr. Smith did not interview Crew, and he did not testify at either phase of the trial. (RT 199, 209.)

Even though, as the Referee found, "at the time of petitioner's trial

in 1989, [Dr. Smith] had previously provided mitigating evidence in capital cases about a defendant's predisposition to addiction, drug and alcohol abuse and the impact of prolonged substance abuse on mental health and functioning" (Findings, p. 7), Dr. Smith was not asked in this case to consider Crew's substance abuse as a potential mitigating factor. (RT 209, 221-222.)

A mental health evaluation relevant to developing a case in mitigation would have included, for example, an assessment of aspects of Crew's history that may have led to his substance abuse problems, the long-term nature of his substance abuse, and the psychological impact of chronic dependence on drugs and alcohol. (Smith Declaration, pp. 12-13.) Morehead, however, never considered using mental health experts in this manner. As he testified at the hearing, the experts were asked to evaluate only whether there was a "viable defense based on the mental state at the time of the crime itself. I really hadn't been contemplating a penalty phase." (RT 221.)

Counsel failed to recognized that the mental health evidence "presented at each phase of a trial serves a markedly different purpose." (*Frierson v. Woodford* (9th Cir. 2006) 463 F.3d 982, 993.) As the Ninth Circuit has articulated:

> 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 don'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.

(*Id.,* quoting *Wallace v. Stewart* (1999) 184 F.3d 1112, 1117, n. 5.)

Counsel also violated his "affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." (*Lambright v. Schriro*, *supra,* 490 F.3d at pp. 1117, quoting *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1254.)

As a result, Morehead's consultation with mental health experts was unreasonably limited. He utilized them as he would in a non-capital homicide case. (RT 199-200, 209.) They were asked to consider only Crew's mental state as it related to a guilt phase defense, rather than assess Crew's mental health symptoms as potential mitigation, regardless of whether they supported a defense to the homicide. (RT 216, 221-223, 233-234.) This was not a tactical decision, but was based on the need to quickly develop a guilt phase defense, Morehead's lack of death penalty experience, and the belief of both trial counsel that there would not be a penalty phase. (RT 207, 232, 265.)

Counsel's failures were in direct contravention of prevailing professional norms.

4. Information Known to Trial Counsel Should Have Alerted Them of the Need to Investigate Petitioner's Traumatic Life History

The Referee found that Crew's attorneys were aware that he abused drugs and alcohol, suffered from depression and sleep disorders, had been involved with many women without being able to maintain stable long-term relationships, and had a strange relationship with his mother. (Findings, p. 9.)

In police reports provided in discovery, former girlfriends described Crew as exhibiting symptoms of depression, insomnia, and serious problems with drugs and alcohol. (JSUF #11.) Morehead recalled that the discovery suggested Crew had a "pattern of drug abuse and alcohol use" that "preceded a few years from the crime." (RT 221.) Morehead also testified that Crew informed him that he abused alcohol, cocaine and other drugs. (RT 202.) In addition, Crew told Morehead that he had relationships with many women and had difficulty maintaining long-term relationships. (RT 230.) O'Sullivan was aware that Crew used drugs and alcohol. (RT 269-270.) Crew also told Murphy about his drug and alcohol use, that he drank to excess, and used cocaine and methamphetamine. (RT 241.)

Crew's defense team, however, never attempted to discover the possible causes, nature or extent of his substance abuse and mental health problems. They never sought to investigate Crew's background to determine whether he had suffered any trauma or abuse, and they never explored whether Crew had a dysfunctional or problematic family history.

While Morehead interviewed Crew's father, William Crew, and was told that Crew had a good childhood at least until he and Crew's mother divorced (RT 225-226), William's reliability as a family historian was clearly questionable. In addition to information counsel was provided in police reports, which documented Crew's substance abuse, depression and sleep problems, noted above, counsel had other information suggesting a family history of substance abuse and providing clues about the inappropriate sexual boundaries of both of Mark Crew's parents. For example, a report by an investigator hired by the victim's family, provided in discovery, referred to an incident in which Crew's father became intoxicated and made sexual advances towards Crew's girlfriend. (JSUF

#12.) Counsel was also in possession of a report of Crew's brother's arrest for public drunkenness. (JSUF #13.) In addition, as the Referee noted, Morehead observed a visit between Crew and his mother when Crew's mother's came to court, during which she sat on Crew's lap while he was shackled. (Findings, p. 10, citing RT 215-216.)

Here, as in *Lucas*, "defense counsel acted unreasonably in failing to conduct a thorough investigation of facts relating to petitioner's social history, considering the suggestive evidence in their possession." (*In re Lucas, supra,* 33 Cal.4th at p. 725.)

5. Trial Counsel Had No Tactical or Strategic Reason for Failing to Investigate Petitioner's Social History

This Court considers "the reasonableness of the investigation in light of defense counsel's actual strategy . . . ." (*In re Lucas, supra,* 33 Cal.4th at p. 725, citing *Wiggins v. Smith, supra,* 539 U.S. at p. 526.) 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.*)

The Referee found two factors that weighed against the investigation or presentation of petitioner's social history: 1) O'Sullivan's alcohol-related problems; and 2) counsel's belief that there would be no penalty phase. (Findings, pp. 17-18.) These two factors left counsel with no time to conduct an adequate investigation, resulting in a strategy based on expediency rather than informed judgment.

The failure to investigate petitioner's background and upbringing was due, first and foremost, to O'Sullivan's inability to conduct any investigation because of his drinking problems. O'Sullivan, who was incapacitated by alcohol abuse from the moment he was retained in July 1987, did no penalty phase investigation, and delegated preparation for the

penalty phase to Morehead (RT 196-197, 239, 265; JSUF #3-#7), who had no prior death penalty experience (RT 193), and was appointed less than five months before trial. (CT 2087; JSUF #8.) And, as discussed above, because O'Sullivan had also done so little to prepare for the guilt phase, Morehead and his investigator, Murphy, were required upon their entry into the case to focus on a defense to the homicide before belatedly turning to the penalty phase. (RT 194-195, 202-203, 238-240, 264.)

Morehead explained at the evidentiary hearing that the mitigating themes he hoped to establish at the penalty phase were that Crew: 1) had a good background and did good things in his life; 2) had good relationships with women; and 3) would be a good prisoner if sentenced to life without possibility of parole. (Findings, p. 3; RT 212-213.) Counsel settled on this approach, however, without the benefit of any investigation. The overarching consideration for limiting the investigation and presentation of mitigating evidence was the lack of time to do more.

As Morehead acknowledged, he did not work on developing evidence for the penalty phase until the trial judge denied his motion to strike the special circumstance. (RT 231-232.) Once that happened, with little time left before the start of the penalty phase, he concentrated on developing these positive aspects of Crew's life. (RT 228-229.) Murphy did not begin interviewing penalty phase witnesses until less than a week before the penalty phase began on August 1, 1989. (RT 251-253.)

As the Referee found, trial counsel's failure to anticipate that the matter would progress past the guilt phase was inexcusable: "Whether they were in denial or merely lacking foresight, this Court is troubled by their procrastination and misjudgment of the necessity of penalty phase investigation." (Findings, p. 18.)

The penalty phase presentation thus, was not limited by any tactical considerations, but by counsel's unreasonable failure to investigate and obtain meaningful mitigating evidence.

C. SUBSTANTIAL EVIDENCE SUPPORTS THE REFEREE'S FINDINGS THAT MITIGATING EVIDENCE THAT COULD HAVE BEEN PRESENTED WAS ABUNDANT, AVAILABLE AND CREDIBLE

Had counsel undertaken an investigation consistent with prevailing professional norms they would have obtained abundant, credible mitigating evidence. (Findings, pp. 16, 19.) As the Referee's findings reflect, petitioner "established that the mitigating evidence he presented at the evidentiary hearing" – family history of incest, abuse and dysfunction, substance abuse and mental illness; expert testimony regarding the impact on Crew of sexual abuse; and expert testimony regarding behaviorial consequences of substance abuse – "was credible and would have been available at the time of trial." (Findings, pp. 13-16.) The Referee "ha[d] no reason to doubt the veracity of any of the evidence that was presented and accept[ed] the evidence as valid." (*Ibid.*)

There was substantial evidence to support these findings.

1. Family History of Incest, Abuse and Dysfunction

a) Crew's mother's violent and incestuous family

The Referee found that Crew's maternal grandfather, Jack Richardson, "physically abused his wife, as well as his children," including Crew's mother, Jean. (Findings, p. 14, citing Eddie Lee Richardson Deposition, pp. 9-16.) His son, Eddie Richardson (Jean's brother), described how Jack beat his wife in the face with his fists. (*Id.* at pp. 9-14.) According to Eddie, he and his mother were often knocked unconscious. Jean was beaten as well. (*Id.* at pp. 10-13, 18.) Eddie also testified that his

father beat his grandmother, recalling how both her jaws were broken and had to be wired. (Richardson Deposition, at pp. 15, 18.) This evidence was not disputed by respondent.

Dr. Morris explained the impact of domestic violence on Crew's mother, Jean:

> Experiencing and witnessing the level of violence in the home as did Mr. Crew's mother, particularly if untreated, would typically have a significant impact on one's emotional and social development. Depression and emotional isolation and withdrawal, as Jean Crew has been described as suffering, are common responses to such experiences.

(Morris Declaration, p. 16.)

The Referee also found that "[p]etitioner's maternal grandfather, Jack Richardson, sexually abused his daughter, petitioner's mother Jean. He also molested his granddaughter Cheryl and young neighbor girls." (Findings, p. 14, citing Cheryl Norrid Deposition, pp. 16-20 [Exh. 157]; Richardson Deposition, pp. 19-12; RT 158-159; Declaration of John Turner [Exh. 73].) Evidence supporting these findings included deposition testimony from Eddie Richardson and Cheryl Norrid, both of whom Jean confided in. Cheryl Norrid, Jack's grandaughter, testified that she, herself, was sexually molested by Jack. In addition, the stipulated declaration of John Turner, the son of Jack's second wife, stated that Jack had molested his granddaughter as well. The veracity of this evidence was not challenged by respondent.

Dr. Morris explained the significance to Crew of the fact that his mother was molested by her father:

> While not all children who are sexually abused go on to perpetrate child sexual abuse, it is a risk factor that cannot be ignored. At the very least, Jean was vulnerable to all the negative impact of child sexual abuse as documented in the research literature and described in detail elsewhere in this declaration. These mental health issues, if not resolved, remain in place while the abused individual parents their own children, putting their children at risk for a continuation of the abuse. In other words, if Jack Richardson molested Mr. Crew's mother, she then becomes at risk to experience serious problems regarding appropriate sexual responses and boundaries, including inappropriate sexual responses to others, including her son.

(Morris Declaration, pp. 18-19.)

Eddie Richardson repeated the pattern of sexual abuse that was perpetrated by his father. (Morris Declaration, p. 19.) As the Referee found, he "molested his daughter Cheryl from the time when she was six or seven years old, as well as other young girls, including his stepdaughter Debra Bumgardner Murphy." (Findings, p. 14, citing Norrid Deposition, pp. 9-14; Debra Murphy Deposition, pp. 10-15, 19 [Exh. 158].) This evidence was also uncontroverted.

Dr. Morris testified that "Eddie Richardson's behavior is significant to an assessment of Mr. Crew – whether or not he and Mr. Crew had much personal contact – because it documents the pervasive inappropriate sexual responses found in Mr. Crew's family history. It provides further support for the notion of intergenerational transmission of sexual abuse within Mr. Crew's maternal family." (Morris Declaration, p. 20.)

b) Crew's father's dysfunctional family

Crew's father, William Crew's parents separated amid his father's infidelity when William was three years old. William was subsequently raised by his paternal grandparents. Crew's mother married and divorced several more times. (Morris Declaration, pp. 21-22.) Dr. Morris testified that "the descriptions of the paternal side of Mr. Crew's family show dysfunctional rather than functional interpersonal relationships, as well as alcohol abuse. These traits are often transmitted to each succeeding generation, including Mr. Crew's father and Mr. Crew himself. Of particular note are reports of womanizing and alcohol abuse." (Morris Declaration, p. 22.) Evidence supporting these facts include court records (Exhs. 38-42), as well as the stipulated declarations of Crew's cousins, Maurice Lambert (Exh. 33), Darla McFarland (Exh. 34) and Margie Crow (Exh. 36). None of the evidence of Crew's father's family history was disputed by respondent.

In addition to the evidence of sexual abuse on the maternal side of Crew's family, described above, there was also undisputed evidence that Crew's father "molested his eight year old stepdaughter." (Findings, p. 14, citing RT 460-461.) As Dr. Morris explained, "even assuming Mr. Crew was unaware of these incidents, they document the pervasive sexual dysfunction of Mr. Crew's family." (Morris Declaration, p. 29.)

c) Crew's parents' troubled marriage

Mark Crew's parents, Jean Richardson and William Crew met in high school in Fort Worth, Texas, and were married on August 22, 1947, when William was 17 and Jean was 16. Their first child, Crew's brother Michael, was born on August 28, 1950. William reported to Dr. Morris that there were difficulties in the early years of their marriage. William

admitted he liked to party and drink, and "had an eye for other women." William recalled that they decided to have a second child, thinking that it would help the marriage. Mark Christopher Crew was born on December 25, 1954. (Morris Declaration, pp. 22-23.)

Records show that on March 2, 1955, Jean filed for divorce, stating 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. (Morris Declaration, p. 23.)

Throughout the marriage, William engaged in numerous extramarital affairs. He admitted to Dr. Morris that he was involved with other women throughout the marriage. Joyce Cox, a childhood friend of Jean's, confirmed to Dr. Morris that William was the most aggressive womanizer she had ever come across. (Morris Declaration, p. 26.) Eddie Richardson recalled visiting the Crew family in California, and going out at night with William Crew to drink and chase women. (Richardson Deposition, at pp. 25-26.)

Crew's parents separated in 1969, when Crew was fourteen, and divorced the following year. Crew lived with his father after the breakup of his parents' marriage. (Morris Declaration, p. 28.)

The evidence presented regarding Crew's parents' relationship was undisputed.

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2. Family History of Mental Illness and Substance Abuse

Petitioner presented evidence that several of Crew's family members had suffered from mental illness. As summarized by the Referee, Crew's maternal grandfather suffered from mental health problems, and his grandfather's brother was psychotic and had to be institutionalized; Crew's paternal grandmother was reportedly unstable; Crew's mother, as discussed below, appeared to suffer from major depression, his father reported symptoms of depression and anxiety, and his brother was described as depressed. (Findings, at p. 15.) None of this evidence was called into question by respondent.

As Dr. Morris noted, "consistent with her upbringing that was marred by sexual and physical abuse, Jean Crew suffered symptoms of depression. She was often described as sad, withdrawn, and emotionless, staying home and not getting dressed for days at a time." (*Id.*) There was substantial evidence presented supporting these conclusions.

William Crew described to Dr. Morris how he often came home from work to find Jean in her robe and slippers, having never gotten dressed for the day. As William described: "Jean did not socialize much after our marriage. She often stayed home and did nothing at all. She sometimes stayed in bed all day long, and there were many days when she did not even get dressed. I recall coming home from work often and being able to tell she had not been up for very long." (Morris Declaration, at pp. 23-24.)

Jean's isolation, withdrawal, complacency and other symptoms of depression were confirmed by family friends and neighbors. (Morris Declaration, pp. 24.) Gail Frost testified at the evidentiary hearing. She and her husband were neighbors of William and Jean Crew in the late

1950s/early 1960s. (RT 358-359.) She remembered the Crew home as "messy" and "cluttered." (RT 360, 363.) Jean was usually dressed in a nightgown and robe or pajamas no matter what time of day it was. (RT 361.) Frost described Jean as a very sad person, who did not laugh and never seemed to be happy. (*Id.*) Jean did not interact with her children. When they ran up to her excited about something, Jean showed no reaction, as if she did not recognize them. (RT 362-363.)

Friends of Mark and Mike Crew uniformly described Jean as different from the other mothers in the neighborhood. (Morris Declaration, pp. 24-25.) They remembered Jean as quiet, sad, and withdrawn, staying at home in her bathrobe. (See, e.g., Declaration of Kenneth Lovitt [Exh. 49].)

Dr. Morris testified that:

> Children need parents who are reasonably stable, good role models, have the emotional resources and knowledge to care for their children's developmental needs, and provide appropriate boundaries. Mr. Crew's mother appeared to have few of these resources. Mr. Crew became a source of support for his mother rather than the other way. This type of role reversal is found frequently in incest families. In short, Mr. Crew was exposed to an inadequate upbringing which provided little in normal development of appropriate emotional and behavioral responses to others, especially women.

(Morris Declaration, p. 25.)

It was undisputed that several members of Crew's family had substance abuse problems, including his father and brother, maternal grandfather, maternal great uncle and paternal grandmother. (Smith Declaration, pp. 5-6; Morris Declaration, pp. 11-14, 22, 34; Richardson

Deposition, pp. 8-10, Norrid Deposition, p. 20; Declaration of Maurice Lambert [Exh. 33]; Declaration of Margie Crow [Exh. 36].)

As Dr. Smith testified, without contradiction, Crew was genetically predisposed toward addiction and mood disorders. (Smith Declaration, pp. 5-6.)

3. Sexual Abuse of Mark Crew and its Impact

The Referee found credible evidence that Mark Crew was sexually abused and victimized as a child, and suffered from mental health problems consistent with such abuse. (Findings, pp. 14-16.)

Substantial evidence was presented that Crew was a victim of sexual abuse when he was young, and that this had a devastating impact on his development and mental health. As Dr. Morris explained, Crew suffered a range of traumatic experiences which encompassed "many kinds of destructive behaviors and is best seen on a continuum from non-abusive behaviors to abuse of sexuality to sexual victimization." (Morris Declaration, p. 6.) Dr. Morris testified that Crew was sexually abused by his mother from his earliest memories for many years. (*Id.* at p. 30.) He was also sexually victimized by Jack Richardson, his grandfather, who sexually exploited him and exposed him to a disturbing sexual environment. (*Id.* at p. 27.)

As summarized by the Referee:

> [Petitioner] was sexually abused by his mother beginning at a very young age and this abuse continued throughout his childhood. In addition, Mr. Crew's maternal grandfather exposed Mr. Crew to an extraordinarily oversexualized environment and encouraged Mr. Crew to participate in highly inappropriate sexual activities for the grandfather's pleasure. Other adult males in Mr. Crew's life, including

> his father and older brother, exacerbated the psychological impact of this abuse through neglect, exposure to additional inappropriate sexual experiences, drug and alcohol abuse, and by being unsuitable role models. These factors had a profound negative impact on Mr. Crew's emotional well-being, the development of functional interpersonal relationships, attitudes and skills, and his developing sexuality.

(Findings, pp. 15-16, quoting Morris Declaration, p. 7.)[4]

Dr. Morris testified that Crew suffered from many of the common symptoms of male sexual abuse, including drug and alcohol abuse, depression, low self-esteem, and sleep disturbances. (Morris Declaration, at p. 10.)

a) Substance Abuse

As early as junior high school, Crew was drinking and using illicit drugs, to which he was first exposed by his brother and the son of a family friend. (Lovitt Declaration [Exh. 49].) His substance abuse problems became more pronounced in high school. Patricia Silva, Crew's first wife, testified that during high school Crew drank beer, smoked marijuana and used other drugs, including barbiturates, on a daily basis. Silva described this as a "daily routine." According to Silva, Crew was always high; he was consistently high through the day. (RT 351, 352.) He also occasionally used LSD. (RT 333-334.)

Crew enlisted in the Army in December 1972, at the age of 17. (Morris Declaration, p. 35.) While in the Army, Crew continued to use

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[4] Substantial evidence of the childhood sexual abuse petitioner suffered is detailed more thoroughly in the Proposed Findings of Fact (pages 30-36), attached as Exhibit 1 to Petitioner's Response to Referee's Findings, filed simultaneously herewith and incorporated herein by reference.

drugs and alcohol excessively. (*Id.* at p. 36.) Patricia Silva, to whom Crew was married at the time, testified that while Crew was somehow able to perform his duties in the Army, he was using drugs, such as marijuana and barbiturates, and drinking daily. (RT 341-342, 354.) Silva noted that there were times when Crew tried to stop using drugs and would remain clean for a few days, but he would then start using again. (RT 342.)

Crew's second wife, Debra Lund, told the police prior to Crew's trial that during their relationship he had been "into drugs, speed, coke and marijuana." (Exh. 85.) Subsequently, in the years leading up to his arrest, Crew was drinking daily, and his drug use escalated. (RT 282-284, 304, 310; Lovitt Declaration [Exh. 49].) As Dr. Morris testified: "Mr. Crew had always drunk and used drugs to self-medicate his emotional distress, but, as he put it, he went from partying with alcohol and drugs to serious self-destructive drinking and drug abuse." (Morris Declaration, p. 39.)

The Referee quoted with approval Dr. Smith's summary of Crew's history of substance abuse:

> Mr. Crew'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. Mr. Crew'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.

(Findings, p. 14, quoting Smith Declaration, p 9.)

According to Dr. Smith, "Mr. Crew suffered from chronic alcohol and drug dependence stemming from his traumatic upbringing and family history, which had a long term deleterious effect on his mental health and functioning . . . ." (Findings, p. 16, quoting Smith Declaration, p. 13.)

Dr. Smith explained that, "in addition to being genetically predisposed to addiction, Crew 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." (Smith Declaration, at p. 4.) He testified that "[s]tudies confirm that 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." (*Id.* at p. 7.)

Furthermore, "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." (Smith Declaration, at p. 8.) It was undisputed that when Crew was growing up, his father was usually absent from the home, and his mother was emotionally withdrawn. Friends and neighbors remarked on the lack of supervision in the Crew household, creating an atmosphere conducive to drug and alcohol use. (*Ibid.*)

Dr. Smith testified without contradiction that Crew was introduced to drugs by his older brother and the older son of a family friend. Crew became aware of his father's drinking around the time of the breakup of his parents' marriage, when he was approximately 14 years old. At that time he noticed his father drinking all the time at home and having a bottle with him when he was out. When Crew was in high school, he attended his father's and stepmother's parties where heavy drinking and the use of marijuana

was condoned. (Smith Declaration, p. 8; see also RT 336-337.)

Crew began drinking with his father when he was in his late teens. (Smith Declaration, p. 8.) In later years, as testified to by a girlfriend, Emily Vander Pauwert, Crew's father encouraged Crew to drink to the point of becoming sick. (*Id.;* see also RT 304-310.)

Dr. Smith explained the impact of Crew's substance abuse on his mental health:

> The heavy use of drugs and alcohol as an adolescent thwarts psychological development. For example, Mr. Crew 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.

(Smith Declaration, p. 13.)

The only rebuttal to the evidence of Crew's drinking and drug use – indeed to the entire social history presentation – was testimony from Doug Thompkins, Crew's stepbrother. Thompkins testified that in the one year period in 1981-1982 that he lived with Crew, he did not see Crew falling down drunk. (RT 463-464.) Thompkins acknowledged that he, Crew and their other roommate, Dick Elander, drank beer daily, and went to the Saddle Rack Bar to drink further. (RT 463-464.) Thompkins conceded on cross-examination that after they got to the bar, the three men would separate and therefore, he did not observe how much Crew actually drank. (RT 465-466.) Thompkins' belief that Crew did not become intoxicated was based on Crew's ability to drive Thompkins and Elander, who were too drunk to drive, back to the house. (RT 464.)

Thompkins' testimony does not rebut the evidence of Crew's long-

term drinking and drug use, or in particular, the testimony of Cynthia Pullman and Emily Vander Pauwert, who knew Crew during the same period of time described by Thompkins, and testified that he was always drinking. (RT 283-284, 304-305, 310.) Thompkins' ultimate conclusion was that Crew did not get as drunk as Elander or himself, and that "he always managed to get us home." (RT 466.) But, as both Pullman and Crew's first wife, Patricia Silva, observed Crew could drink an enormous amount or use drugs and still function. (RT 284, 341.)

b) Mood Disorders

As the Referee found, "Petitioner suffered from symptoms of depression, anxiety, low self-esteem and sleep disorders." (Findings, pp. 7-8, 13.) According to Crew's first wife, Patricia Silva, Crew became depressed two or three times a month while he was in the Army. (RT 344-345, 347; Morris Declaration, p. 36.) In later years, as other witnesses confirmed, Crew suffered from periods of severe depression, during which he would often withdraw and sleep. Other times, he could not sleep at all. (Morris Declaration, p. 38; RT 280, 284, 287, 311-315.)

Dr. Smith testified without contradiction that "[i]t is common for persons with mood disorders to 'self-medicate' with drugs and alcohol to alleviate the symptoms of their diseases such as overwhelming anxiety and depression." (Smith Declaration, at p. 7.)

c) Relationship Problems

Crew separated from his first wife, Patricia Silva, and they divorced in 1974, when it became clear that Crew could not settle down, handle the responsibilities of a family, or curb his drinking and drug use. (RT 345-347.) In 1976, Crew moved to Minnesota with Debra Lund, with whom he had established a relationship. He continued to drink, use drugs and date other women. (Morris Declaration, p. 36.) In early 1977, Crew left Debra

and returned to California. He met and began dating Emily Vander Pauwert. Several months later, Debra came to California, and she and Crew reconciled. They were married on August 26, 1977, and moved back to Minnesota. (*Ibid.*)

Dr. Morris explained that, once again, Crew's inability to maintain a healthy, intimate relationship led him to see other women, and he continued to drink and abuse drugs. As Dr. Morris testified, when Crew's "life appeared to be going well, he became even more self-destructive, believing that he did not deserve the things he had. Although he badly wanted what he viewed as a normal life, when it appeared he had obtained everything he wanted – a wife, baby, house and job – he became anxious and overwhelmed." (Morris Declaration, p. 37.)

Crew left Debra, and after spending some time with his grandmother in Texas, returned to California in the summer of 1980, and resumed his relationship with Emily Vander Pauwert. During this period his drinking, drug use and womanizing escalated until Vander Pauwert ended the relationship after learning that Crew was seeing other women. (RT 315-316.) Dr. Morris testified that, "[a]fter the failure of [Crew's] marriage to Debra, he realized that he was incapable of having a normal life, and the ensuing self-hatred and despair resulted in a life that spiraled out of control." (Morris Declaration, p. 37.)

d) Impact of Sexual Abuse and Victimization

As Dr. Morris concluded, in the few years immediately prior to the events leading to Crew's arrest and conviction, he was often extremely depressed, and his womanizing, drinking and drug use increased significantly. Dr. Morris testified that "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." (Morris Declaration, p. 39.) Crew, like other sexual abuse survivors, developed ways to cope with his traumatic childhood experiences, including "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." (*Ibid.*)

Dr. Morris explained that, "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" and "[w]hile these strategies may have provided some utility as a child and adolescent, collectively they became a serious liability as an adult, leaving Mr. Crew 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." (Morris Declaration, at p. 39.)

D. GIVEN THE ABUNDANCE OF CREDIBLE MITIGATING EVIDENCE THAT COULD HAVE BEEN PRESENTED, TRIAL COUNSEL'S FAILURE TO OBTAIN AND PRESENT SUCH EVIDENCE WAS PREJUDICIAL

Counsel's failure to adhere to prevailing professional norms in investigating mitigating evidence is prejudicial where, "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.)

Given the abundance of available credible mitigating evidence of Crew's sexual victimization, addiction to drugs and alcohol, depression, and family history "fraught with incest, abuse, dysfunction, mental illness and substance abuse" (Findings, p. 19), and the evidence counsel did present, that Crew had no prior criminal record, served honorably in the military, would function well in prison and was a kind and generous person, it is reasonable to conclude that "at least one juror" would have struck a different balance.

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"].)

Trial counsel failed to obtain evidence of petitioner's disturbed family history and traumatic childhood not because of any tactical reason or the unavailability of reliable evidence, but simply because they 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 upon him. (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 has 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, supra,* 404 F.3d. at p. 1180.)

The defense case to spare Mark Crew's life at the penalty phase was grossly incomplete. The jurors were told nothing of Crew's seriously troubled history or his abusive upbringing, and did not have the benefit of expert interpretation of the factors that affected his 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 superficial, inaccurate and uncompelling view of Crew's life that was presented to the jury (see Findings at pp. 11-12) is amply demonstrated by a jury instruction proposed by the defense and read to the jury, summarizing the defense case in mitigation: (a) Crew's mother and stepmother were "emotionally neglectful;" (b) Crew was helpful to his grandmother; (c) Crew was kind and generous towards several girlfriends and an Army buddy; (d) Crew was an outstanding soldier; (e) Crew had been a model prisoner in county jail and would adjust well to state prison; (f) Crew's family and friends did not believe he should receive a death sentence; and (g) Crew had a high degree of mechanical aptitude. (CT 2553-2554.)

The prosecutor predictably capitalized on counsel's inadequate presentation by arguing that Crew deserved no mercy because he had squandered a good and decent upbringing and suffered none of the traumatic life experiences that could have 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.

(Trial RT 5068-5069; see also Trial RT 5065 ["He has a charisma, you heard from people, that talents [sic], 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"].)

In fact, Crew did not have a "good background" as the prosecutor suggested, and his upbringing was quite tragic. As the Referee found, there was abundant credible evidence available to trial counsel that Crew was raised in a family with a history of mental illness, substance abuse, sexual abuse and domestic violence. Crew was sexually abused by his mother, not merely neglected by her, as defense counsel argued (Trial RT 5047), and was sexually victimized by his grandfather. The effects of these psychologically devastating experiences were exacerbated by the actions of the other male figures in his life, including his brother, who exposed him to drugs at a young age, and his father, who encouraged him to drink to excess. His abusive upbringing, genetic predisposition to mood disorders and substance abuse, and other environmental factors led Crew to suffer from depression and to become addicted to drugs and alcohol. In sum, the events of Mark Crew's life had a destructive impact on his emotional well-being, his self-esteem and his ability to maintain healthy interpersonal relationships.

But without evidence of Crew's traumatic upbringing, the jurors were left with a false picture of a relatively normal childhood which could only lead them to agree with the prosecutor's view 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].)

The mitigating evidence that was not presented complemented the penalty phase evidence of Crew's positive traits and non-violent history, and could have shown the jury that despite his destructive upbringing, Crew 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.

Moreover, the mitigating evidence counsel failed to present would not have been subject to impeachment and would not have opened the door to potentially damaging rebuttal. (See, e.g., *In re Ross* (1995) 10 Cal.4th 184, 206.) According to the Referee, trial counsel believed that the prosecution may have been able to cross-examine defense mental health experts at the penalty phase regarding the facts of the crime. (Findings, p. 18.) Assuming this is correct, the jurors were well-acquainted with the facts of the crime, having heard the guilt phase testimony and the prosecutor's penalty phase closing argument, which dealt at length with the facts of the case. (See Trial RT 5059-5061, 5064-5065, 5067-5068.) Cross-examination of mental health experts would have revealed no new facts about the crime.

The Referee also noted that a prosecution expert may have testified that Crew's mental health symptoms, while consistent with childhood sexual abuse, were also consistent with antisocial personality disorder. (Findings, p. 18.) Any adverse impact of this opinion would have been blunted, however, by the undisputed evidence presented at the hearing that

Crew did not meet the criteria for a diagnosis of antisocial personality disorder. (RT 152.)

In contrast to the powerful mitigation case that could have been made, the aggravation evidence that was presented was relatively weak. Crew was convicted of the murder of a single individual with one special circumstance, a special circumstance whose applicability was seriously debatable. (See CT 2523-2526 [memorandum from trial court's clerk recommending 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].) Other than factor (a) – the circumstances of the crime and one special circumstance – there were no aggravating circumstances.

Even without the presentation of compelling mitigating evidence of Crew's life, the sentencing determination was close. Significantly, after reviewing the evidence pursuant to Penal Code section 190.4(e), the trial judge found that the mitigating circumstances outweighed the aggravating circumstances. (Trial RT 5179.) Whether or not the decision to reduce petitioner's death sentence to life without possibility of parole was legally correct, the trial judge's findings demonstrate that the aggravating evidence was not substantial and that this was a close case.

In *In re Marquez, supra,* 1 Cal.4th 584, this Court found prejudice where substantial mitigating evidence was available but not presented, and the aggravating evidence was not substantial. There, as in this case, the defendant had no prior convictions and had committed no 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), this Court found "it was reasonably probable a jury would believe life in prison without possibility of parole was sufficient punishment." (*In re Marquez*, *supra*, 1 Cal.4th at p. 609.) This Court's conclusion in *Marquez* 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, in *In re Lucas*, the defendant was convicted of the murder of an elderly couple who suffered multiple stab wounds, and two special circumstances (multiple murder and murder during commission of burglary). While noting the brutality of the murders and the existence of a prior violent assault, this Court found prejudicial counsel's failure to present mitigating evidence, particularly evidence of childhood abandonment and abuse, and 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." (*In re Lucas*, *supra*, 33 Cal.4th at p. 735.)

In *Wiggins v. Smith*, the 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 p. 536, quoting *Williams v. Taylor*, *supra,* 529 U.S. at pp. 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 counsel's omissions prejudicial. (*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 could have heard is far more compelling than the evidence the jury weighed in determining petitioner's sentence. 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, reversal is required. (See *Williams v. Taylor*, *supra*, 529 U.S. at pp. 368-369, 399).

V.

THE FORMER PROSECUTOR'S COMMENTS WHICH RESULTED IN THE DISQUALIFICATION OF THE REFEREE MUST BE DISCLOSED TO PETITIONER

A. SUMMARY OF PROCEEDINGS

On March 22, 2006, Judge Walsh recused himself from presiding over the reference hearing, stating that he had been the object of "an inadvertent disclosure concerning this case." (Reporter's Transcript of Proceedings, March 22, 2006, Petition for Review, Supreme Court No. S143693, Attachment A.)[5] Judge Walsh went on to state that, "[a] Judge of our court made statements to me about this case and then I learned from him that while a deputy district attorney several years ago, he had some involvement with the prosecution of the case. As the result of this disclosure here, I believe the interest of justice would be furthered by my recusal from this case." (*Ibid.*)

On March 27, 2006, counsel for petitioner requested that Judge Walsh disclose the basis for the disqualification and provide the parties an

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[5] The Attachments to the Petition for Review are incorporated herein by reference. Petitioner will provide copies of the attachments to the Court upon request.

opportunity to waive the disqualification, as provided by Code of Civil Procedure, section 170.1, et seq. In a letter dated April 26, 2006, Judge Walsh denied petitioner's request. (Petition for Review, Attachment B.)

On May 8, 2006, petitioner filed a petition for a writ of mandate in the Court of Appeal, Sixth Appellate District, directed to the Santa Clara Superior Court, to vacate Judge Walsh's order of disqualification. On May 19, 2006, the court of appeal denied the petition for writ of mandate. (Attachment C.) On May 24, 2006, petitioner filed a petition for review of this decision in this Court, which was denied on June 14, 2006. (*Crew v. Santa Clara Superior Court*, No. S143693.)

On September 13, 2006, this Court vacated the order appointing Judge Walsh and appointed Judge Bryan to sit as referee.

Petitioner filed a motion with the Referee that sought discovery of the information provided by the ex-prosecutor/judge that resulted in Judge Walsh's recusal. The motion was argued on March 19, 2007, after which Judge Bryan took the matter under submission. (RT 65-70.)

On March 26, 2007, an order denying the motion for discovery was issued. The Referee agreed that petitioner's contention that he was entitled to this information under the principles of *Brady v. Maryland* (1963) 373 U.S. 83, "has some merit." (Order, Mar. 26, 2007, at p. 2.) As the Referee put it: "If the disclosure (which was of such significance that it caused Judge Walsh to recuse himself) was in substance favorable to the accused, then it probably also rises to the level of *Brady* material and should be disclosed to Petitioner." (*Ibid.*) The Referee found, however, that *Brady's* due process requirements are "self-executing" and because there was no "voluntary disclosure" by either Judge Walsh or the judge who gave him the information that resulted in recusal, "we must conclude that the information

was not *Brady* material." *(Ibid.)*

For the reasons discussed below, petitioner submits that the Referee's ruling was erroneous, and that Judge Walsh and/or the offending judge must be ordered to disclose the substance of the communication that resulted in Judge Walsh's recusal in order to protect petitioner's state law and federal constitutional rights.

B. PETITIONER IS ENTITLED TO DISCOVERY OF A FORMER PROSECUTOR'S COMMENTS ABOUT THE CASE WHICH LED TO THE REFEREE'S RECUSAL

This Court has held that discovery is available in habeas corpus proceedings once an order to show cause has issued. (*In re Scott* (2003) 29 Cal.4th 783, 814; *In re Avena* (1996) 12 Cal.4th 694, 730.) The statutory authority for discovery in habeas proceedings is conferred by Penal Code section 1484, which provides that after the issuance of an order to show cause, the court has the "full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and a determination of the case." The judge presiding over the reference hearing, therefore, has "the power to order discovery when requested by a party . . . once the order to show cause has issued and discovery jurisdiction has been conferred." (*Board of Prison Terms v. Superior Court* (6th Dist. 2005) 130 Cal.App.4th 1212, 1242.)

As this Court has observed, "[t]he nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis." (*In re Scott*, *supra*, 29 Cal.4th at p. 813.) In essence, "discovery must be relevant to issues upon which the petition states a prima facie case for relief and an order to show case has issued." (*Board of Prison Terms v. Superior Court, supra,* 130 Cal.App.4th at p. 1243.)

Judge Walsh was appointed specifically to take evidence and make findings of fact related to petitioner's ineffective assistance claim. The relevance of the comments made by a former prosecutor to Judge Walsh about petitioner's case is demonstrated by Judge Walsh's reaction to hearing them. The only reasonable conclusion to be drawn from Judge Walsh's recusal is that the information he received was of such materiality to the issue before him that it would have had an impact on his findings, otherwise there would have been no proper basis for recusal. (See Code Civ. Proc. § 170.1 et seq.)

C. DUE PROCESS REQUIRES THAT THE INFORMATION ABOUT THE CASE DISCLOSED BY A FORMER PROSECUTOR TO THE REFEREE BE PROVIDED TO THE DEFENSE

Prosecutors play a special role in our justice system. They are "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88, quoted in *Strickler v. Greene* (1999) 527 U.S. 263, 281.) "In their solemn constitutional obligation 'as [] representative[s] of the government to protect the integrity of the court and the criminal justice system,' *Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1122, prosecutors have a 'special duty commensurate with [their] unique power, to assure that defendants receive fair trials.' *United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492." (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972 989 (conc. & dis. opn. of Tallman, J.).)

Beyond the prosecution's overarching duty of fairness, *Brady v. Maryland, supra,* 373 U.S. 83 and *Kyles v. Whitley* (1995) 514 U.S. 419

require the prosecution to disclose as a matter of due process any "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment . . . ." (*Brady v. Maryland, supra*, 373 U.S. at p. 87.) *Brady* is explicitly not limited to issues of guilt or innocence: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him *or reduce the penalty* helps shape a trial that bears heavily on the defendant." (*Id.* at pp. 87-88 [emphasis added].) Thus, under *Brady*, favorable evidence in the context of a capital case is generally construed to encompass mitigating evidence as well as exculpatory evidence. (See *Calley v. Callaway* (5th Cir. 1975) 519 F.2d 184, 221.) Such evidence is "material" if its nondisclosure results in "prejudice" to the accused. (*Strickler v. Greene, supra,* 527 U.S. at p. 280.) This means "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682.)

The requirements of such disclosure continue after trial, and throughout post-conviction proceedings. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60; *United States v. McCrane* (3d Cir. 1976) 547 F.2d 204, 207; *United States v. Konefal* (D.C.N.Y. 1983) 566 F.Supp. 698, 705; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260-1261 ["[w]e expect and assume that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully"]; *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-50 ["We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding"].)

In *Monroe v. Blackburn* (E.D.La. 1988) 690 F. Supp. 521, aff'd (5th Cir. 1988) 853 F.2d 924, the federal court rejected the State's argument that *Brady* was inapplicable because the non-disclosure did not occur until after trial. As that court noted, "nothing in *Brady* or its progeny limits its doctrine of fact-characterization to the pre-conviction context." (*Id.* at p. 525.) Indeed, "such nondisclosure is as unfair where it prevents a defendant from taking full advantage of postconviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial." (*Ibid.*)

Here, the judge who was presiding over the reference hearing had a conversation with a fellow judge, a former deputy district attorney who was involved in the prosecution of petitioner at trial. The information provided by the former prosecutor was deemed so significant that the hearing judge determined that he must recuse himself in the interest of justice. In such a situation, where a prosecutor – or former prosecutor – is in possession of information that is relevant to petitioner's ability to obtain post-conviction relief, due process demands that the information be disclosed.

The fact that the party in possession of this information is now a judge and no longer associated with the prosecutor's office is of no consequence. The key issue in determining whether due process requires disclosure "is not the character of the party in possession of the evidence, but rather the character of the evidence." (*Commonwealth v. Santiago* (Pa. 1991) 591 A.2d 1095, 1109-1115 [trial court has duty to reveal to the defense content of in camera pre-trial interviews with witnesses]; *United States v. Cuthbertson* (D.N.J.) 511 F.Supp. 375, 382, reversed on other grounds (3d. Cir. 1981) 651 F.2d 189 ["The Court, unlike the prosecution, is not an adversarial party in the proceedings. It sits neither to prove guilt nor establish innocence; but merely to maintain a fair trial. It is almost

inconceivable that a court, possessing exculpatory information, must remain silent when the prosecution possessing identical information would be compelled to speak"].) Thus, judges – and certainly, judges who were former prosecutors on the case – have the same duty as prosecutors to release to the defense information in their possession. (See *United States v. Strifler* (9th Cir. 1988) 851 F.2d 1197, 1202 [trial court has duty to release *Brady* material in probation file that is in the court's possession].)

The Due Process Clause of the Fourteenth Amendment mandates that if the information which caused a judge to recuse himself is relevant to the petitioner's ability to establish his right to relief, the information must be disclosed to the defense.

The Referee recognized that the due process requirement that the prosecutor disclose material and exculpatory evidence is "self-executing." Thus, in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, this Court noted that:

> The prosecutor's duties of disclosure under the due process clause are wholly independent of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective. Such obligations exist whether or not the state has adopted a reciprocal discovery statute. Furthermore, if a statutory discovery scheme exists, these due process requirements operate outside such a scheme. The prosecutor is obligated to disclose such evidence *voluntarily*, whether or not the defendant makes a request for discovery.

(*Id.* at p. 378 [emphasis in original].)

It cannot be reasonably concluded, however, that because the state has a duty under the Due Process Clause to voluntarily disclose *Brady* material, that the lack of disclosure means there is no such material.

Otherwise a *Brady* violation would rarely be found. Nor are courts powerless to order prosecutors or former prosecutors to disclose such information specifically sought by the defense where there has been no voluntary disclosure. (See *United States v. Agurs* (1976) 472 U.S. 97, 106 ["if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable"].) When a court has become aware that members of the government may be in possession of material exculpatory information that has not been disclosed, an order for disclosure is warranted. It is not sufficient to rely on the good faith of government officials to do so voluntarily. The Referee therefore abused its discretion in refusing to order disclosure of this information.

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VI.

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be granted insofar as it is based upon counsel's constitutionally inadequate representation of petitioner at the penalty phase of the trial, and the death sentence imposed upon petitioner should be vacated. In addition, this Court should remand the case to the Referee with instructions to order disclosure of the communication between Judge Walsh and the former prosecutor which resulted in Judge Walsh's recusal.

Dated: May 1, 2008

Respectfully submitted,

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DECLARATION OF SERVICE

Re: In re Mark Christopher Crew, S107856

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

PETITIONER'S BRIEF ON THE MERITS

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

Glenn R. Pruden
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Hon. Andrea Y. Bryan
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and causing said envelope to be sealed and deposited in the United States mail, with postage thereon fully prepaid, at San Francisco.

I declare under penalty of perjury that service was effected on May 1, 2008, at San Francisco, California and that this declaration was executed on May 1, 2008, at San Francisco, California.

GLENICE FULLER